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The Role of United States Trade Laws in Resolving the Florida-Mexico Tomato Conflict

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THE ROLE OF UNITED STATES TRADE LAWS IN RESOLVING THE FLORIDA-MEXICO TOMATO CONFLICT

*Stephen J. Powell and Mark A. Barnett**

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Free trade is not a principle, it is an expedient.
Benjamin Disraeli

I. INTRODUCTION

As demonstrated by the cases involving lumber from Canada,¹ cement from Mexico,² and semiconductors from Japan,³ to name only a few, the most significant areas of trade between two countries rarely are resolved after a single flareup of trade tensions. Rather, trade disputes involving these goods recur periodically until trade negotiators somehow can design creative

1. Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 56,055 (1991) [hereinafter Lumber Products from Canada]; Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 21,205 (1986); Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 47 Fed. Reg. 49,878 (1982).

2. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 62 Fed. Reg. 50,292, 50,293 (1997); Initiation of Antidumping Duty Investigation: Gray Portland Cement and Clinker from Mexico, 54 Fed. Reg. 43,190 (1989).

3. Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan: Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 51,450 (1985); Erasable Programmable Read Only Memories (EPROMs) from Japan: Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 43,603 (1985); 64K Dynamic Random Access Memory Components (64K DRAMS) from Japan: Initiation of Antidumping Duty Investigation, 50 Fed. Reg. 29,458 (1985).

ways to meet the needs of each country. In the first round of a trade "war," one country may have an edge, perhaps because of higher demand for its product, or an exchange rate favorable to its exporters, or an initially successful unfair trade action brought by its producers. When such an asymmetrical situation prevails, the solution that emerges is likely to be fragile, for the simple reason that the fundamental needs of the disadvantaged country have not been met. Moreover, the first-round advantage often shifts, causing the previously handicapped country to abandon the initial solution in the hopes of a more favorable outcome.⁴

In the final analysis, the perceived needs of each country must be conscientiously addressed before one can confidently predict the end of a dispute. Unfortunately, the self-evident nature of these observations to the historian rarely serves as an aid to the trade negotiator attempting, in the tumult that accompanies the eruption of trade conflicts, to develop a permanent solution to an undesirable interruption in an otherwise smooth relationship with a major trading partner.

This is the situation with the importation of winter vegetables from Mexico. Production of winter vegetables (tomatoes, bell peppers, cucumbers, eggplant, and squash) in Florida is a US\$530 million a year business.⁵ Mexican exports of these winter vegetables to the United States, valued at US\$727 million for 1995-96, accounted for approximately one percent of Mexico's total annual exports to the United States.⁶ In anyone's book, these are the kinds of numbers that can be expected to cause governments to take strong positions in support of their industries, even at the risk of disturbing the peaceful calm of a trade relationship with a vital neighbor.

For discussion purposes, we have been asked by Professor Gordon to assume that the agreement entered into in October 1996 between the U.S. Department of Commerce (Commerce)⁷ and Mexican tomato exporters,

4. For example, in 1991, responding to pressure that had been mounting inexorably for five years from its lumber industry, Canada repudiated an agreement with the United States that had settled the 1986 countervailing duty investigation of this US\$2 billion-a-year trade irritant. See *Lumber Products from Canada*, 56 Fed. Reg. at 56,056.

5. Based on January-July 1996 data as reported by the Florida Agric. Stat. Serv., *State Statistical Report: Vegetables* (visited June 3, 1998) <<http://www.nass.usda.gov/fl/veg/v9596apv.htm>>.

6. Based on December 1995-May 1996 data as reported in U.S.D.A., ECON. RES. SERV., FOREIGN AGRICULTURAL TRADE OF THE UNITED STATES. These data are available in Lotus spreadsheet format at <gopher://usda.mannlib.cornell.edu:70/11/reports/erssor/trade/fau-bb/data> (visited June 9, 1998). The percentage calculation is based on total 1996 imports from Mexico of US\$73 billion as reported in the National Trade Data Base, which is based on information from the Bureau of the Census, U.S. Dep't of Commerce.

7. The U.S. Department of Commerce is responsible for determining whether imported merchandise is subsidized or dumped. 19 U.S.C. §§ 1671(a), 1673, 1677(1) (1994). An independent federal agency, the U.S. International Trade Commission (ITC), decides whether an industry in the United States is being materially injured or threatened with material injury

which resulted in suspension of an antidumping investigation of tomatoes from Mexico, has ended. The new owner of many of Florida's winter vegetable producers, concerned with the continuing rise in market share represented by Mexican imports, is considering further action under the trade remedy and other laws. This article will discuss the potential role of the antidumping and countervailing duty laws in these deliberations, as well as the operation of the dispute settlement mechanisms of the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO).

II. PURPOSE OF THE UNFAIR TRADE LAWS

The definitive defense of the unfair trade laws is beyond the scope of this article, but it is fair to ask at the start, why do the unfair trade laws exist? Why has the General Agreement on Tariffs and Trade (GATT) concluded for fifty years that unfair trading practices are to be condemned if they cause injury to a domestic industry?⁸ While various justifications have been advanced over the years, the most straightforward and compelling reason is that they skew investment decisions by sending false signals to the market. Dumping, or price discrimination between national markets, causes resources to be misallocated by acting as a disincentive to investment in the country where the dumping is taking place (the importing country), and as an incentive to investment in the market of the dumper. Government subsidies that are conditioned on export, or are targeted to specific industries, rather than being spread broadly across the economy, distort market signals about the subsidizing country's comparative advantage. Dumping and subsidies have a dramatic effect on investor decisions.

Thus, although dumping and subsidies may in the short term reduce prices in the importing country, in the longer term these practices will be harmful to the importing country's economy because investments will be made on basis of these false signals, and not as the result of relative production efficiencies in the exporting country, such as an abundance of raw material inputs or the existence of special or lower-cost labor skills. The unfairly reduced prices impede competition by preventing producers from entering the marketplace. Freed from competitive forces, the dumping companies can gain control of the market and raise prices. In the long run, the consumer's interests will be harmed, not only by the increased cost of the

by these imports. *Id.* §§ 1671(a)(2)(A), 1673(2)(A), 1677(2). Affirmative determinations by both agencies are necessary for Commerce to issue a countervailing or antidumping duty order. *Id.* §§ 1671(a), 1673.

8. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 194 art. VI(1) [hereinafter GATT 1947].

goods, but in terms of high unemployment for which they pay as citizens.⁹

Dumping is especially likely in countries characterized by profit sanctuary markets, which allow companies to operate in an environment where market entry by exporters is prevented or impeded by trade barriers. Exporting companies can use antidumping laws as a means to compete against these protected competitors, by causing them to pay an additional amount for pursuing a dumping strategy. Antidumping duties thus promote competition by preventing domestic production from being displaced by higher-cost imports.¹⁰

The antidumping and countervailing duty laws attempt to remedy these unfair trading practices by imposing an additional duty on the dumped or subsidized imports equal to the amount of the price discrimination or the government subsidies, with the purpose of allowing producers to compete fairly in the marketplace.

III. ANTIDUMPING LAW

A. *In General*

The term "dumping" is generally used to describe price discrimination in which a producer charges a higher price in its home market than in an export market.¹¹ Article VI of GATT 1947,¹² and the Agreement on Implementation of Article VI of GATT 1994 (Antidumping Agreement),¹³ authorize WTO Members to impose antidumping duties when products are dumped and cause material injury to, threaten material injury to, or materially retard the establishment of a domestic industry in the export market. The dumping aspects of these international agreements have been incorporated into U.S. law at Subtitle B of Title VII of the Tariff Act of 1930, as amended.¹⁴

9. Other justifications for the unfair trade laws have been offered. For example, the former Chair of the President's Council of Economic Advisers suggests that they serve as "a poor but necessary substitute for enforceable multilateral competition policies," a rough mechanism to cushion differences among economies with different approaches to competition. LAURA D'ANDREA TYSON, *WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES* 268 (1992).

10. James Brander & Paul Krugman, *A "Reciprocal Dumping" Model of International Trade*, 15 J. INT'L ECON. 313 (1983).

11. In certain circumstances, dumping will be measured by comparing third-country prices or a constructed value of the merchandise to the price in the export market in question.

12. GATT 1947, *supra* note 8, art. VI.

13. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1144 [hereinafter WTO Agreement], Annex 1A [hereinafter Antidumping Agreement], reprinted in PHILIP RAWORTH & LINDA C. REIF, *THE LAW OF THE WTO* 414 (Practitioners DeskBook Series, 1995) [hereinafter LAW OF THE WTO].

14. 19 U.S.C. §§ 1673-1673i.

1. Initiation

In most cases, an antidumping investigation is commenced by the filing of a petition requesting relief on behalf of the domestic industry producing the domestic like product.¹⁵ In substance, the petition must contain evidence "reasonably available" to the petitioners to support their claims of material injury and dumping.¹⁶ In other words, it should contain information about the condition of the domestic industry, prices of the imported products with which they are concerned, foreign (home market or third country) prices of comparable products, and in some cases, the cost of producing the products.¹⁷

Before initiating an investigation, Commerce must confirm that there is sufficient industry support for the petition.¹⁸ Sufficient industry support exists when more than fifty percent of those members of the industry expressing either support for or opposition to the petition (excluding those with no opinion) favor the investigation, and the supporters account for no less than twenty-five percent of total domestic production.¹⁹

2. ITC Preliminary Investigation

The International Trade Commission's (ITC) preliminary investigation is a forty-five-day proceeding in which the ITC obtains and analyzes information to determine whether there is a reasonable indication that the domestic industry is materially injured or threatened with material injury or that the establishment of a domestic industry has been materially retarded by reason of dumped imports.²⁰ The first step in the ITC's analysis is to determine the relevant domestic industry to be examined. The statute defines the domestic industry as the producers of the "domestic like product."²¹ "Domestic like product" is defined, in turn, as a "product which is like . . . or most similar in characteristics and uses with, the [products] subject to . . . investigation."²² Thus, the parameters of the domestic like product define the parameters of the domestic industry which the ITC will examine.

15. *Id.* § 1673a(b). The U.S. Department of Commerce also may self-initiate an antidumping investigation. *Id.* § 1673a(a). The Antidumping Agreement, however, requires that "special circumstances" exist in order to self-initiate an investigation. Antidumping Agreement, *supra* note 13, art. 5.6.

16. 19 U.S.C. § 1673a(b)(1); Antidumping Agreement, *supra* note 13, art. 5.2.

17. 19 U.S.C. § 1673a; Antidumping Agreement, *supra* note 13, art. 5.2.

18. 19 U.S.C. § 1673a(c)(4).

19. *Id.* § 1673a(c)(4)(A); Antidumping Agreement, *supra* note 13, art. 5.4.

20. 19 U.S.C. § 1673b(a).

21. *Id.* § 1677(4)(A).

22. *Id.* § 1677(10).

The ITC examines the existence of material injury²³ based on questionnaires issued to the domestic industry that seek data regarding production levels, shipment levels, profitability, capacity utilization, employment statistics, investment, and other indicia of the health of the domestic industry.²⁴ Typically, the ITC collects data for a three-year period of investigation, and downward trends in these factors may be indicative of injury.

If the domestic industry appears to be materially injured, the ITC must further determine whether that injury is by reason of the allegedly dumped imports.²⁵ In order to make this determination, the ITC issues questionnaires to importers, seeking information about the volume and value of imports subject to the investigation. The ITC seeks both aggregate data and data for a selected sample of products subject to the investigation. The ITC compares these data to the data obtained from domestic producers in order to analyze the price and volume effects of the imports and their impact on the domestic producers.²⁶

3. Commerce Investigation

The Commerce investigation involves the collection of information needed to calculate U.S. prices and normal value for the products under investigation. Commerce makes adjustments to these prices to put them on a comparable, ex-factory basis and compares them to determine whether dumping is occurring. To obtain this information, Commerce issues questionnaires to the foreign producers of the subject merchandise (respondents), requesting detailed information on their corporate structure and affiliations, distribution and sales processes, accounting and financial practices, and the specifications of the products they sell that are subject to the investigation. In addition, Commerce normally requires respondents to report, on a transaction-specific basis, twelve months of both their home market and their U.S. sales. These sales reports must include all relevant expenses on a transaction-specific basis, from price, quantity, and customer name to a complete physical description of the merchandise sold to the movement, packing, and direct selling expenses associated with the sale.

The twelve-month period for which data are collected is referred to as the

23. Material injury and the factors used to evaluate it are described in § 771(7) of the Tariff Act of 1930. *Id.* § 1677(7).

24. *Id.*

25. *Id.* §§ 1673, 1677(7)(F).

26. In investigations involving imports from two or more countries, the ITC will cumulate the effects of the imports from all of the countries if the investigations were initiated on the same day and the imports compete with each other and with domestic like products. *Id.* § 1677(7)(G)(i). There are exceptions. *See id.* § 1677(7)(G)(ii).

period of investigation. The period of investigation typically is the four fiscal quarters most recently completed prior to the filing of the antidumping petition, although Commerce has discretion to vary this period in appropriate circumstances.²⁷ The period of investigation precedes the filing of the petition in order to ensure that foreign producers cannot artificially revise their pricing after the investigation begins solely to reduce or eliminate their actual rates of dumping.

4. Normal Value

"Normal value" is the term used to denote the comparison point for determining whether the U.S. price is dumped.²⁸ Normal value may be based on home-market sales, third-country sales, or constructed value.²⁹

The statutory preference is to base normal value on home-market sales, provided that home-market sales have been made in sufficient quantities to form a basis for comparison; normally at least five percent, by volume, of sales to the United States.³⁰ When home-market sales do not meet this standard, the home market is not considered "viable," and the statute directs Commerce to examine third-country sales if they form an adequate basis for comparison.³¹

If there are insufficient or no sales in either the home market or in third countries, Commerce uses constructed value as the basis for normal value.³² When normal value is based on constructed value, Commerce calculates, for the product imported into the United States, the sum of: (1) the cost of materials, labor, and variable and fixed overhead; (2) packing expenses for shipment to the United States; (3) selling, general, and administrative expenses; and (4) profit.³³

There is one additional circumstance in which Commerce uses constructed value — when home-market or third-country sales have been made below the cost of production, within an extended period of time in substantial quantities, and at prices which do not permit the recovery of all costs within a reasonable period of time.³⁴ For these purposes, Commerce calculates the cost of production as the sum of materials, labor, and overhead

27. 19 C.F.R. § 351.204(b) (1997); see Memorandum A-201-820 (Investigation) from Judith Wey Rudman, Import Compliance Specialist, Office of Antidumping Investigations, ITA, Dept. of Commerce, to Barbara R. Stafford, Deputy Ass't Secretary for Investigations, 2 (June 12, 1996) [hereinafter Memorandum].

28. 19 U.S.C. § 1677b(a).

29. *Id.*

30. *Id.* § 1677b(a)(1)(B)(ii)(II).

31. *Id.* § 1677b(a)(1).

32. *Id.* § 1677b(a)(4).

33. *Id.* § 1677b(e).

34. *Id.* § 1677b(b)(1).

costs plus selling, general, and administrative expenses.³⁵ The extended period of time requirement is defined as normally one year and is addressed through Commerce's practice of using a one-year period of investigation.³⁶ If more than twenty percent of the sales of the product in question were made below the cost of production, Commerce considers them to have been in substantial quantities.³⁷ Alternatively, the substantial quantities test is met if the weighted average price of the examined sales is less than the weighted average cost of production for such sales.³⁸ Commerce will find that the prices do not permit the recovery of costs and disregard the below-cost sales in its calculation of normal value if the price, which was below cost at the time of sale, was also below the average cost of production for the period under consideration.³⁹ If there are no above-cost sales of the product remaining, Commerce then resorts to constructed value to determine normal value.

Depending upon the manner in which normal value is calculated, that figure may need to be adjusted to place it on an ex-factory basis for comparison to the U.S. price. Adjustments include substituting U.S. packing costs for home-market packing costs, deducting movement expenses, and deducting any taxes imposed on home-market sales that are rebated or not collected on U.S./export sales.⁴⁰ In addition, when the comparison is made with the U.S. price, Commerce may make other adjustments to the normal value to account for differences in quantity, circumstances of sale (for example, credit, warehouse, and other expenses), level of trade, and physical differences in the merchandise being compared.⁴¹

5. United States Price

The U.S. price that Commerce uses to determine whether dumping is occurring may be calculated as either an "export price" or a "constructed export price."⁴² As described in Section 772(a) of the Tariff Act of 1930, an export price calculation is appropriate when the first sale of the merchandise to an unaffiliated purchaser, either in the United States or for exportation to the United States, is made prior to the importation of the merchandise into the United States.⁴³ If, on the other hand, the first sale to an unaffiliated

35. *Id.* § 1677b(b)(3).

36. *Id.* § 1677b(b)(2)(B).

37. *Id.* § 1677b(b)(2)(C)(i).

38. *Id.* § 1677b(b)(2)(C)(ii).

39. *Id.* § 1677b(b)(2)(D).

40. *Id.* §§ 1677b(a)(6)(A)-(B).

41. *Id.* §§ 1677b(a)(6)(C), (a)(7).

42. *Id.* § 1677a.

43. *Id.* § 1677a(a).

customer occurs after importation, constructed export price often will be the basis for calculating U.S. price.⁴⁴ Constructed export price situations typically occur in one of two situations. Most constructed export price transactions occur when the producer or exporter has an affiliated sales agent in the United States. Constructed export price transactions also may occur when the U.S. sales agent is unaffiliated, such as in the case of consignment sales, in which the U.S. sales agent is simply the consignee and does not take title to the merchandise.

Regardless of whether the U.S. price is based on the export price or constructed export price, the price is adjusted, if necessary, to include U.S. packing, home-market import duties that were rebated because of exportation, and any countervailing duties imposed to offset export subsidies.⁴⁵ The price also will be adjusted to exclude any U.S. import duties and any movement expenses incurred in bringing the merchandise into the United States.⁴⁶ When the U.S. price is a constructed export price, additional adjustments will be made to exclude any commissions, direct and indirect selling expenses, selling expenses incurred on behalf of the buyer, and further manufacturing expenses.⁴⁷ Additionally, Commerce must now allocate profit to these "constructed export price expenses" and reduce the constructed export price accordingly.⁴⁸

6. Preliminary Determination

Within 140 days of initiating an antidumping investigation, Commerce must issue a preliminary determination as to "whether there is a reasonable basis to believe or suspect" that dumping is taking place.⁴⁹ If the preliminary determination is affirmative, Commerce will instruct the U.S. Customs Service to impose a bonding requirement on the subject merchandise in the amount of the estimated antidumping duties to ensure payment if duties ultimately are imposed.⁵⁰ Regardless of whether Commerce's preliminary determination is affirmative or negative, Commerce must complete its investigation and issue a final determination.

44. *Id.* § 1677a(b).

45. *Id.* § 1677a(c)(1).

46. *Id.* § 1677a(c)(2).

47. *Id.* §§ 1677a(d)(1)-(2).

48. *Id.* §§ 1677a(d)(3), (f); see CHRISTIAN MARSH & KATHLEEN HATFIELD, U.S. DEP'T OF COMMERCE, IMPORT ADMINISTRATION POLICY BULLETIN NO. 97.1, CALCULATION OF PROFIT FOR CONSTRUCTED EXPORT PRICE TRANSACTIONS 1 (1997).

49. 19 U.S.C. § 1673b(b)(1)(A). If the investigation is "extraordinarily complicated," Commerce may extend the deadline for the preliminary determination to 190 days after initiation of the investigation. *Id.* § 1673b(c)(1)(B).

50. *Id.* § 1673b(d)(B).

7. Verification

Between the preliminary and final determinations, Commerce conducts a verification of the data submitted by each respondent.⁵¹ This verification consists of an on-site visit by Commerce analysts, and in some cases, accountants, to spot-check the respondent's submitted data. Respondents are asked to provide documentation for the sales-specific data submitted and to reconcile that data to the company's audited books and records. Verification of sales data often lasts a full week, while a cost verification (when below-cost sales are being investigated) often lasts a second full week.

Following verification, but prior to the final determination, both petitioners and respondents have an opportunity to submit briefs and participate in a public hearing.⁵² New factual information may not be submitted at this time; rather, this is an opportunity for parties to make arguments regarding Commerce's interpretation of respondents' data and its analysis of those data.⁵³

8. Termination or Suspension

Commerce has limited authority to "settle" an antidumping investigation prior to completing its investigation.⁵⁴ This authority is rarely used.⁵⁵ In fact, at present, Commerce has more than 400 antidumping duty orders in place and only thirteen antidumping suspension agreements.⁵⁶

Commerce's statutory authority to settle antidumping investigations is found in Section 734 of the Tariff Act of 1930.⁵⁷ Section 734(a) provides Commerce with the authority to terminate an investigation based upon withdrawal of the petition pursuant to an agreement limiting the volume of imports into the United States.⁵⁸ This authority was last used in the mid-

51. *Id.* § 1677m(i).

52. *Id.* § 1677m(g).

53. *Id.*

54. *Id.* § 1673c.

55. See, e.g., The Uruguay Round Trade Agreements Act, Statement of Administrative Action § 3512(d), at 204, reprinted in H.R. DOC. No. 103-316, at 874 (1994) [hereinafter Statement of Administrative Action] (noting that such agreements are "the exception rather than the rule").

56. Department of Commerce statistics as of July 31, 1997. *Statistical Summary of AD/CVD Investigations Since 01/01/80* (visited June 3, 1998) <http://www.ita.doc.gov/import_admin/records/stats/allstats.htm> (antidumping duty orders); International Trade Administration, *Suspension Agreements Currently in Effect* (visited June 3, 1998) <http://www.ita.doc.gov/import_admin/records/stats/susp.txt> (suspension agreements).

57. 19 U.S.C. § 1673c.

58. *Id.* § 1673c(a).

1980s to settle various steel investigations.⁵⁹ The WTO Agreement on Safeguards prohibits voluntary export restraints and other similar measures, at least with other WTO member countries, thus making further use of this provision problematic.⁶⁰

Section 734(b) provides Commerce the authority to suspend an investigation pursuant to an agreement with companies representing substantially all (at least eighty-five percent) exports to the United States that they will either cease dumping, or less frequently, cease exports to the United States.⁶¹ In most cases, "cease dumping" agreements provide a mechanism whereby Commerce calculates normal values, based on constructed value principles, above which the signatories agree to sell their merchandise in the United States.⁶²

Section 734(c) provides Commerce with the authority to suspend an investigation pursuant to an agreement with companies representing substantially all (at least eighty-five percent) exports to the United States that will "eliminate" completely the injurious effect of their exports to the United States.⁶³ In addition, such an elimination of injury agreement must prevent price suppression or undercutting of U.S. prices and eliminate at least eighty-five percent of the dumping margin found in the investigation.⁶⁴ Because such an agreement does not completely eliminate the dumping that has been found to be occurring, Commerce may only enter into such agreements when there are extraordinary circumstances.⁶⁵ "Extraordinary circumstances" have been defined as meaning that the case is complex and that suspension would be "more beneficial" to the domestic industry than continuation of the

59. See, e.g., Termination of Antidumping Duty Investigation: Welded Carbon Steel Pipe and Tube Products from Yugoslavia, 51 Fed. Reg. 15,036 (1986); Termination of Antidumping Duty and Countervailing Duty Investigations: Oil Country Tubular Goods from Austria, 51 Fed. Reg. 664 (1986). The most widespread use of this authority had come in 1982 in the termination of numerous antidumping and countervailing duty investigations of flat-rolled and other steel products from various members of the European Economic Community. Certain Steel Products from Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom: Termination of Countervailing Duty and Antidumping Investigations, 47 Fed. Reg. 49,058 (1982).

60. Agreement on Safeguards, art. 11(1)(b), WTO Agreement, *supra* note 13, Annex 1A, reprinted in LAW OF THE WTO, *supra* note 13, at 599.

61. 19 U.S.C. § 1673c(b). "Substantially all" is defined in the legislative history as not less than 85% of exports to the United States. Senate Report No. 96-249 at 71; Statements of Administrative Action (to P.L.96-39) at 401.

62. See, e.g., Color Negative Photographic Paper (CNPP) and Chemical Components Thereof from Japan: Suspension of Investigation, 59 Fed. Reg. 43,547, 43,551 (1994); Grey Portland Cement and Clinker from Venezuela: Suspension of Investigation, 57 Fed. Reg. 6706 (1992).

63. 19 U.S.C. § 1673c(c); see *supra* note 61 regarding the meaning of "substantially all."

64. *Id.* § 1673c(c)(1).

65. *Id.*

investigation.⁶⁶

Section 734(l) provides Commerce with the authority to suspend an investigation involving a nonmarket economy country pursuant to an agreement with that country restricting the volume of imports into the United States provided that the agreement prevents price suppression or undercutting, is in the public interest, and can be effectively monitored.⁶⁷ Typically, these agreements have established limits on exports to the United States and a minimum price below which those imports cannot be sold.⁶⁸

In the case of an agreement pursuant to Section 734(b) or (c), before entering into the agreement, Commerce must first determine that the agreement is in the public interest and can be effectively monitored.⁶⁹ If Commerce finds that the terms of a suspension agreement are being violated, it must terminate the agreement and resume the investigation from the point of the preliminary determination.⁷⁰ Rarely, a domestic producer or respondent will request "continuation" following the conclusion of a suspension agreement.⁷¹ When continuation is requested, both Commerce and the ITC proceed to their final determinations; however, assuming both determinations are affirmative,⁷² no antidumping duty order is issued.⁷³ Instead, the proceeding continues to be suspended pursuant to the agreement, and if the agreement is violated, Commerce immediately issues the antidumping duty order.⁷⁴

9. ITC Final Investigation and Antidumping Duty Order

The ITC's final investigation proceeds in much the same manner as its preliminary investigation, albeit over a longer timeframe. If Commerce's preliminary determination is affirmative, the ITC commences its final investigation at that time, normally completing it forty-five days after Commerce's final determination (assuming Commerce's final determination is also affirmative).⁷⁵ In the event of a negative preliminary determination by Commerce, the ITC will not commence its final investigation unless and

66. *Id.* § 1673c(c)(2)(A).

67. *Id.* § 1673c(l).

68. *See, e.g.,* Honey from the People's Republic of China: Suspension of Investigation, 60 Fed. Reg. 42,521, 42,523-24 (1995); Antidumping: Silicomanganese from Ukraine: Suspension of Investigation, 59 Fed. Reg. 60,951, 60,953 (1994).

69. 19 U.S.C. § 1673c(d).

70. *Id.* § 1673c(i)(1).

71. *Id.* § 1673c(g).

72. If the final determination of either Commerce or the ITC is negative, the investigation is terminated, and the agreement will have "no force or effect." *Id.* § 1673c(f)(3)(A).

73. *Id.* § 1673c(f)(3)(B).

74. *Id.* § 1673c(i)(1)(C).

75. *Id.* § 1673d(b)(2)(B).

until there is an affirmative final determination by Commerce.

As in the preliminary investigation, the ITC issues questionnaires to the domestic industry, importers, and foreign producers in order to evaluate the condition of the domestic industry and the conditions of competition between the domestic industry and the imported subject merchandise. In addition, Commerce also may issue questionnaires to domestic consumers of the imported product and the domestic like product in order to gain additional perspective on the conditions of competition between these products.

If Commerce and the ITC issue affirmative final determinations, then Commerce must publish an antidumping duty order in the Federal Register.⁷⁶ The antidumping duty order directs the U.S. Customs Service to require U.S. importers to make cash deposits of estimated antidumping duties.⁷⁷ The importer may no longer post bonds in lieu of cash deposits following publication of the antidumping duty order.⁷⁸

10. Judicial/Panel Review

A party that participates in the Commerce or ITC investigation may challenge the factual findings or legal conclusions in the final determinations before the U.S. Court of International Trade (CIT).⁷⁹ In such a challenge, the court reviews the administrative determination to determine whether it was based on "substantial evidence on the record" (for factual findings) and is otherwise "in accordance with law" (for legal conclusions).⁸⁰ If a party to the litigation is dissatisfied with the decision of the CIT, that party may appeal the adverse decision to the U.S. Court of Appeals for the Federal Circuit.⁸¹

In addition to the domestic courts of the United States, two international dispute resolution procedures are available. First, if the antidumping case involves a member country of the WTO, that member country may invoke the WTO's dispute settlement procedures to examine whether the action was consistent with the WTO obligations of the United States.⁸² Further, for antidumping cases involving Mexico or Canada, the affected party may utilize the procedures established by NAFTA and challenge the final determinations before a binational panel.⁸³

76. *Id.* § 1673e.

77. *Id.* § 1673e(a)(3).

78. *Id.*

79. *Id.* § 1516a(a).

80. *Id.* § 1516a(b).

81. *Id.* § 1337(c).

82. *See infra* part VI for further discussion of WTO dispute settlement procedures.

83. *See infra* part V for further discussion of NAFTA dispute settlement procedures.

B. *The 1980 Winter Vegetables Case*

The dispute with Mexico over its sales of winter vegetables in the United States traces its roots back at least to 1978. In September of that year, several groups representing Florida growers of fresh cucumbers, eggplant, peppers, squash, and tomatoes filed an antidumping petition against imports of those products from Mexico.⁸⁴ Significantly, that case was limited to "vegetables shipped during the winter vegetable season and cover[ed] entries during the period November 1 in any year through the last day of the following April."⁸⁵

The investigation was limited both in terms of the specific vegetables covered and as to the time period during which they were shipped and entered into the United States. There is, however, no discussion of these limitations in Commerce's determination. The 1980 case is of limited value in explaining temporal limitations in the scope of an antidumping investigation.

The 1980 case is, however, telling in other respects. First, the case stands as an early example of Commerce's use of third-country sales as the basis of fair value. Commerce found that home-market sales of the types of vegetables under investigation were not made in sufficient quantities to provide a basis for fair value comparisons.⁸⁶ The parties agreed, and Commerce determined that the Canadian market was essentially the same as the U.S. market. Consequently, Commerce used sales to Canada to calculate fair value.⁸⁷ This decision was affirmed by the CIT, which agreed that the legislative history and regulations indicate a preference for using third-country sales as the basis for fair value over constructed value when home-market sales are inadequate.⁸⁸

In finding that the U.S. and Canadian markets were essentially the same for winter vegetables, Commerce also determined that the markets were "unitary."⁸⁹ In fact, it found that sales both to the United States and to Canada were made at the same location (Nogales, Arizona) and by the same distributors.⁹⁰ Based on its analysis of the pricing patterns within a day and

84. *Certain Fresh Winter Vegetables from Mexico: Termination of Antidumping Investigation*, 44 Fed. Reg. 43,567 (1979).

85. *Certain Fresh Winter Vegetables from Mexico: Antidumping: Final Determination of Sales at Not Less Than Fair Value*, 45 Fed. Reg. 20,512, 20,513 (1980) [hereinafter *Winter Vegetables*].

86. *Id.* at 20,514.

87. *Id.*

88. *Southwest Florida Winter Vegetable Growers Ass'n v. United States*, 584 F. Supp. 10, 14-15 (Ct. Int'l Trade 1984).

89. *Winter Vegetables*, 45 Fed. Reg. at 20,514.

90. *Id.*

over a season, along with the recognition of the impact of quality, color (ripeness), and the time of day of sale, Commerce determined that there was no evidence of price discrimination between the two markets.⁹¹ This analysis was done on a somewhat aggregate basis because the facts presented to Commerce did not permit it to isolate identical merchandise of identical quality sold under identical conditions.

The 1980 *Winter Vegetables* case remains important to this day with respect to its application of the below-cost sales test to perishable agricultural commodities. It was in this case that Commerce first determined that "a relatively high level of sales below cost is normal and to be expected" when dealing with a perishable agricultural product.⁹² In fact, it found that it was not uncommon for as much as fifty percent of a producer's sales to be below cost over a season.⁹³ Because this was found to constitute normal business practice in the fresh vegetable industry, Commerce did not disregard sales to Canada as being below cost unless the below-cost sales constituted more than fifty percent of that grower's total sales of that type of vegetable for the season.⁹⁴ The reliance on normal business practices and the recognition that vegetable growers make their profit over a season rather than on individual sales led the CIT to affirm the Department's use of a fifty-percent standard for below-cost sales when dealing with perishable agricultural products.⁹⁵

C. *The 1996 Tomatoes Investigation*

Following the negative determination in 1980, dumping claims against Mexico by the Florida industry lay dormant for sixteen years. On March 29, 1995,⁹⁶ the Florida tomato industry sought relief from increasing imports of fresh winter tomatoes from Mexico under Section 201 of the Trade Act of 1974, which permits the President to impose restrictions on imports to provide time for a domestic industry to adjust to import competition.⁹⁷ This claim was limited to tomatoes imported during the months of January through April.⁹⁸ In April 1995, the ITC rejected Florida's claim for provisional relief, finding, among other things, that the like product could not properly be limited to winter tomatoes, and that the provisional relief, even if granted, could not have had a significant impact on that season (that is, that the injury could be timely prevented through an ordinary Section 202

91. *Id.*

92. *Id.* at 20,515.

93. *Id.*

94. *Id.*

95. *Winter Vegetable Growers*, 584 F. Supp. at 17-18.

96. *Fresh Winter Tomatoes*, USITC Pub. 2881, Inv. No. TA-201-64, at I-4 (Apr. 1995).

97. 19 U.S.C. § 2251.

98. *Fresh Winter Tomatoes*, USITC Pub. 2881, at I-8.

investigation).⁹⁹ The Florida industry subsequently withdrew its request for full relief under Section 202.¹⁰⁰

A year later, the domestic industry returned with a two-pronged approach. On March 11, 1996, they filed a petition with the ITC again seeking full relief under Section 202 of the Trade Act of 1974.¹⁰¹ This time, however, the petition virtually abandoned its claim that the like product should be limited to winter production.¹⁰² In addition, the request for relief was filed on behalf of the bell pepper industry as well as the tomato industry.¹⁰³ Once again, however, on July 2, 1996, the ITC found that the domestic tomato and bell pepper producers were not suffering "serious injury" by substantially increased imports of tomatoes and bell peppers.¹⁰⁴

On April 1, 1996, the domestic industry filed an antidumping petition with Commerce and the ITC.¹⁰⁵ This petition contained sufficient information regarding the condition of the U.S. tomato growers and the prices of Mexican tomatoes in the United States and in Mexico to justify Commerce's initiation of an antidumping investigation.¹⁰⁶ The petition contained production information for the entire U.S. industry (based on USDA statistics), including the production of the petitioners and others supporting the petition.¹⁰⁷ These data established that the petitioners and the supporters represented more than fifty percent of U.S. fresh tomato production, thus establishing sufficient industry support to meet the statutory requirements.¹⁰⁸

Prior to issuing its questionnaire, Commerce received comments on the appropriate period of investigation, that is, the period for which sales would be examined. Based on its analysis of these comments, Commerce set the period of investigation as March 1, 1995 through February 29, 1996.¹⁰⁹ March 1996 was not included in the period of investigation because the

99. *Id.* at I-8, I-21.

100. Fresh Winter Tomatoes, 60 Fed. Reg. 25,248 (1995).

101. Fresh Tomatoes and Bell Peppers, 61 Fed. Reg. 13,875 (1996).

102. *Id.*

103. *Id.*

104. Fresh Tomatoes and Bell Peppers, USITC Pub. 2985, Inv. No.TA-201-66, at I-5 (Aug. 1996).

105. Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 18,377 (1996). Although the petition was filed with the Department of Commerce on March 29, 1996, it was not considered officially filed until April 1, 1996, because it was not timely filed with the ITC until that day. *Id.* The Tariff Act of 1930 requires that petitions be simultaneously filed at both agencies. 19 U.S.C. § 1671a(b)(2).

106. Fresh Tomatoes from Mexico, 61 Fed. Reg. at 18,577.

107. *Id.*

108. *Id.*

109. Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico, 61 Fed. Reg. 56,608, 56,610 (1996) [hereinafter Postponement: Fresh Tomatoes from Mexico].

petition was actually filed with Commerce in March 1996, and Commerce noted that prefiling publicity and the commencement of the ITC's Section 201 investigation in March made the representativeness of March 1996 data questionable.¹¹⁰ Commerce did not further adjust the period of investigation back to the end of the prior fiscal quarter (December 1995) because it had no evidence that fiscal quarters were relevant in the fresh tomato industry.¹¹¹

1. Respondent Selection

With the initiation of the investigation, Commerce was soon faced with determining the appropriate Mexican growers from whom to request information. Section 777A(c)(1) of the Tariff Act of 1930 provides that Commerce is to "calculate individual dumping margins for all known producers and exporters of subject merchandise."¹¹² When there is a large number of producers and exporters, however, Commerce may investigate less than all of them and base the investigation on either a statistically valid sample, or on examination of producers and exporters that account for the largest volume of exports that can reasonably be examined.¹¹³ Commerce, recognizing that there were over 200 Mexican tomato growers, and possibly as many as 600, requested comments on possible sampling or other reduced reporting methodologies early in the investigation.¹¹⁴

In the 1980 investigation, Commerce had analyzed data from thirty-four growers accounting for approximately fifteen percent of the shipments to the United States.¹¹⁵ The thirty-four growers included not only the largest Mexican producers, but also middle- and small-sized growers.¹¹⁶ Additionally, Commerce did not examine all of the sales of the thirty-four growers.¹¹⁷ Instead, it examined a statistically representative sample of all their transactions.¹¹⁸

Based on the comments of the Mexican government, the petitioners, and the respondents in the 1996 investigation, Commerce decided to examine producers and exporters accounting for the largest volumes of exports.¹¹⁹ After considering the administrative resources available and its expectations as to the number of affiliated companies that would be involved, Commerce

110. *Id.*

111. *See* Memorandum, *supra* note 27, at 2.

112. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,608.

113. *Id.*

114. *Id.*

115. Winter Vegetables, 45 Fed. Reg. at 20,513.

116. *Id.*

117. *Id.*

118. *Id.*

119. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,608.

decided that it could analyze six respondents.¹²⁰ Commerce found that based on its available information, examining the top six exporters would account for just under forty percent of exports and would include growers in both Sinaloa and Baja.¹²¹ Commerce also stated that it would consider information supplied by a voluntary respondent only if a selected respondent refused to participate in the investigation.¹²²

2. Home Market Viability

As discussed earlier, during the 1980 investigation, Commerce found that Mexican growers did not have sufficient home market sales to form a basis for comparison to the U.S. sales. By contrast, in the 1996 investigation, Commerce found that except for one respondent, home-market sales exceeded five percent of U.S. sales and therefore, were made in sufficient quantities to provide a basis for comparison.¹²³

The finding of home market viability in the 1996 investigation is a significant change from the 1980 investigation. In 1980, because the home market was not viable, Commerce based normal value (then foreign market value) on third country sales. Specifically, Commerce based normal value on sales to Canada that were made by the growers' consignment agents in the United States.¹²⁴ Of course, these were the same consignment agents responsible for U.S. sales, and it is for this reason perhaps not surprising that Commerce found no price discrimination between U.S. and Canadian sales.¹²⁵

In 1996, by contrast, the home market for Mexican tomatoes was found to be viable.¹²⁶ Consequently, Commerce used home-market sales by the Mexican growers as the basis for normal value.¹²⁷ These home-market prices, set either by the grower or by a home-market consignment agent, were compared with U.S. prices established by U.S. consignment agents.¹²⁸ Even with all of the adjustments made to set each price on an ex-factory basis, it is reasonable to assume that this use of home-market prices increased the possibility that margins of dumping would be found.

120. *Id.*

121. *Id.* at 56,609.

122. *Id.*

123. *Id.* at 56,613. Eco Cultivos, S.A. de C.V. (Eco) was the only exception. Eco had neither a "viable" home market nor any third-country sales, therefore, Commerce based Eco's normal value on constructed value. *Id.*

124. Winter Vegetables, 45 Fed. Reg. at 20,514.

125. *Id.* at 20,515-16.

126. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,613.

127. *Id.*

128. *Id.* at 56,614.

3. Cost Test

Perhaps the most significant differences between the 1980 and 1996 investigations relate to differences in the application of the sales-below-cost provisions of the Tariff Act of 1930. The 1980 investigation was limited to winter vegetables, and therefore, Commerce reasonably limited its review to sales and costs of one winter season.¹²⁹ The 1996 investigation covered all tomatoes, regardless of their growing season, and thus raised distinct issues relating to the period of investigation and the range of sales examined by Commerce.¹³⁰

Commerce's use of a twelve-month period of investigation in the 1996 investigation was due, in part, to a statutory change with respect to the cost test. The statute now provides that:

If the administering authority determines that sales made at less than the cost of production —

(A) have been made within an extended period of time in substantial quantities, and

(B) were not at prices which permit recovery of all costs within a reasonable period of time,

such sales may be disregarded in the determination of normal value.¹³¹

The statute defines an "extended period of time" as "a period that is normally 1 year, but not less than 6 months."¹³² Consequently, in order to meet the definition of an extended period of time, Commerce normally examines home market sales over a period of at least one year.¹³³

The one-year period of investigation selected by Commerce, March 1, 1995 through February 29, 1996, coincided with the growing season for some Mexican growers, but not for others. The growing season in Baja, California, is spring through fall; therefore, growers in that region had a complete growing season within the period of investigation.¹³⁴ On the other hand, Sinaloa's growing season is fall through spring.¹³⁵ Consequently, the period of investigation covered the last part of the 1994-95 growing season

129. Winter Vegetables, 45 Fed. Reg. at 20,513.

130. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,609.

131. 19 U.S.C. § 1677b(b)(1).

132. *Id.* § 1677b(b)(2)(B). Comparable language is found in the WTO Antidumping Agreement. See Antidumping Agreement, *supra* note 13, art. 2.2.1, n.4.

133. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,610.

134. Memorandum, *supra* note 27, at 1.

135. *Id.*

and the first part of the 1995-96 growing season.

Commerce recognized that there could be significant cost variations from one season to the next due to variations in such things as weather conditions, soil conditions, crop pests, diseases, and yields. For this reason, when the period of investigation included sales from more than one growing season for a region, Commerce examined the costs associated with each season separately.¹³⁶

Commerce also recognized that costs relating to the production of a tomato may be incurred throughout the growing season. For example, growers will incur seed and planting costs at the beginning of the growing season, irrigation and picking costs throughout the growing season, and field cleanup costs at the end of the growing season. Consequently, in order to calculate the average cost of production for the tomatoes grown during a particular growing season, it was necessary to collect all production costs (and yields) relating to that growing season.¹³⁷

In addition to these agriculture-specific issues, Commerce found that Mexico experienced significant inflation during the period of investigation.¹³⁸ In order to ensure that inflation did not distort Commerce's cost and dumping calculations, Commerce indexed each month's costs forward to the end of the growing season, based on the consumer price index, in order to calculate the weighted average cost for that growing season.¹³⁹

The statute contains a special rule for determining whether below-cost sales have been made in substantial quantities, which applies with particular force in the case of a perishable agricultural product.¹⁴⁰ In fact, this special test is based on Commerce's prior practice for these products. The antidumping law provides that below-cost sales have been made in substantial quantities if "the weighted average per unit price of the sales under consideration for the determination of normal value is less than the weighted average per unit cost of production for such sales."¹⁴¹

Again, Commerce recognized that the application of the below-cost test could only make sense on a growing season-specific basis. In other words, Commerce sought to determine whether, for each growing season, the weighted average unit price was greater than the weighted average cost.¹⁴²

In order to calculate the weighted average growing season price, Commerce determined that it was appropriate to collect all home-market sales

136. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,613.

137. *Id.*

138. *Id.*

139. *Id.*

140. 19 U.S.C. § 1677b(b)(2)(C)(ii).

141. *Id.*; see Statement of Administrative Action, *supra* note 55, at 162, *reprinted in* H.R. DOC. NO. 103-316, *supra* note 55, at 832.

142. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,613.

for each growing season (regardless of whether they were outside the period of investigation).¹⁴³ Commerce recognized that tomato prices may fluctuate significantly over the course of a growing season; thus, using all home-market sales to calculate the weighted average home-market price was more appropriate than limiting the weighted average price to home-market transactions during the period of investigation.¹⁴⁴ These prices were indexed to the end of the growing season in the same manner as were the costs in order to allow the comparisons to be made on a common basis.¹⁴⁵

If, as a result of the comparisons of costs and prices, Commerce determined that the weighted average price exceeded the weighted average cost, Commerce concluded that below-cost sales were not made in substantial quantities during that growing season and no below-cost sales were excluded from the dumping calculation.¹⁴⁶ If, on the other hand, Commerce determined that the weighted average cost exceeded the weighted average price, Commerce determined that below-cost sales were made in substantial quantities, and it became necessary to identify the below-cost sales.¹⁴⁷ This identification of individual sales below cost was performed by comparing sale prices, on a transaction-specific basis, to the weighted average cost of production, indexed to the month in which the sale occurred.¹⁴⁸

The final step in determining whether a particular below-cost sale was to be excluded from the normal value calculation was to determine whether each individual below-cost sale was at a price sufficient to recover costs within a reasonable period of time.¹⁴⁹ Commerce determined that given the nature of the subject merchandise as a perishable agricultural product, the appropriate period for the cost recovery test was a growing season.¹⁵⁰ For this reason, Commerce performed the cost recovery test by comparing transaction-specific prices with the growing season average cost.¹⁵¹

As a result of this cost analysis, Commerce found that below-cost sales were made within an extended period of time in substantial quantities and at prices which did not permit the recovery of all costs during some growing seasons and for some tomato types.¹⁵² When this was the case, Commerce excluded those sales from its normal value calculation.¹⁵³ When there were

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 56,613-14.

149. *Id.* at 56,614.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

no above-cost sales remaining for a particular tomato type and growing season, Commerce calculated normal value based on constructed value.¹⁵⁴

4. Preliminary Determination

Commerce issued its preliminary determination on November 1, 1996.¹⁵⁵ In contrast to the 1980 investigation, in which no margins of dumping were found, Commerce found that there was a reasonable indication that dumping was occurring in the 1996 investigation and estimated that the margins ranged from 4.16% to 188.45%, with the weighted average estimated margin at 17.56%.¹⁵⁶

5. Suspension of Investigation

Commerce, however, did not complete the 1996 investigation. Instead, shortly after making its preliminary determination, it signed a suspension agreement with Mexican tomato growers, who accounted for substantially all imports of fresh tomatoes from Mexico into the United States.¹⁵⁷ In this agreement, each signatory agreed to revise its prices to eliminate completely the injurious effects of its tomato exports to the United States.¹⁵⁸

Consistent with the requirements of Section 734(c) of the Tariff Act of 1930,¹⁵⁹ the agreement established a reference price below which the signatories agreed not to sell tomatoes in the United States.¹⁶⁰ The agreement also provided that no entry by any exporter would be dumped at greater than fifteen percent of the estimated dumping margin for that exporter from the investigation.¹⁶¹ Commerce found that the combination of these requirements would completely eliminate the injurious effect of Mexican tomato imports and prevent the suppression or undercutting of domestic price levels by Mexican tomato imports.¹⁶²

For the Mexican growers, the signing of the suspension agreement eliminated (at least for the time being) a major source of uncertainty in the market: the existence and extent of antidumping duties. The agreement replaced that uncertainty with a need to change how they did business. The reference price requirements of the agreement meant that Mexican growers

154. *Id.*

155. *Id.* at 56,608.

156. *Id.* at 56,615.

157. Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618 (1996) [hereinafter Suspension: Fresh Tomatoes from Mexico].

158. *Id.* at 56,619.

159. 19 U.S.C. § 1673c(c).

160. Suspension: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,619.

161. *Id.*

162. *Id.* at 56,618.

could no longer simply ship their product to the United States, accept whatever price the consignment agent received, and hope to come out ahead at the end of a growing season. Instead, their consignment contracts had to be revised to ensure that consignees could not sell tomatoes on behalf of the signatories for less than the agreed reference price. Equally important, the consignees had to ensure that their sales contracts, on behalf of the signatories, contained appropriate language such that the buyer could not make claims for post-sale price adjustments, which would have the effect of lowering the price below the reference price.¹⁶³

D. 1997 Winter Vegetables Investigation

At this point, attention turns to the hypothetical situation posited in the Fifth Annual International Business Law Symposium Proceedings,¹⁶⁴ involving a possible 1997 antidumping action against winter vegetables from Mexico. The first issue to be wrestled with is "the transition." The hypothetical assumes the end of the suspension agreement, but explains that there had been general compliance with the terms of the agreement. This suggests that the 1996 suspension agreement was not terminated pursuant to the violation provisions of the agreement or Section 734(i) of the Tariff Act of 1930.¹⁶⁵ Had this been the case, termination of the agreement would have been cause for Commerce and the ITC to resume their 1996 investigations as of the preliminary determinations and complete those investigations "without regard to the effect of" the terminated agreement.¹⁶⁶ This completion of the 1996 investigations would be inconsistent with the hypothetical's instructions to consider a new antidumping case, which in any event would be required to address the winter vegetables other than tomatoes that also are of concern to Florida growers in the hypothetical. For these reasons, the hypothetical would appear to assume that the 1996 petition was withdrawn, allowing Commerce to terminate the suspension agreement and underlying investigation. Beyond these transition issues, the hypothetical raises several issues which relate to the ability of CONVEG to seek relief under the antidumping provisions of the Tariff Act of 1930. We will discuss each of these issues in turn.

163. See, e.g., U.S. Dep't of Commerce, Clarification of Suspension Agreement on Fresh Tomatoes from Mexico, May 2, 1997 (on file with *The Florida Journal of International Law*) (detailing Commerce's interpretation of the agreement and its application to claims for spoilage). This clarification was necessary particularly to the extent that the requirements of the agreement differ from the customary basis for making such claims pursuant to the Perishable Agricultural Commodities Act, 7 U.S.C. §§ 499a-499t (1994).

164. *Proceedings Fifth Annual International Business Law Symposium*, 11 FLA. J. INT'L L. 233 (1997).

165. 19 U.S.C. § 1673c(i).

166. *Id.* § 1673c(j).

1. Industry Support

The antidumping law requires that Commerce find that a petition has been filed on behalf of the domestic industry producing the domestic like product.¹⁶⁷ As previously discussed, to meet this test, more than fifty percent of those members of the industry expressing either support for or opposition to the petition must favor the investigation, and the supporters must account for no less than twenty-five percent of total domestic production.¹⁶⁸

The hypothetical posits the following facts relevant to the issue of industry support: CONVEG owns approximately one-half of the South Florida tomato and other winter vegetable farms; and CONVEG is working with an unknown number of other Florida growers to consider filing an antidumping petition. The hypothetical does not specify whether CONVEG and the other growers produce tomatoes and other winter vegetables only in Florida and whether they produce these products only during the winter months.

The production figures for CONVEG and the other Florida growers behind the petition, at least initially, will constitute the numerator for the determination of industry support. The key factor in this equation will be the denominator, the figure that represents the total production of the domestic like product.

Commerce's calculation of the denominator will depend upon its determination of the domestic like product.¹⁶⁹ The Tariff Act of 1930 defines "domestic like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."¹⁷⁰ The hypothetical facts suggest two possible domestic industry, like product¹⁷¹ arguments: (1) the like products are comprised of all production of vegetables regardless of when they are grown, or (2) the

167. *Id.* § 1673a(c)(4).

168. *Id.*; see *supra* text accompanying note 19.

169. While Commerce applies the same statutory definition of domestic like product as the ITC, the two agencies apply this definition for different reasons and pursuant to different statutory authority. Moreover, each agency maintains a distinct administrative record, possibly containing different facts due, in part, to the different amounts of time each agency has to develop its record. Consequently, the two agencies may arrive at different domestic like product definitions, neither of which will be contrary to law. See, e.g., Initiation of Antidumping Duty Investigations: Collated Roofing Nails from the People's Republic of China, the Republic of Korea, and Taiwan, 61 Fed. Reg. 67,306, 67,306-07 (1996); Initiation of Antidumping Duty Investigation: Vector Supercomputers from Japan, 61 Fed. Reg. 43,527, 43,528 (1996).

170. 19 U.S.C. § 1677(10).

171. Because the domestic industry is defined in terms of producers of the domestic like product, the two issues are closely related.

like products are comprised only of the winter production of these vegetables. The first approach is, on the one hand, straightforward. On the other hand, it will have the effect of diluting the significance of CONVEG's production figures. This dilution will be evident not only before Commerce in its industry support determination, but also before the ITC as it examines whether the domestic industry is materially injured by reason of unfairly priced imports. If, for example, summer producers are better off than CONVEG, it may be more difficult for the ITC to find material injury when looking at the industry as a whole.

The alternative would be for petitioners to argue that the like product should be limited to winter production of tomatoes and the other products in question. Such a limitation would maximize the significance of the petitioners' figures, both to establish industry support and to support a finding of material injury. This approach would allow CONVEG and the other supporting companies to represent a much larger share of the domestic industry. If accepted by the ITC, it would also require the ITC's injury test to be limited to the domestic companies growing the subject merchandise during the winter months, thus focusing the inquiry on the "who and when" most concerned and affected by the competition from Mexico. Attempting to limit the like product to winter vegetables would be controversial. While in the past, Commerce has been willing to define the like product on a temporal basis as well as a physical basis,¹⁷² recent experience demonstrates that the ITC is less likely to accept these distinctions.¹⁷³

2. Timing of Filing and Period of Investigation

The timing of a petition is always an important issue for the domestic industry.¹⁷⁴ The date the petition is filed represents not only the beginning

172. As noted, the 1980 *Winter Vegetables* case was limited to imports from Mexico during the months of November through April. The ITC did not address this temporal requirement because the law, at that time, did not provide for a preliminary determination of injury, and Commerce's negative determination of dumping made unnecessary a final determination of injury. Commerce included temporal limitations in its investigation of *Fall-Harvested Round White Potatoes from Canada*, and the ITC also limited its like product definition to fall-harvested round white potatoes. In doing so, however, the ITC appeared to recognize physical, marketing, and price differences between fall-harvested round white potatoes and round white potatoes harvested at other times. *Fall-Harvested Round White Potatoes from Canada*, USITC Pub. 1463, Inv. No. 731-TA-124 (Dec. 1983).

173. The Florida tomato industry attempted to seek relief as to winter tomatoes under Section 201 of the Trade Act of 1974 in the spring of 1995. *Fresh Winter Tomatoes*, USITC Pub. 2881, at I-4. The ITC rejected the industry's claim that the like product should be limited to winter tomatoes, finding, among other things, that there was a continuum of production throughout the year. *Id.* at I-8.

174. Many of the concerns raised here are specific to tomatoes and do not necessarily impact CONVEG's case vis-à-vis other winter vegetables; however, to the extent that tomatoes

of the calendar for the investigation, it also represents, typically, the end of the period that will be examined to determine if relief is warranted.

The hypothetical contains one relevant piece of information to consider from a timing perspective. The Mexican growers sold their tomatoes above the suspension agreement reference price during the 1996-97 season. This fact alone suggests that patience may be called for with respect to the consideration of a new antidumping case.

Commerce's normal practice has been to establish a twelve-month period of investigation, based on the four most recently completed fiscal quarters prior to the filing of the petition. Commerce, however, may vary this practice and has done so in cases involving very large or infrequently sold products and in cases involving unusual prefiling notice of the impending investigation and where such notice may have had an impact on the market. Neither of these situations would appear relevant to determining whether the 1996-97 season would be included in the period of investigation of a new antidumping investigation.

Plainly, the unique fact about the 1996-97 season is that a suspension agreement would have been in effect with respect to tomatoes. It is unclear, however, that this single fact would be sufficient to cause Commerce, or the ITC for that matter, to exclude this period from the period of investigation of a new, distinct investigation. This new investigation would differ in scope, and because it would be a distinct investigation (rather than the continuation of the suspended investigation begun in 1996), there is no statutory directive to disregard the period in which the suspension agreement operated.¹⁷⁵

If CONVEG were to pursue an antidumping action in late 1997, they would have to assume that the 1996-97 growing season would be included in the periods of investigation of both Commerce and the ITC. Based on the hypothetical's statement that there was compliance with the agreement, the Mexican growers would start from the position that during this season, (1) they had revised their prices so as to completely eliminate any injurious effects on the U.S. tomato industry, and (2) their price revisions eliminated at least eighty-five percent of the previously estimated antidumping duty margin. On the injury side, the implication would be that imports from Mexican signatories (more than eighty-five percent of all imports from

represent the majority of winter vegetables from Mexico and the majority of winter vegetables produced by CONVEG, the other winter vegetables may not justify the expense of further trade litigation if relief on tomatoes is found to be unlikely.

175. As discussed *supra* part III.D., if the 1996 suspension agreement had been terminated as a result of a violation, Section 734(j) of the Tariff Act of 1930 instructs Commerce and the ITC not to take the terminated agreement into account when making their final determinations in the resumed investigation. 19 U.S.C. § 1673c(j). The hypothetical situation posits a new investigation, and therefore, the limits of Section 734(j) would not be applicable.

Mexico), were not a cause of any further injury to the U.S. industry, making a material injury finding by the ITC a significant challenge. Likewise at Commerce, the implication of compliance with the agreement would be that for most Mexican growers, the margin on any particular transaction would be no more than 2.6%.¹⁷⁶ This suggests a reasonable likelihood that the weighted average margin for all transactions will be less than 2%, the statutory threshold for de minimis margins in an investigation.¹⁷⁷

3. Rate Calculation Issues

When examining whether winter vegetables from Mexico are being dumped in the United States, Commerce would most likely split the products into separate "classes or kinds" of merchandise (for example, tomatoes, bell peppers, cucumbers). Commerce's class or kind distinctions are based on the physical characteristics of the products, the expectations of the ultimate purchasers, the ultimate use of the products, the channels of trade, and the manner of advertising and display.¹⁷⁸ These criteria suggest that separate classes or kinds of merchandise for each type of winter vegetable would be appropriate.

The significance of establishing separate classes or kinds of merchandise based on vegetable type is that each aspect of Commerce's examination would be separate: home market viability, examination of sales below cost, and calculation of the dumping margin would be performed separately for each class or kind of merchandise. Thus, while the investigation of tomatoes might proceed in a manner comparable to the 1996 investigation, the investigation of cucumbers might be more comparable to the 1980 investigation: (1) if there are insufficient home-market sales to use for comparison, Commerce would use sales to a third country (possibly Canada) as the basis for normal value; (2) below-cost sales would have to be alleged and investigated separately; (3) if sales to Canada were to be the basis for comparison and such sales continue to be made in Nogales by the same consignment agents that make U.S. sales, the likelihood of finding significant margins of dumping may be low; and (4) such margins, if less than two percent, would be considered de minimis and result in a negative determination by Commerce with respect to that vegetable.

For all of these reasons, significant market research would be necessary

176. The weighted average rate assigned to "All Others" in the investigation (except the companies individually examined) was 17.56%. Postponement: Fresh Tomatoes from Mexico, 61 Fed. Reg. at 56,615. Fifteen percent of that figure is 2.6%.

177. 19 U.S.C. § 1673b(b)(3). *De minimis* margins are treated as zero margins.

178. *Diversified Prod. v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China, 59 Fed. Reg. 55,625 (1994).

before any new antidumping case could be filed based on the hypothetical situation. Moreover, to the extent that tomatoes represent the most economically significant winter vegetable, CONVEG might do well to exercise patience until a more favorable period of investigation were likely.

IV. COUNTERVAILING DUTY LAW

A. *In General*

Subsidies materialize in many different forms. Prior to the conclusion of the GATT Uruguay Round Trade Negotiations (Uruguay Round), the GATT 1947 Subsidies Code did not specifically define "subsidy," even though that is the Code's most important term, and the countervailing duty law in the United States did so only in very general terms, which were interpreted broadly. The new GATT 1994 Subsidies Agreement, by contrast, precisely defines a subsidy as certain financial contributions provided directly or indirectly by a government that confer a benefit.¹⁷⁹ This "financial contribution" definition is narrower than the one previously applied by the United States, although it is likely that nearly all subsidies found in past U.S. investigations would fall within the new GATT definition.

Not all government benefits are countervailable subsidies. Pervasive government expenditures, such as those for national defense, education, public health, and general infrastructure are not considered countervailable subsidies, even though they manifestly provide benefits to their recipients. Only benefits provided by governments to a specific enterprise, industry, or group of industries are countervailable subsidies.¹⁸⁰ Specific subsidies often enable their recipients to gain an unfair advantage over other domestic producers or over foreign manufacturers.¹⁸¹ General subsidies, on the other hand, typically do not confer such an advantage, and in fact may be necessary because of the inability of the price system to distribute certain essential goods and services to all members of the society.¹⁸²

B. *The Uruguay Round Framework*

In the Uruguay Round, negotiators relegated the types of subsidies covered by the new Agreement into three classes, which are popularly labeled

179. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, art. 1.1, WTO Agreement, *supra* note 13, Annex 1A [hereinafter Subsidies Agreement], *reprinted in* LAW OF THE WTO, *supra* note 13, at 529.

180. *Id.* art. 2.1; *see also* 19 U.S.C. § 1677(5A)(D).

181. Stephen J. Powell et al., *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, 236 (1990).

182. *Id.*

based on the red, yellow, and green colors of a traffic light. Thus, under the new GATT 1994 Subsidies Agreement, subsidies are either "red light," "yellow light," or "green light."

Red light subsidies are prohibited and countervailable. These are export subsidies, that is, subsidies contingent, in law or in fact, on export performance (for example, special domestic freight rates for export shipments); and import substitution subsidies contingent on the use of local content.¹⁸³ Prohibited subsidies are deemed to be specific and countervailable.¹⁸⁴

Yellow light subsidies are permissible but countervailable. These subsidies are not prohibited but may be countervailed to offset injury, if they are specific. They may be found to be specific if they are explicitly limited by law or regulation to certain enterprises, or if the granting authority, in its administration of the program, limits access to certain enterprises, or if the subsidy is, in fact, predominantly used by or disproportionately granted to certain enterprises.¹⁸⁵ Specificity is one of the most controversial issues in countervailing duty cases. A grant to a particular company is obviously specific. But are preferential government prices for timber harvesting rights a specific benefit? In the case involving lumber imports from Canada, Commerce found these rights specific to the primary timber processing industries.¹⁸⁶ A Canadian-U.S. binational review panel disagreed in a controversial decision from which both U.S. panelists dissented.¹⁸⁷ The decision was allowed to stand by an Extraordinary Challenge Committee.¹⁸⁸

Most subsidies, those that are neither red light nor green light, will be yellow light and thus subject to dispute. In addition, certain yellow light subsidies are presumed by the Agreement to cause serious prejudice to the complaining country and thus may more easily be overturned in a WTO dispute settlement. These are popularly termed "dark amber" subsidies. They include: large subsidies, subsidies to cover operating losses by an industry or by an individual firm if the latter are nonrecurring, and forgiveness of government-held debt or grants to cover debt payments.¹⁸⁹

Green light subsidies are noncountervailable. In addition to nonspecific subsidies, the GATT 1994 Subsidies Agreement identifies, for the first time,

183. Subsidies Agreement, *supra* note 179, arts. 2.3 & 3.

184. *Id.*

185. *Id.* art. 5.

186. Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,610 (1992).

187. United States-Canada Free Trade Agreement Binational Panel Review, In the Matter of Certain Softwood Lumber Products from Canada, USA-92-1904-01 (Dec. 17, 1993). Part VI of this article discusses the binational panel review system.

188. United States-Canada Free Trade Agreement Binational Panel Review, In the Matter of: Certain Softwood Lumber Products from Canada, ECC-94-1904-01USA (Aug. 3, 1994) [hereinafter *Lumber ECC*].

189. Subsidies Agreement, *supra* note 179, art. 6.

subsidies that not only are permissible (that is, not prohibited), but also exempt from countervailing measures. This is by far the most significant change to the Subsidies Agreement. There are three categories of green light subsidies. The first category is subsidies for industrial research and precompetitive development.¹⁹⁰ A second potential green light area is subsidies for disadvantaged regions. To be noncountervailable, government assistance to an eligible region must be directed both in law and in practice toward the development of the region as a whole rather than being provided in a "specific" manner to enterprises or groups of enterprises within the region.¹⁹¹ The third green light category is subsidies for the adaptation of existing facilities to new environmental regulations.¹⁹² Like the other green light categories, this is a closely circumscribed exception. For example, only "one-time non-recurring measures" are eligible for this treatment.¹⁹³ Parties seeking noncountervailable status for a subsidy under this provision also must show, among other things, that the underlying environmental statute or regulation results in "greater constraints and financial burdens on the recipient of the subsidy."¹⁹⁴

C. *Agricultural Subsidies*

One of the top Uruguay Round negotiating objectives of the United States, the nation that has always led the field in its actions to eliminate government subsidies, was to realize international discipline on the provision of agricultural subsidies.¹⁹⁵ Indeed, widespread displacement of efficient U.S. agricultural producers from traditional world markets by overproduction in countries that relied on subsidies was a major impetus for U.S. pursuit of a new round of GATT negotiations.¹⁹⁶ That objective was substantially

190. *Id.* art. 8.2(a); see also 19 U.S.C. § 1677(5B)(B).

191. Subsidies Agreement, *supra* note 179, art. 8.2(b); see also 19 U.S.C. § 1677(5B)(C). Pursuant to the Subsidies Agreement, art. 2.2, and 19 U.S.C. § 1677(5A)(D)(iv), subsidies provided by a central government to particular regions are normally specific, and thus countervailable, regardless of the degree of availability or use within the region. Subsidies Agreement, *supra* note 179, art. 2.2; 19 U.S.C. § 1677(5A)(D)(iv). The provision for "green light" treatment of certain subsidies to disadvantaged regions constitutes an exception to this general rule.

192. Subsidies Agreement, *supra* note 179, art. 8.2(c); see 19 U.S.C. § 1677(5B)(D).

193. Subsidies Agreement, *supra* note 179, art. 8.2(c)(i); see 19 U.S.C. § 1677(5B)(D)(i)(I).

194. See 19 U.S.C. § 1677(5B)(D)(i); Subsidies Agreement, *supra* note 179, art. 8.2(c).

195. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901(b)(7). "The principal negotiating objectives of the United States with respect to agriculture are to achieve . . . more open and fair conditions of trade in agricultural commodities by . . . resolving questions pertaining to export and other trade-distorting subsidies . . ."

196. See generally Paul C. Rosenthal & Lynn E. Duffy, *Reforming Global Trade in Agriculture*, in *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 145 (Terence P. Stewart ed., 1996) [hereinafter *THE WORLD TRADE ORGANIZATION*].

realized. In the Agreement on Agriculture, WTO Members distinguished between subsidies that do not distort trade ("green box" subsidies) and those that do. Green box subsidies, even though they might meet the basic definition of the Subsidies Agreement by involving a financial contribution by a government that is specific to an industry and conveys a benefit, were shielded from national countervailing duty laws for nine years by the "peace clause," while other agricultural subsidies that met the Subsidies Agreement's definition of subsidy remained countervailable.¹⁹⁷ Even as to trade-distorting subsidies, if a Member meets its commitment to reduce the volume of agricultural products subsidized and its budgetary outlays on such products, other countries must show "due restraint" in the initiation of countervailing duty investigations during this implementation period.¹⁹⁸ With regard to non-green box subsidies that Mexico may provide to its winter vegetable producers, this latter commitment will be of small comfort, because the Administration has interpreted its obligation in this respect to be only to restrain from self-initiating countervailing duty investigations of products subject to the relevant domestic support measures.¹⁹⁹ Due restraint would not prevent Commerce from initiating an investigation on the basis of a proper petition filed on behalf of the domestic U.S. winter vegetable industry.²⁰⁰

The domestic support measures and export subsidies, identified in Annex 2 to the Agreement on Agriculture, that are eligible for exemption from countervailing duty laws must meet an extensive list of qualifying requirements.²⁰¹ Even so, the kinds of government programs eligible for green box treatment span a wide range of significant benefits to agricultural

197. Agreement on Agriculture, Apr. 15, 1994, arts. 1(f) & 13, WTO Agreement, *supra* note 13, Annex 1A [hereinafter Agreement on Agriculture], reprinted in LAW OF THE WTO, *supra* note 13, at 227; see also Statement of Administrative Action, *supra* note 55, at 67 & 268, reprinted in H.R. DOC. NO. 103-316, *supra* note 55, at 723 & 938. The Statement constitutes unusually authoritative legislative history, because it not only represents the views of the Executive Branch, but was explicitly approved by the Congress in the Uruguay Round Agreements Act. 19 U.S.C. § 3511(a)(2).

198. Agreement on Agriculture, *supra* note 197, art. 13; Statement of Administrative Action, *supra* note 55, at 268, reprinted in H.R. DOC. NO. 103-316, *supra* note 55, at 938.

199. Statement of Administrative Action, *supra* note 55, at 268; reprinted in H.R. DOC. NO. 103-316, *supra* note 55, at 938.

200. The same industry support concerns outlined in *supra* part III.D.1. for an antidumping petition would apply, as a result of § 702 of Tariff Act of 1930, to a countervailing dumping petition. 19 U.S.C. § 1671a(c)(1)(A)(ii).

201. Agreement on Agriculture, *supra* note 197, annex 2. The WTO Committee on Agriculture must be notified that these measures are green box subsidies, they must have virtually no trade-distortive effects, the programs may not involve transfers of funds from consumers, they may not have the effect of providing price supports to producers, and they must meet additional criteria set out in Annex 2 for each type of eligible subsidy program. *Id.* arts. 5, 6, 18, & annex 2.

producers. Annex 2 covers, for example, "general services," which can include product-specific research, marketing and promotion services, and infrastructure services such as the building of dams, roads, and ports.²⁰² Even certain direct payments to farmers are exempt, such as amounts for income safety net and insurance programs, crop insurance and disaster assistance, farmer and land retirement incentives, compliance with governmental environmental or conservation requirements, and regional assistance benefits.²⁰³ In forwarding the WTO Agreements for approval by the U.S. Congress, the Administration noted that several U.S. agricultural support programs would fall within the green box, including crop disaster assistance, marketing aid, extension services, and research.²⁰⁴

Conceivably, Mexican winter vegetable producers could argue that some Mexican government programs qualify for green box treatment. For example, FOGAIN is a program that provides long-term loans to companies in priority industries and targeted regions of Mexico.²⁰⁵ Would such a loan to a producer of winter vegetables be exempt from countervailing duties under the Agreement on Agriculture if the loan were used to build an irrigation channel?

An interesting issue is raised by the fact that several of the green box subsidies also speak to purposes that surface as green light subsidies under the Subsidies Agreement. Subsidies for research, for assistance to disadvantaged regions, and for meeting new environmental requirements are nonactionable if they meet the requirements of the Subsidies Agreement.²⁰⁶ Depending on the circumstances, compliance with the requirements of the Subsidies Agreement may be less stringent than meeting the criteria in the Agreement on Agriculture. If the program is one that clearly was intended by the government for agricultural recipients, may the government nonetheless seek exemption from countervailing duty laws under the Subsidies Agreement? Would the converse be true? Neither Agreement resolves this issue. Under basic rules of construction, the more specific should take precedence over the general, that is, if a program is meant for agricultural purposes, its actionability should rely on its meeting the Agreement on Agriculture standards; if the program is general as to eligible recipients, the fact that a benefit is provided to an agricultural producer most

202. *Id.* annex 2, at para. 2.

203. *Id.* annex 2, at paras. 5-13.

204. Statement of Administrative Action, *supra* note 55, at 61, *reprinted in* H.R. DOC. NO. 103-316, *supra* note 55, at 717.

205. *See, e.g.,* Certain Textile Mill Products from Mexico: Preliminary Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 37,081-82 (1991) [hereinafter Textile Mill Products from Mexico].

206. Subsidies Agreement, *supra* note 179, art. 8.2.

likely should not permit escape from the Subsidies Agreement test.²⁰⁷

Another basis for avoiding countervailing duties that will not escape the attention of the Mexican producers of winter vegetables is the long-standing U.S. practice of treating agricultural subsidies as nonspecific. Under the new subsidies regulations proposed by Commerce, a subsidy will not be regarded as specific "solely because the subsidy is limited to the agricultural sector."²⁰⁸ As applied, the rule means that Commerce would not find a program *de jure* specific solely because the law or regulation in question is limited on its face to the agricultural sector. In deciding whether the program is *de facto* specific, Commerce would examine only producers of agricultural products. Of course, if a program is not found to be specific to an industry or group of industries, the program is not countervailable.²⁰⁹ In an early case, Commerce found that extension services provided by Israel's Ministry of Agriculture and consisting of assistance in production economics, water and plant use, and applied research were "available to all sectors of agriculture and [we]re not directed exclusively to rose growers or any other sector of agriculture [and thus were] not subsidies within the meaning of the countervailing duty" law.²¹⁰ In 1983, Commerce found that Mexico provided no countervailable benefits to its asparagus producers, including capital inputs for the construction of irrigation facilities.²¹¹ The Department of Commerce noted that "such projects are available for use by the agricultural sector as a whole . . . [and] are not specifically targeted to asparagus."²¹² Similar treatment under the specificity test is provided to programs that are limited to small- and medium-sized businesses, that is, Commerce does not consider such programs to be specific.²¹³ This additional exception likely would have application to a number of the producers of Mexican winter vegetables as to programs not otherwise

207. See Rosenthal & Duffy, *supra* note 196, at 172.

208. Countervailing Duties, 62 Fed. Reg. 8818, 8848 (1996) (to be codified at 19 C.F.R. § 351.502(a)) (proposed Feb. 26, 1997). This approach was first proposed in 1989. Countervailing Duties, 54 Fed. Reg. 23,366, 23,368 (to be codified at 19 C.F.R. § 355.43(b)(8)) (proposed May 31, 1989).

209. 19 U.S.C. § 1677(5)(A).

210. Fresh Cut Roses from Israel: Final Countervailing Duty Determination and Countervailing Duty Order, 45 Fed. Reg. 58,516, 58,519 (1980).

211. Final Negative Countervailing Determination: Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618, 21,622 (1983) [hereinafter *Fresh Asparagus from Mexico*].

212. *Id.* Commerce later made clear that it considered the agricultural sector in Canada to be a sector of the economy, and not a specific industry or group of industries, even though agriculture employs a far smaller percentage of the population in Canada than in Mexico. Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Canada, 52 Fed. Reg. 2134, 2137 (1987). The *Cut Flowers from Canada* case also extended the agricultural exception to farm improvement loans and to tax credits for farmers. *Id.* at 2135-36.

213. Countervailing Duties, 62 Fed. Reg. at 8848.

exempted from countervailing duty treatment either by U.S. law or the Subsidies Agreement.

D. *Subsidies and Mexican Winter Vegetables*

Leaving aside a significant equity infusion on noncommercial terms by the Mexican government²¹⁴ into the winter vegetables industry as unlikely, the only potential subsidy programs found by Commerce in cases conducted in the 1990s are a number of loan programs and the Program for Temporary Importation of Products Used in the Production of Exports (PITEX), which allows duty-free importation of products that will be reexported. PITEX exempts from duties raw materials, packing materials, fuels and lubricants, and certain machinery used by companies with proven export records.²¹⁵ Some of these items could be used by winter vegetable producers, although one would expect the subsidy amounts to be small, particularly if Mexican producers purchase them from a NAFTA country. Loan programs present the best chance to discover countervailable benefits,²¹⁶ but it is difficult to speculate whether such loan benefits have been received by Mexican winter vegetable producers in the absence of any Mexican agricultural cases in recent years.

We also may draw limited conclusions about the domestic industry's view of the viability of a countervailing duty petition from the fact that the Southwest Florida Winter Vegetable Growers Association did not file such a petition as a companion to its 1980 antidumping petition, even though Mexico did not become entitled to an injury examination by the ITC until 1985.²¹⁷ With the massive peso devaluation since that time, the elimination of a number of subsidy programs found by Commerce in the past to be countervailable,²¹⁸ and the ineligibility of agricultural producers for many of the remaining programs,²¹⁹ it is unlikely that the amount of money spent

214. See Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Mexico, 58 Fed. Reg. 37,352, 37,356 (1993).

215. Textile Mill Products from Mexico, 56 Fed. Reg. at 37,083.

216. See, e.g., Porcelain-on-Steel Cookingware from Mexico: Preliminary Results of Countervailing Duty Administrative Review, 60 Fed. Reg. 49,565, 49,566 (1995) (involving Banco Nacional de Comercio Exterior, S.N.C. (BANCOMEXT) government program providing short-term financing for producers engaged in export activities).

217. United States Trade Representative Brock signed the bilateral agreement with Mexico on April 23, 1985. See Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18,335 (1985).

218. See, e.g., Fresh Asparagus from Mexico, 48 Fed. Reg. at 21,619 (verifying that Mexico has discontinued Certificado de Devolucion de Impuestos Indirectos (CEDI) tax-credit certificates for all products).

219. In *Fresh Asparagus from Mexico*, Commerce confirmed that agricultural producers are not eligible for the popular Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX) loans administered by the Mexican Treasury Department with the Bank

by the Mexican government on subsidy programs for the agricultural sector is increasing. The relevance of these considerations is evidenced by the fact that although Mexico was the subject of more than two dozen countervailing duty investigations in the early 1980s,²²⁰ with the exception of the massive steel petitions filed in 1992 on imports from most steel-producing nations,²²¹ no countervailing duty petition has been filed with respect to a Mexican product since that country became eligible for the injury test over a decade ago, and several countervailing duty orders on Mexican imports have been revoked by Commerce in recent years for lack of interest in continuing the orders on the part of U.S. producers.²²²

of Mexico as a trustee that was established to encourage exports. Also, Commerce determined that only processed vegetables qualify for the Certificados de Promocion Fiscal (CEPROFI) tax credits used to promote employment and industrial development. *Id.* at 21,619-20.

220. *See, e.g.*, Porcelain-on-Steel Cooking Ware from Mexico, the People's Republic of China, and Taiwan, 50 Fed. Reg. 50,855 (1985); Initiation of a Countervailing Duty Investigation: Portable Aluminum Ladders and Certain Components of Ladders from Mexico, 50 Fed. Reg. 15,950 (1985); Initiation of a Countervailing Duty Investigation: Converted Paper-Related School and Office Supplies from Mexico, 49 Fed. Reg. 48,347 (1984); Lime from Mexico: Initiation of Countervailing Duty Investigation, 49 Fed. Reg. 15,011 (1984); Initiation of Countervailing Duty Investigation: Bricks from Mexico, 48 Fed. Reg. 52,496 (1983); Initiation of Countervailing Duty Investigation: Certain Fresh Cut Flowers from Mexico, 48 Fed. Reg. 49,531 (1983); Initiation of Countervailing Duty Investigation — Unprocessed Float Glass from Mexico, 48 Fed. Reg. 47,039 (1983); Initiation of Countervailing Duty Investigation: Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 14,019 (1983); Initiation of Countervailing Duty Investigation: Certain Iron-Metal Construction Castings from Mexico, 47 Fed. Reg. 44,131 (1982); Initiation of Countervailing Duty Investigation: Toy Balloons (Including Punchballs) and Playballs from Mexico, 47 Fed. Reg. 23,798 (1982); Ceramic Tile from Mexico: Initiation of Countervailing Duty Investigation, 46 Fed. Reg. 53,738 (1981); Leather Wearing Apparel from Mexico: Initiation of Countervailing Duty Investigation, 45 Fed. Reg. 74,743 (1980).

221. *See* Initiation of Countervailing Duty Investigations and Postponement of Preliminary Determinations: Certain Steel Products from Austria, Belgium, Brazil, France, Germany, Italy, Korea, Mexico, New Zealand, Spain, Sweden, Taiwan, and the United Kingdom, 57 Fed. Reg. 32,970 (1992). As to the determination of whether Mexican imports are injuring the domestic industry, Mexico's imports were cumulated with those of the other countries, as required by § 771(7)(G) of the Tariff Act of 1930. 19 U.S.C. § 1677(7)(G). Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, U.S. International Trade Commission Report No. 2664, Inv. Nos. 701-TA-319-322, 334, 336-342, 344, 347-353 (Final) & Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), at 24 (Aug. 1993).

222. *See* Litharge and Red Lead from Mexico: Final Results of Changed Circumstances Administrative Review and Revocation of Countervailing Duty Order, 56 Fed. Reg. 28,530 (Jan. 21, 1991); Iron-Metal Construction Castings from Mexico: Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 55 Fed. Reg. 39,498 (Sep. 27, 1990).

V. BINATIONAL PANEL REVIEW OF ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS

A. *The Agreement*

Nine years ago the United States agreed with its neighbor to the north, and later with its southern border partner, to a unique and still controversial cession of judicial sovereignty. Chapter 19 of the U.S.-Canada Free Trade Agreement, overtaken in 1994 by Chapter 19 of NAFTA when Mexico joined the pact, provides an innovative solution to a complex issue, that is, how to satisfy our free-trade agreement colleagues that U.S. unfair trade laws will be applied fairly to their imports, while preserving the right of U.S. producers to be protected fully from unfairly traded imports from two of our most important trading partners.

Chapter 19 provides for the review of antidumping and countervailing duty determinations involving goods of another NAFTA party by independent binational panels composed of private trade law experts chosen by the two countries involved in the dispute, instead of the traditional review by national courts. Article 1904 of NAFTA provides that final determinations (as defined in Article 1911) of the investigating authorities in each country²²³ that involve goods of the other country²²⁴ will be subject to review by binational panels selected by the two governments.²²⁵ Panelists cannot be government employees or otherwise affiliated with the governments (judges are not considered affiliated with governments for this purpose) and a majority of the panelists on a given panel (including the chair) must be lawyers in good standing. All panelists are to be selected on the basis of

223. The U.S. Department of Commerce's International Trade Administration and the U.S. ITC (to decide injury) in the United States; the Deputy Minister of National Revenue for Customs and Excise and the Canadian International Trade Tribunal (which decides injury) in Canada; and the International Trade Practices Division of the Department of Commerce and Industry (SECOFI), which decides both dumping or subsidization and injury in Mexico.

224. Whether an investigation involved Mexican goods, for example, would be decided by the International Trade Administration, applying U.S. antidumping law to the facts of the specific investigation. North American Free Trade Agreement, U.S.-Canada-Mexico, Jan. 1, 1994, art. 1901(1), 32 I.L.M. 289, *reprinted in* H.R. DOC. NO. 103-159, at 1231-32 (1993) [hereinafter NAFTA]. This is an exception to the rules of origin provided in Chapter 4 for other trade matters regulated by NAFTA.

225. A clear distinction should be drawn between the binational panels that will review antidumping and countervailing duty determinations under Article 1904 and panels that review statutory amendments to the antidumping and countervailing duty laws to advise on the consistency of such amendments with GATT or NAFTA. Findings of panels that review statutory amendments are not binding, although the failure of the governments to resolve the problem after a panel's finding on inconsistency authorizes the other government to take equivalent legislative or executive action. *Id.* art. 1903.

their "objectivity, reliability, sound judgment, and general familiarity with international trade law."²²⁶

The emphasis on legal knowledge, even for the nonlawyer panelists, is well-placed because the panel's function is to determine whether the investigating authority has properly applied its antidumping or countervailing duty law, based solely on the record created during the administrative process and on the standard of review and the general legal principles that would apply in that country's courts.²²⁷ A final determination may be challenged under normal judicial review procedures only if neither government requests a panel within thirty days after receiving notice of the determination.²²⁸ The government request may be either on its own initiative or at the insistence of a private party that would otherwise have standing under domestic law to bring an action in the courts.²²⁹

If the panel finds that the investigating authority has incorrectly applied its antidumping duty law, the panel will remand the determination for action not inconsistent with the panel's decision and must establish a time limit for compliance with the remand.²³⁰ Under very limited circumstances, the decision of a panel may be brought before an "extraordinary challenge committee" composed of judges or former judges for an expedited decision.²³¹ Decisions of the panel are binding on the parties insofar as the particular matter before the panel is concerned, and the Agreement provides that the governments may not legislate an appeal of a panel decision to the domestic courts.²³²

B. *Improvements Made by NAFTA to the U.S.-Canada Model*

After five years of experience under the U.S.-Canada agreement, the parties were able to identify modifications to the binational panel system that would better reflect the intent of the crafters of the system. First, it should be noted that despite the addition of a third party, the system did not become one of trinational panels. Only two parties participate in any given review, precisely the same situation that would prevail in the judicial systems of the

226. *Id.* annex 1901.2.

227. *Id.* art. 1904(2)-(3). See *id.* art. 1911 for definitions of "administrative record," "general legal principles," and "standard of review."

228. *Id.* art. 1904(10)-(12).

229. *Id.* art. 1904(5), (7).

230. *Id.* art. 1904(8).

231. *Id.* art. 1904(13). The basis for the extraordinary challenge procedure is that a panel member has a serious conflict of interest, that the panel seriously departed from a fundamental procedural rule, or that the panel manifestly exceeded its powers, and that such action materially affected the panel's decision and threatens the integrity of the panel process. For procedures, see *id.* annex 1904.13.

232. *Id.* art. 1904(9), (11).

countries involved. Perhaps a faithful description of the current process is that it is triangular.

One improvement introduced by NAFTA is a preference for judges, either sitting or retired, from the federal courts of the three countries. This change emphasizes that a panel's task is to apply existing law as a court would, not to create a new body of law. This change also will have the effect of reducing the potential for a conflict of interest by trade practitioners who also represent clients in other trade matters pending before the administering authorities of the countries involved.

In addition, the procedures for challenging a panel decision through an extraordinary challenge committee have been improved by expressly requiring these committees to examine the legal and factual conclusions of the panel, and by tripling the length of time available to the committees to undertake that examination.

The third change, the corrective mechanism added by Article 1905, is quite substantial. The parties recognized that some risk attended the melding of Mexico's civil law system, together with its recently enacted antidumping and countervailing duty law, with the common law system, and the more mature antidumping and countervailing duty laws of the other two NAFTA parties. The principal protection against an adverse clash of systems was to ensure sufficient change to Mexico's laws that the exporters of all three countries would be in a roughly equivalent position. Essentially, this combination of changes²³³ shifts Mexico several steps closer to a common law system for antidumping and countervailing duty.

Article 1905 then provides that if a party's laws prevent a panel from being established, or have the effect of rendering its decisions nonbinding, or if these laws fail to provide a meaningful opportunity for judicial review, and a special committee agrees that one of these situations exists, the complaining party may suspend operation of the binational panel system, or suspend equivalent benefits to the other party. This is, of course, a remedy reminiscent of GATT. Article 1905 goes on to provide that when and if the problem is eliminated, any suspension of operation of the binational panel system would be terminated. This snapback provision, while potentially draconian in its impact, is an effective and fair method for ensuring that Chapter 19 continues to operate as the Parties anticipated it would.

233. *Id.* annex 1904.15 (Schedule of Mexico). Through such provisions as disclosure meetings, notices of intended action by SECOFI, access to proprietary business information by counsel under a protective order, detailed reasons for SECOFI decisions, and elimination of the need to seek an administrative appeal before challenging a SECOFI determination before a binational panel, Mexico's law was assured a solid foundation in transparency and due process. One can argue that Mexico's system is more advanced in this respect than Canada's.

C. *Considerations for Mexican Winter Vegetables*

Because binational panel review replaces national courts, the primary differences to the Government of Mexico²³⁴ of pursuing any concerns through Chapter 19 review will be procedural. Interlocutory review, not permitted in U.S. courts for antidumping and countervailing duty determinations,²³⁵ also may not be sought before a panel, although Mexico could send a signal of its dissatisfaction with the direction in which Commerce or the ITC is heading in their preliminary determinations by notifying the United States of its intention to request formation of a panel. Nonetheless, a panel will not be established until the final determination is issued.²³⁶ A request by Mexico for a panel after affirmative preliminary determinations by the agencies would be premature, at least in the sense that not only could one of the final determinations be negative, but also at that point, the issues maybe significantly different. Even so, early invocation of Chapter 19 could serve to put the agencies on notice that certain issues will be scrutinized carefully, although the agencies rarely need such a reminder, given the full participation of the private parties in their determinations.

The five-member panels are composed of two members chosen by each of the involved parties, with the fifth to be chosen by agreement (which has never happened) or "by lot," that is, by tossing a coin to decide which party will make the choice, and thus have a majority of its appointees on the panel.²³⁷ After all panelists have passed their conflict-of-interest examinations, they elect a chair, who must be a lawyer.²³⁸ Once established, the panels move swiftly, in recognition of the deadline of 315 days imposed by NAFTA.²³⁹ Because panels do not have equity powers,²⁴⁰

234. As with most other international agreements, private citizens of the NAFTA parties do not have directly enforceable rights under the Agreement. The government of Mexico must, therefore, trigger initiation of Chapter 19 dispute settlement. In recognition of the rights of private citizens to take their complaints to the national court system, NAFTA requires parties to initiate Chapter 19 procedures upon request by an entity that could have sued in the courts. *Id.* art. 1904(5).

235. 19 U.S.C. § 1516a(a)(1)(D).

236. NAFTA, *supra* note 224, art. 1901.4.

237. *Id.* annex 1901.2.2 -2.3.

238. *Id.* annexes 1901.2, 1901.6. The principal potential conflicts of the practicing trade attorneys often chosen are pending cases involving the same companies or issues, or representation of one of the governments on other legal matters.

239. *Id.* art. 1904(14). This period does not include the time needed for the agencies to respond to panel remands. Time also can be added when a panelist realizes midway through the proceeding that a conflict of interest exists because of one of the issues, and resigns. In any event, the deadline is unenforceable.

240. United States-Canada Free-Trade Agreement, Statement of Administrative Action 104, reprinted in H.R. DOC. NO. 100-216, at 266 (1988).

the panel's jurisdiction over the imports at issue is preserved not through a panel injunction, but by an equivalent order by Commerce to the U.S. Customs Service.²⁴¹

As required by NAFTA, panel decisions will be implemented by the agencies based directly on the panel's order, without need for an intervening governmental decision, as befits a forum that substitutes for a court. If the United States believes the panel has seriously exceeded its powers, it may request reconsideration by an extraordinary challenge committee, an avenue pursued three times in the eight years of binational panel review, never successfully.²⁴² The decision to seek such review is made by the U.S. Trade Representative upon the advice of several interested federal agencies.²⁴³ In the view of some trade practitioners, past extraordinary challenge committees have so limited the availability of this remedy that such a committee can be expected to act only if a panel overtly refuses to apply the clearly relevant standard of review, or if it contains a truly corrupt panelist whose vote mattered.²⁴⁴

VI. DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION

A. *Early GATT Practice*

To understand the present nature of dispute settlement in the WTO, one needs to have a picture of the winding path GATT has taken to reach this critical point. In effect, what began as a diplomacy-driven process of negotiation to resolve disputes has, rather amazingly, and perhaps without a full appreciation by the parties of its impact, been transformed into a rule of law.

At their inception, GATT dispute settlement procedures were straightforward. If a party considered that benefits to which it was entitled under the Agreement were being nullified or impaired, the Agreement entitled the party to the "sympathetic consideration" of the party alleged to have violated its

241. 19 U.S.C. § 1516a(g)(5)(C). In a limitation that became controversial in the *Lumber Products from Canada* case (as did virtually everything else in that proceeding), this injunction equivalent is not available during review of the original antidumping or countervailing duty investigation, because actual assessment of duties occurs only during later proceedings by Commerce under § 751(a) of the Tariff Act of 1930. *Id.* § 1675(a) (1996); see Statement of Administrative Action, *supra* note 240, at 104, reprinted in H.R. DOC. NO. 100-216, *supra* note 240, at 266.

242. See United States — Canada Free Trade Agreement Binational Panel Review, In the Matter of: Fresh, Chilled, or Frozen Pork from Canada, ECC-91-1904-01USA (June 14, 1991); United States — Canada Free Trade Agreement Binational Panel Review, In the Matter of: Live Swine from Canada, ECC-93-1904-01USA (Apr. 8, 1993); *Lumber ECC*, *supra* note 188.

243. North American Free Trade Agreement Implementation Act of 1988, 19 U.S.C. § 3432(c)(2)(B)(iv) (1994).

244. Conversations by author with members of trade bar.

GATT obligations or otherwise caused the nullification or impairment.²⁴⁵ If these consultations failed to resolve the dispute, the matter could be referred to the contracting parties (that is, the parties to the Agreement acting jointly²⁴⁶) for investigation, to be followed by a recommendation or ruling.²⁴⁷

Over time, these investigations progressed from being handled by a working party to a panel of experts to a separate panel for each case, none of which is identified by the Agreement, and each of which is an inexorable step toward greater objectivity in the dispute resolution process.²⁴⁸ After receiving the panel's report, the contracting parties could, if they considered the situation "serious enough," authorize the complaining party to impose countermeasures in the form of suspension of GATT concessions,²⁴⁹ although they have done so only once, in a complaint by the Netherlands involving U.S. quotas on the importation of dairy products.²⁵⁰ Modest procedures for the handling of Article XXIII complaints were adopted in 1966.²⁵¹

B. Tokyo Round

GATT 1947's very sketchy provisions were fleshed out minimally by a framework understanding on dispute settlement rules²⁵² and by the particular provisions of the six new 1979 Tokyo Round codes addressing nontariff measures (standards, government procurement, subsidies, antidumping, customs valuation, and import licensing). These provisions continued the emphasis on stimulating settlement by Parties through an informal, policy-oriented reasoning together approach, although they made an initial stab at a disciplined process with the setting of loose time limits for panel

245. GATT 1947, *supra* note 8, art. XXII(1).

246. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, at xxxix (1969).

247. GATT 1947, *supra* note 8, art. XXIII(2).

248. Compare Chile's complaint against Australia's fertilizer subsidies, GATT, B.I.S.D. at 193 (1952) (working party), with the poultry war between Europe and the United States, GATT, B.I.S.D. (12th Supp.) at 65 (1964) (expert panel), and European Communities: Refunds on Exports — Complaint by Brazil, GATT, B.I.S.D. (27th Supp.) at 69 (1981) (individual panel).

249. GATT 1947, *supra* note 8, art. XXIII(2). If the party whose concessions were withdrawn disapproved of the remedy, its only recourse was to withdraw from the Agreement within a shorter time period than otherwise provided under Article XXXI.

250. Netherlands Measures of Suspension of Obligations to the United States, GATT, B.I.S.D. (1st Supp.) at 32 (1953).

251. Procedures Under Article XXIII, GATT B.I.S.D. (14th Supp.) at 18 (1966).

252. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT B.I.S.D. (26th Supp.) 1980, *reprinted in* THE TEXTS OF THE TOKYO ROUND AGREEMENTS 200 (GATT 1986). Article 7 of the Understanding explicitly reaffirms that the customary practice of GATT in the field of dispute settlement includes the 1966 procedures for the settlement of disputes between developed and less-developed countries.

reports and for compliance with panel recommendations. In hindsight, it is clear that the sixty-day targets in the codes for completion of panel proceedings and the "reasonable period" suggested for bringing the offending laws into compliance, harkened back to the clubby 1950s when GATT was made up of twenty-three like-minded countries whose representatives had negotiated the Agreement together.²⁵³

As became obvious by the failure of these improvements to ensure successful resolution of a deluge of disputes, both broader and deeper than in earlier times, which characterized the 1980s,²⁵⁴ the new GATT had become an altogether different creature.²⁵⁵ The basic remedy of GATT dispute settlement continued to be bringing the offending measure into compliance with GATT or its agreements. The losing party could continue to block adoption of a panel report because adoption required the consensus of the contracting parties. The codes and the understanding confirmed that countermeasures, in the case of failure of a party to bring its laws into compliance, could include the withdrawal of GATT concessions, that is, increased tariffs on products that were not the subject of the dispute. Under this prescription, countermeasures always, of course, had the effect of harming or helping industries that had not been injured by the activity that was the subject of complaint.

Taken together with the fact that the losing party also had the power to block countermeasures, very few trade disputes were resolved under this political process, which set the stage for an early harvest in this field during the Uruguay Round.

C. *Mid-Term Uruguay Round Improvements*

At the April 1989 mid-term meeting of ministers, the parties agreed to apply on a trial basis a bold new set of initiatives until the end of the Round.²⁵⁶ Binding arbitration was added for the first time, as a mutually agreed upon option (albeit an opportunity that no party chose to take). Standard terms of reference were adopted when the parties to the dispute could not agree; failure of the party complained against to agree to the issues to be decided by the panel had become a standard tactic for delaying the

253. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 29 (1993). Professor Hudec notes that the cohesiveness of this group was so strong that the first disputes were resolved by a ruling from the chair, usually accepted by consensus without debate. *Id.*

254. Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*, 8 LEIDEN J. INT'L L. 115, 117 (1995).

255. See generally HUDEC, *supra* note 253, ch. 7.

256. Improvement to the GATT Dispute Settlement Rules and Documents, GATT B.I.S.D. (36th Supp.) at 61 (1989).

substantive work of a panel.

Together with this automatic establishment of panels, more realistic deadlines were established, in recognition of the intense fact-gathering nature of dispute settlement, as well as the need for considerable legal analysis — a nine-month deadline was set for the panel's report, with a target of six months. The GATT Council was to monitor implementation of an adopted report, and the subject would, until resolved, remain on the council agenda beginning six months after adoption. No actual deadline was established for compliance with a panel's recommendations, although peer pressure had become decidedly stronger than in earlier days as parties, particularly developing countries, came to the view that hard-won GATT benefits were worth substantially less to them if they could not be enforced. The essence of the mid-term improvements was that while they clearly were aimed more toward a judicial rather than a legislative process, any party still could block adoption of a panel report, and any party still could prevent countermeasures from being approved even if it permitted the report to be adopted.

D. *Dispute Settlement in the Uruguay Round*

As might have been predicted from the early harvest, the dispute settlement procedures that emerged from the Uruguay Round easily were the most significant advance since GATT was born.²⁵⁷ Parties subjected their disagreements to truly binding arbitration by the panel process. A panel report must be adopted unless there is consensus to reject the panel report.²⁵⁸ Because this consensus must include the winner of the dispute, this reverse consensus would be exercised only when all agreed to reject an "outlaw" panel decision, one whose adverse impact on other programs would be worse than its favorable effects on the activity under dispute.

Tighter timeframes, including for compliance, are provided. "Urgent" cases (including, for example, those involving perishables), are to be completed in only three months, while other disputes retain the mid-term target of six months and deadline of nine.²⁵⁹ In a change most resembling court proceedings, there is an appeal of right to a standing body.²⁶⁰ In the event of noncompliance, the winning party has the right to retaliate, unless there is consensus to reject the countermeasures.²⁶¹

Significantly, the basic remedy is bringing the offending measure into

257. HUDEC, *supra* note 253, at 194.

258. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 16(4), WTO Agreement, *supra* note 13, Annex 2, 33 I.L.M. 1235 (1994) [hereinafter Dispute Settlement Understanding].

259. *Id.* art. 12(8).

260. *Id.* arts. 16(4), 17.

261. *Id.* art. 22(6).

compliance;²⁶² also unchanged from the original GATT, countermeasures constitute the withdrawal of GATT concessions.²⁶³ In essence, although the vestiges of a political process remain, the new dispute settlement in the WTO is mostly a rule-driven, judicially oriented system.

E. Initial Considerations

Under our hypothetical, any petition by the U.S. winter vegetable industry for the imposition of antidumping²⁶⁴ or countervailing duties²⁶⁵ would be filed after the January 1, 1995 entry into force of the WTO Antidumping and Subsidies Agreements.²⁶⁶ Thus, determinations by the U.S. Department of Commerce and the U.S. ITC will be subject to binding WTO dispute settlement procedures. At the outset, one must recall that GATT disputes are government-to-government affairs; a complaint may be made only by a government Member of the WTO,²⁶⁷ not by a private citizen.²⁶⁸ Thus, AGMEX's first task will be to convince its government that the merits of its concerns with any U.S. action warrant the Mexican government's putting its own credibility on the line with its trading partners to bring an action in the WTO. One can surmise that the importance of the trade in the products in question will weigh in the balance of such a decision.

Special considerations may apply with respect to the timing of Mexico's complaint, and with respect to the time periods allowed for consultation and

262. *Id.* art. 22(1).

263. *Id.* art. 22(3).

264. See Antidumping Agreement, *supra* note 13, art. 18.3. Unlike the 1979 codes, all WTO signatories automatically agree to adhere to the terms of all the Uruguay Round agreements, except for the so-called plurilateral agreements. Final Act Embodying the Results of the Uruguay Round Multinational Trade Negotiations, Apr. 15, 1994, para. 4, 33 I.L.M. 1143 (1994) [hereinafter Final Act]. Plurilateral agreements concern trade in civil aircraft, government procurement, the dairy agreement, and the bovine meat agreement. Plurilateral Trade Agreements, WTO Agreement, *supra* note 13, Annex 4, reprinted in LAW OF THE WTO, *supra* note 13, at 757.

265. Subsidies Agreement, *supra* note 179, art. 32.3.

266. Final Act, *supra* note 264, at para. 3. The U.S. law implementing the results of the Uruguay Round makes the new provisions effective on the date on which the WTO Agreement enters into force for the United States. Uruguay Round Trade Agreements Act § 130, 19 U.S.C. § 3531 note (1996).

267. Dispute Settlement Understanding, *supra* note 258, art. 1.

268. Both Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, and the European Union Trade Barriers Regulation, Council Reg. (EC) No. 3286 (1994), while leaving with governments the ultimate discretion whether to bring the matter before the WTO, permit private citizens to engage the resources of their governments in the investigation whether a practice actionable under the WTO has been taken by another WTO member. The WTO dispute between the United States and Japan concerning photographic film was begun as a Section 301 petition filed by Kodak; the EU recently initiated a Trade Barriers Regulation investigation of the U.S. Antidumping Act of 1916 on the basis of a petition filed by a European steel trade association, EUROFER.

for issuance of a panel report. As to the timing of a complaint, disputes involving antidumping determinations were treated differently than those concerning countervailing duty measures, at least prior to the Uruguay Round Agreements. With regard to challenges to antidumping determinations, the Antidumping Agreement has long required, with minor exception, that the complainant await "final action . . . by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings,"²⁶⁹ which translates in the U.S. system to the antidumping order issued by Commerce after affirmative determinations of dumping and injury have been reached by Commerce and the ITC, respectively.²⁷⁰ Thus, the Mexican government could not request establishment of a dispute settlement panel to review an antidumping measure until the completion of investigations by both agencies, unless it could demonstrate that "provisional measures" have both had a "significant impact" and suffer from a gross procedural defect, such as the failure of the agency to make a preliminary injury finding.²⁷¹ Provisional measures are the steps taken by the authorities after partial investigation to ensure the integrity of any final action to assess duties and are similar to an injunction issued by a court to protect its jurisdiction. Such measures usually take the form of a requiring a security bond to be posted by the importer.²⁷² As to a countervailing duty action, the Subsidies Agreement imposes no similar limitations on the timing of a challenge to countervailing duty measures, no doubt in recognition of the fact that countervailing duty measures scrutinize the behavior of governments, not private companies. Early challenge, even at the initiation stage, is not necessarily precluded,²⁷³ although the Dispute Settlement Understanding

269. Antidumping Agreement, *supra* note 13, art. 17.4.

270. In GATT terms, "levy" means the "final legal assessment or collection of a duty." Antidumping Agreement, *supra* note 13, art. 4 n.12. The order issued by Commerce under § 736(a) of the Tariff Act of 1930 is final action to levy such duties (albeit in the future) because the order "directs customs officers to assess an antidumping duty" equal to the dumping margin later calculated by Commerce during its periodic review of imports made subject to the order. 19 U.S.C. § 1673e(a)(1).

271. Article 17.4 refers to the three procedural defects regarding the procedures for application of provisional measures as contained in Article 7.1. Antidumping Agreement, *supra* note 13, arts. 17.4, 7.1, respectively. These procedural defects are (1) improperly initiating an investigation; (2) issuing a preliminary determination without affirmative findings both of dumping and injury; or (3) failing to find that provisional measures are needed. While conceding that these standards provide room for spirited debate, it also is clear that the drafters intended the exceptions to be limited. *See id.* art. 7.1.

272. *See id.* art. 7.2.

273. The Government of Canada challenged, unsuccessfully, self-initiation by the United States of a countervailing dumping investigation of softwood lumber in United States. Measures Affecting Imports of Softwood Lumber from Canada, GATT B.I.S.D. (40th Supp.) at 35 (1992). As to an antidumping measure, no reading of the Antidumping Agreements would permit a challenge at the initiation stage of an investigation. Yugoslavia: Status as a Contracting Party, GATT B.I.S.D. (40th Supp.) at 35 (1992).

that emerged from the Uruguay Round probably eliminates that option.²⁷⁴

As to the time periods for resolution of the dispute, the WTO provides for expedited timelines “[i]n cases of urgency, including those which concern perishable goods.”²⁷⁵ Parties are admonished to “accelerate [consultations] to the greatest extent possible,”²⁷⁶ and panels to issue their reports in three months, half the time otherwise permitted.²⁷⁷ The Dispute Settlement Understanding does not specify how one would decide whether a case is urgent, that is, whether a simple assertion by Mexico would be sufficient, whether the Parties at issue must agree, or whether the Dispute Settlement Body itself must decide.²⁷⁸ The fact that winter vegetables are perishable would not necessarily be dispositive if, for example, the complaint were filed at the end of a growing season. One thing is clear — a three-month target for issuance of a panel report will not make the issues easier for a panel to resolve; such a timeframe may be unrealistic and lead to an ill-considered analysis.

F. *Standard of Review*

In addition to the procedures common to all of the eighteen WTO agreements,²⁷⁹ by far the most significant additional rule that applies to antidumping and countervailing duty determinations is the special standard of review. U.S. negotiators recognized that given the tight new rules on nontariff measures to be established by the WTO agreements and the continuing desire of U.S. exporters to pry open foreign markets, the United States could expect often to be the complainants in WTO dispute settlement and, thus, to be a main beneficiary of more effective dispute resolution. On the other hand, it also was clear from past complaints that U.S. antidumping and countervailing duty determinations would often enough be the subject of complaint by other parties. In light of the quasi-judicial nature of antidumping and countervailing duty determinations under the expansive WTO Antidumping and Subsidies Agreements, deference to the expertise of the administering authorities in this technical field seemed appropriate. As a

274. For example, Articles 4(4) and 6(2) of the Dispute Settlement Understanding contemplate that challenges will be brought with respect to “measures.” Dispute Agreement Settlement, *supra* note 258, arts. 4(4), 6(2). Initiation of an investigation is not a “measure,” which is a term distinguished from the term “investigation,” throughout the Understanding.

275. *Id.* art. 4(8).

276. *Id.* art. 4.9.

277. *Id.* art. 12(9).

278. Because the Dispute Settlement Body must operate by consensus, *id.* art. 1(4), this third option adds nothing to the mix because the United States still could disagree on the urgent nature of the situation.

279. That is, the procedures applicable as a result of the Dispute Settlement Understanding. *Id.* art. 1 & app. 1.

result, during the final weeks of the round, U.S. negotiators engaged in a fierce, solitary campaign to codify this deference in a special standard of review and identified this critical issue as one of its short list of deal breakers.²⁸⁰ Remarkably enough, this crusade succeeded, at least in part.

Article 17.6 of the Antidumping Agreement specifies that in its assessment of the facts of an antidumping dispute, a panel shall determine whether evaluation of those facts by the administering authorities was "unbiased and objective." If so, "even though the panel might have reached a different conclusion, the evaluation shall not be overturned."²⁸¹ As to the legal conclusions of the administering authorities, if "the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."²⁸² *De novo* review, then, is inappropriate, and with respect to the factual findings of the agencies, substantial deference is required, in that the panel is not permitted to make an independent decision as to whether the facts are accurate, but is permitted only to ensure the propriety of the examination of those facts by the administering authority.

The standard as to legal conclusions is, of course, the *Chevron* doctrine.²⁸³ Article 17.6(ii) requires the same two-step process as did the U.S. Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁸⁴ First, the panel is to decide whether the language of the Agreement explicitly resolves the issue and if not, is to uphold the agency's legal interpretation if it is one permissible reading of the Agreement.²⁸⁵ As the United States put it in its definitive interpretation of the WTO

280. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996). Professors Croley and Jackson find this priority by the U.S. Government "particularly odd," even while stating, accurately, in later discussion that "the standard-of-review question goes to the core of an international procedure that (in a rule-based system) must assess a national government's actions against a treaty or other international norms. *Id.* at 194, 197.

281. Antidumping Agreement, *supra* note 13, art. 17.6(i).

282. *Id.* art. 17.6(ii).

283. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

284. *Id.*

285. Antidumping Agreement, *supra* note 13, art 17.6(ii); *see Chevron*, 467 U.S. at 842-43. One can envision substantial litigation over whether a provision of the Agreement permits of more than one interpretation. One example would be if the Agreement is silent on the point (for example, whether a country can take action to prevent circumvention of an antidumping or countervailing duty order). In that instance, more than one permissible interpretation is possible, unless other provisions of the Agreement indirectly preclude the interpretation. Professors Croley and Jackson suggest that this provision is unclear, based on the interpretive rules of the Vienna Convention on the Law of Treaties. Croley & Jackson, *supra* note 280, at 201. But my view is that the dozens of court cases interpreting *Chevron* will be instructive to panels in this respect.

Agreements and their implementing legislation, "Article 17.6 ensures that panels will not be able to rewrite, under the guise of legal interpretation, the provisions of the Agreement, many of which were deliberately drafted to accommodate a variety of methodologies."²⁸⁶ In short, if a provision in such a carefully drafted Agreement is ambiguous, one can be reasonably sure the uncertainty was the purposeful resolution of conflicting views.

GATT expert Professor John Jackson has argued that the presence in administering authorities of "technical superiority over factual matters," recognized by the deferential standard of art. 17.6(i), does not justify such deference for their legal interpretations, because agencies "probably do not bring . . . any specialized understanding that renders them specially qualified to ascertain the legal meaning of *international agreements*."²⁸⁷ To the contrary, the comparison of agencies and courts central to the *Chevron* analysis rings equally true for agencies and binational panels: ad hoc panelists confronting a provision of the Agreement for the first and likely only time can only serendipitously approach the expertise of agencies obligated to conform their practice to the international rules and who apply those rules on a daily basis in a variety of actual case situations. Moreover, it is possible that Professor Jackson, in his commitment to a rule-based dispute settlement system, overstates the proper role of panels, viewing them as vindicators of the political decisions made by the parties as a whole.²⁸⁸ In fact, the parties retained that role to themselves in stating unequivocally that the purpose of dispute settlement is to "achiev[e] a satisfactory settlement of the matter in accordance with the rights and obligations [of Members],"²⁸⁹ and that dispute settlement is "without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decisionmaking under the WTO Agreement."²⁹⁰ If there were any doubt about the role the parties intended for panels, it is resolved by the Dispute Settlement Understanding's proscription that the dispute settlement process "cannot add to or diminish the rights and obligations provided in the covered agreements."²⁹¹

While no similar provision on standard of review appears in the Subsidies Agreement, the parties issued a Ministerial Declaration at the conclusion of the Uruguay Round recognizing "the need for consistent resolution of disputes arising from anti-dumping and countervailing duty

286. Statement of Administrative Action, *supra* note 55, at 148, *reprinted in* H.R. DOC. NO. 103-316, *supra* note 55, at 818.

287. Croley & Jackson, *supra* note 280, at 208.

288. *See id.* at 209.

289. Dispute Settlement Understanding, *supra* note 258, art. 3(4).

290. *Id.* art. 3(9).

291. *Id.* art. 3(2).

measures.”²⁹² As interpreted by the Statement of Administrative Action, this Declaration “provides for the ‘consistent resolution’ of disputes arising from the imposition of antidumping and countervailing duty measures through the application of the Article 17.6 standard of review to both types of disputes.”²⁹³ The parties also decided to review the Antidumping Agreement’s standard of review in three years to consider whether it is capable of general application.²⁹⁴ The Mexican government could expect, then, that panels convened under the Antidumping or the Subsidies Agreements will apply a deferential standard of review to determinations of Commerce and the ITC.

G. Prospective Relief

In 1991, the panel reviewing Sweden’s complaint about U.S. imposition of antidumping duties on a steel product recommended that the antidumping order be revoked and all duties paid be refunded.²⁹⁵ Articulating its long-held position, the United States strongly objected to the nature of the remedy recommended, noting that in all but one of the 139 other panel reports, the remedy recommended had been to bring the offending country’s laws into compliance with its international obligations within a reasonable period of time. The United States contended that it was entirely inappropriate for a panel to “mandate precisely what a sovereign country must do to comply with its international obligations,” and that if this “radical expansion of GATT law” were to be accepted, the United States would insist on retroactive remedies in other areas of dispute settlement, such as Article III violations, customs tariffs in excess of bound rates, and other situations.²⁹⁶

In light of this panel report and a similar one issued in 1992 by a panel reviewing the U.S. antidumping order on Mexican cement,²⁹⁷ the United

292. Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, Ministerial Decisions and Declarations, Apr. 15, 1994, Decisions and Declarations Relating to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [hereinafter Decisions & Declarations: Article VI GATT 1994], *reprinted in* LAW OF THE WTO, *supra* note 13, at 783.

293. Statement of Administrative Action, *supra* note 55, at 148, *reprinted in* H.R. DOC. No. 103-316, *supra* note 55, at 818.

294. Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Decisions & Declarations: Article VI GATT 1994, *supra* note 292, *reprinted in* LAW OF THE WTO, *supra* note 13, at 781.

295. United States — Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, GATT Doc. ADP/47 paras. 5.23-24 (1990).

296. Minutes of the Meeting Held on 19 November 1990, GATT Doc. No. ADP/M/30, at 4-5 & 7-8 (Jan. 10, 1991).

297. United States — Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico, GATT Doc. ADP/82 (1992).

States entered the Uruguay Round Negotiations with the objective of clarifying the proper function of dispute panels.²⁹⁸ The WTO Agreement does not explicitly prohibit panels from making specific and retroactive recommendations, although the parties did emphasize that "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."²⁹⁹ The United States nonetheless clearly accomplished its purpose in the implementing legislation, which provides that where determinations by Commerce or the ITC are impacted by WTO decisions that the United States chooses to implement, relief may only be applied on a prospective basis, that is, the agency's redetermination to bring its antidumping or countervailing duty decision into compliance with the WTO may only apply to imports made after the U.S. Trade Representative directs such implementation.³⁰⁰

As the Administration explained in its transmittal of the legislation to the Congress, this approach is consistent with the principle that GATT recommendations apply prospectively only, and is distinguishable from relief available in actions brought in courts or before NAFTA panels, where retroactive relief may in certain circumstances be appropriate. If implementation of a WTO panel report should require revocation of an antidumping and countervailing duty order, imports made before the Trade Representative directed implementation of the report would remain subject to potential duty liability.³⁰¹ With regard to a potential WTO complaint regarding any U.S. antidumping and countervailing duty measure on Mexican winter vegetables, this means that recourse to the national courts or to a NAFTA panel would, if successful, have greater potential for immediate practical impact on AGMEX than resort to a WTO dispute resolution process, in that the United States has committed to prospective implementation of any adverse panel report, if it decides to implement the report at all.

VII. CONCLUSION

As noted at the outset, major trade wars will not, even between the closest of trading partners, yield solely to the fervent wishes of the countries involved that the matter be put behind them. The parties must eliminate the

298. James R. Cannon, Jr., *Dispute Settlement in Antidumping and Countervailing Duty Cases*, in THE WORLD TRADE ORGANIZATION, *supra* note 196, at 359, 372.

299. Dispute Settlement Understanding, *supra* note 258, art. 3(7).

300. Uruguay Round Trade Agreements Act § 129(c)(1), 19 U.S.C. § 3538(c)(1).

301. Statement of Administrative Action, *supra* note 55 at 357, *reprinted in* H.R. DOC. NO. 103-316, *supra* note 55, at 1026.

causes of the dispute, whether it is unfair pricing, government subsidies, unjustified phytosanitary requirements, excess capacity, or differing notions of worker security. Often the unfair trade laws can, because of the effectiveness of their remedies and the international acceptance of their rules, serve as unique catalysts to bring the warring parties to that realization. In my view, that is likely to be the case in the Florida-Mexico tomato conflict, although the careful reader will not expect overnight success.