Michigan Journal of International Law

Volume 10 | Issue 3

1989

# The Specificity Test Under U.S. Countervailing Duty Law

Pieter Matthijs Alexander
*Cleary, Gottlieb, Stein & Hamilton*



## Recommended Citation

Pieter M. Alexander, *The Specificity Test Under U.S. Countervailing Duty Law*, 10 MICH. J. INT'L L. 807 (1989).
Available at: https://repository.law.umich.edu/mjil/vol10/iss3/3

# THE SPECIFICITY TEST UNDER U.S. COUNTERVAILING DUTY LAW

*Pieter Matthijs Alexander**



* University of Amsterdam J.D. (1987), University of Michigan LL.M. (1988). The author is an associate in the Brussels office of Cleary, Gottlieb, Steen & Hamilton. He is grateful to Judith Hippler Bello, William D. Hunter and, in particular, Gary N. Horlick for their comments on an earlier draft of this article.

## I. INTRODUCTION

One of the most controversial areas in the field of international trade law is the use of domestic subsidies and the imposition of countervailing duties to offset their effects. Under the GATT[1] system, there are two legitimate disciplines which deal with these issues. On the one hand, there is a set of rules regarding the *use* of subsidies. International disputes concerning these rules may be settled on a multilateral basis. On the other hand, there are rules that impose restrictions on an importing country's ability to take unilateral countermeasures against imports of subsidized goods. The second set of rules provides that an importing country is allowed to impose countervailing duties on imported products in order to offset the effects of a subsidy only if the imports, through the effects of the subsidy, cause material injury to the producers of the like product in the importing country.

The imposition of countervailing duties has advantages for the importing country over other forms of import protection. First, there is no obligation to provide compensation or trade benefits to the exporting country. Second, since the threshold of injury to the domestic industry ("material injury") is lower than that for safeguard measures under article XIX of GATT ("serious injury"), there are fewer barriers for this type of protection.[2]

1. General Agreements on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, arts. V & VI, T.I.A.S. No.1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. The use of countervailing duties may also have certain disadvantages. Most importantly, the benefits of the subsidy to the consumers in the importing country may outweigh the harm to the domestic producers. In such cases, the imposition of countervailing duties not only reduces the benefit of the cheap imports for the consumers but may also cause a loss of welfare for the importing country as a whole. For a discussion of the economics of subsidies, see Deardorff & Stern, *Current Issues in Trade Policy: An Overview*, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 15-68 (R. Stern ed. 1987); Dixit, *How Should the United States Respond to Other Countries' Trade Policies?* in *id.* at 245-282; Brander, *Rationales for Strategic Trade and Industrial Policy*, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 23-46 (P. Krugman ed. 1986); W. CORDEN, TRADE POLICY AND ECONOMIC WELFARE, Ch. 2

Since it determines the scope of application of countervailing duty law, the definition of a "countervailable subsidy" is critical to the availability of this form of import protection. There are certain rules concerning the minimum procedures for the imposition of such duties. However, no detailed substantive definition of what constitutes a countervailable or actionable subsidy is agreed upon, either nationally or internationally.

Both international rules and U.S. law distinguish between subsidies that are specifically linked to the export of a product ("export subsidies") and those that are bestowed on the manufacture or production of a good ("domestic subsidies"). In this article, I shall discuss the so-called "specificity test," which is used to determine which types of domestic subsidies are potentially countervailable under U.S. law. Under this test, a benefit conferred by government on more than a specific group of enterprises or industries within a community is not considered a countervailable subsidy.

The definition of a countervailable subsidy based on a specificity requirement has been criticized extensively. Opponents of such a test have argued that a subsidy should be defined on the basis of the competitive advantage that the recipient of the government-provided benefit obtains vis à vis producers of like products in the importing country. According to this view, a countervailable subsidy should be found where the exporting industry obtains a benefit that the injured importing industry of the like products does not receive. This is the case, according to this argument, regardless of whether producers of other products in the exporting country receive similar benefits.

This article argues that this criticism is invalid, and that "specificity" should, in fact, be required before a benefit can be considered a countervailable subsidy. Subsequently, it explains the shades of the specificity test under U.S. law, and how the agency which administers countervailing duty law applies that test. Finally, this article discusses whether, under U.S. law, it is sufficient to rely on this test or whether additional requirements should be imposed before a benefit is deemed a countervailable subsidy.

The specificity test has both an economic and a pragmatic rationale. The economic rationale lies in the concept of competitive free markets, where scarce resources are channelled to their most profitable uses by the forces of supply and demand. A subsidy is a discriminatory practice in favor of one or more market participants giving its

(1974); INTERNATIONAL TRADE AND INDUSTRIAL POLICIES: GOVERNMENT INTERVENTION IN AN OPEN WORLD ECONOMY (S. Warnecke ed. 1978); Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

recipients have obtained an exclusive advantage vis à vis the other participants in such markets. Subsidies distort the free market process by enabling the recipients of the benefits to obtain scarce resources which other market participants could have used more profitably. Therefore, they are generally considered to be inefficient.[3]

Measures that do not discriminate between market participants, alternatively, do not create such distortions. Suppose, for example, that the central bank of country A raises taxes or prints extra money and gives all the citizens of that country $1,000. Because all market participants receive the same treatment, the grant will not change the competitive position of its beneficiaries to obtain scarce resources. The same point can be made where a government provides goods (e.g., petroleum) or services to all domestic users at prices below world market rates. Since the concept of subsidy presumes discrimination among market participants, measures that affect all sectors of an economy equally cannot be considered to confer countervailable subsidies.[4]

However, there is no sort of governmental action or intervention so broad as to affect all market participants equally. Capital intensive enterprises, for example, benefit disproportionately from a system of taxation that allows accelerated depreciation of assets. Likewise, high-technology enterprises benefit more from a well-developed educational system than the agricultural sector does. Hence, the specificity test does not require that an equal benefit be obtained by all market participants or that intervention be completely neutral in its effects in order to avoid countervailing duties. As long as programs benefit more than specific enterprises or industries, they will not cause *significant* economic distortions, and will be held consequently not countervailable.

In addition to recognizing the fact that the effects of general programs are offset by other macroeconomic factors, the specificity test has a practical purpose. All governments adopt programs and take measures that affect certain enterprises or industries more than others. Such government actions and regulations affect nearly all goods in in-

3. *See, e.g.,* Carbon Steel Wire Rod from Czechoslovakia, 44 Fed. Reg. 19,370-71 (1984) (final determination) (unless otherwise noted, all Commerce decisions cited hereinafter are final determinations), and Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).

4. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency's Record at 29-30, Cabot Corp. v. United States, Consolidated Court No. 86-09-01109 (Ct. Int'l Trade, filed Sept. 8, 1986) ("Cabot Memorandum") *partially reprinted in* Hunter & Kuhbach, *Subsidies and Countervailing Duties: Highlights Since 1984,* in THE COMMERCE DEPARTMENT SPEAKS 491, 538-540 (PLI 1987). Likewise, the effects of such general measures on international trade are mitigated or counterbalanced by other macro-economic factors such as higher levels of taxation and inflation, or a devaluation of the country's currency. *See also* Commission of the European Communities, Dec., O.J. EUR. COMM. (No. L106) 233 (1985).

ternational trade. If the benefits of all these programs were countervailable, then, in theory, countervailing duties could be imposed on nearly all imports which caused injury to producers of like products in the importing country. This would mean not only that the countervailing duty law would be virtually impossible to administer, but countervailing duty law would also tend to replace the import protection that can be given by ordinary safeguard measures. There would be substantial potential for political problems between the United States and the affected exporting countries. The specificity test offers a reasonably objective standard for deciding which types of domestic government practices are potentially countervailable. The test therefore helps to increase predictability in the application of the countervailing duty law, and to reduce the potential number of trade disputes.

## II. Background

The first countervailing duty statute of general applicability was the Tariff Act of 1897.[5] The language of this Act evolved out of two earlier countervailing duty provisions that had been applicable only to sugar imports.[6] Congress periodically reenacted the 1897 law, which was limited to export subsidies.[7] The only substantive amendment to its concept of a countervailable benefit (a "bounty or grant") was the inclusion of domestic subsidies in 1922.[8] Like its predecessors, the current version of this statute, section 303 of the Tariff Act of 1930,[9] does not generally require a determination regarding the effects of a subsidy before countervailing duties can be imposed. Current U.S. law

5. 30 Stat. 151, 205.

6. These first U.S. countervailing duty provisions were Tariff Act § 237, sched. E, 26 Stat. 567, 584 (1890) and Tariff Act, para. 182, 28 Stat. 521 (1894).

7. Tariff Act § 6, 36 Stat. 85 (1909); Tariff Act, para. E, 38 Stat. 193 (1913); Tariff Act, ch. 356, § 303, 42 Stat. 935 (1922); Tariff Act § 303, 46 Stat. 687 (1930); Trade Act § 331(a), 88 Stat. 2049, 19 U.S.C. § 1303 (1974).

8. Tariff Act, ch. 356, § 303, 42 Stat. 935 (1922).

9. Section 303(a)(1) of the Tariff Act of 1930, as amended (the "1930 Act"), 19 U.S.C. § 1303 (1982) provides:

> Levy of Countervailing Duties
>
> (1) [W]henever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

Unless otherwise noted, sections cited hereinafter will refer to the 1930 Act, as amended.

provides that the determination whether a subsidy exists, and the calculation of its amount, falls under the authority of the International Trade Administration (the "ITA") of the Department of Commerce ("Commerce").[10]

In 1947, the GATT was established. Article VI of the GATT requires that, before countervailing duties may be imposed, it must be determined not only that imports are subsidized but also that the subsidized imports cause or threaten material injury to the producers of the like product in the importing country (or materially retarded the establishment of such an industry).[11] However, the Protocol of Provisional Application, through which the GATT is still applied, exempts pre-existing legislation from compliance with, *inter alia*, article VI. Since section 303 antedated the GATT, the absence of an injury requirement under U.S. countervailing duty law did not constitute a violation of the GATT.

The Trade Act of 1974 (the "1974 Act") included non-dutiable merchandise within the scope of the countervailing duty law. Since this inclusion could not benefit from the grandfather rights of the Protocol of Provisional Application, the 1974 Act requires an injury determination by the International Trade Commission ("ITC") before countervailing duties may be imposed on non-dutiable products. The 1974 Act specifies that such a determination is only applicable, however, when it is required by "the international obligations of the United States" to the exporting country or countries involved.[12]

The countervailing duty law was substantially amended by the Trade Agreements Act of 1979 ("1979 Act"). These amendments were intended, in particular, to implement the Agreement on Interpretation and Application of articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade[13] ("Subsidies Code"), which was con-

10. Commerce became the administering authority in 1979. Reorg. Plan No. 3 of 1979, § 2(a); 3 C.F.R. 131 (1981), 44 Fed. Reg. 69,273, 69,274 (1979), *reprinted in* 19 U.S.C.A. § 2171 (1982). Until 1979, the countervailing duty law was administered by the Treasury Department.

11. GATT, *supra* note 1, art. VI, para. 6(a).

12. Section 303(a)(2) of the 1930 act, 19 U.S.C. § 1303(a)(2) (1982). The most important obligations in this respect are, of course, the obligations under the GATT to the other signatories.

Reflecting Congress' increasing concern for U.S. manufacturers and the greater need for import relief when lowering tariff protection, the 1974 Act also imposed specific time limits upon the determination by the Treasury Department of the existence of a "bounty or grant" (19 U.S.C. § 1303(a)(4) (1982)), granted American producers the right to judicial review of negative determinations (19 U.S.C. § 1516(a) (1982)) and empowered the Treasury Department with a conditional right to waive the imposition of countervailing duties in order to facilitate the Tokyo Round of Multilateral Trade Negotiations. (19 U.S.C. § 1303(d)(2) (1982)). *See, e.g.*, ASG Industries v. United States, 610 F.2d 770, 777 (C.C.P.A. 1979).

13. Agreement on Interpretation and Application of articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, *reprinted*

cluded during the Tokyo Round of Multilateral Trade Negotiations. The most important amendment to the 1930 Act was the introduction of a new section 701,[14] which requires an injury determination before countervailing duties may be imposed on goods originating in a "country under the Agreement."[15] Section 303 remained applicable to merchandise originating in other countries outside the GATT.

Hence, before countervailing duties may be imposed on imported products, Commerce should determine that a more than *de minimis*[16]

---

*in* GATT, 26th Supp. BISD 56-83 (1980); *see generally*, The Tokyo Round of Multilateral Trade Negotiations, Report by the Director-General 53-61 (GATT/1979-3), Geneva, Apr. 1979; Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 L. & POL'Y INT'L BUS. 1477 (1979); Tarullo, *The MTN Subsidies Code: Agreement without Consensus*, in EMERGING STANDARDS OF INTERNATIONAL TRADE AND INVESTMENT 63-99 (S. Rubin & G. Hufbauer eds. 1984).

14. Section 701(a), 19 U.S.C. § 1671(a) (1982) provides:

General Rule. —If—

(1) the administering authority determines that

(A) a country under the Agreement, or

(B) a person who is a citizen or national of such a country, or its corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and

(2) The Commission determines that. . .

(A) an industry in the United States. . .

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

15. Section 701(b), as amended by the Trade Agreements Act of 1979, § 101, codified at 19 U.S.C. § 1671(b) (1982), defines the term "country under the Agreement" as a country whose government has: (1) signed the Subsidies Code, *id.* at (b)(1) (GATT Doc. No. L/5808) (as of April 1988, Australia (with reservation), Austria, Brazil, Canada, Chile, member states of the European Economic Community, Egypt, Finland, Hong Kong, India, Indonesia (with reservation), Israel (with reservation), Japan, Korea, New Zealand, Norway, Pakistan, Philippines (with reservation), Sweden, Switzerland, Turkey, United States, Uruguay, Yugoslavia); (2) concluded an agreement with the U.S. that includes obligations substantially equivalent to those under the Subsidies Code, *id.* at (b)(2) (currently Taiwan is the only such country, 45 Fed. Reg. 1181 (1980)); or (3) been determined by the President to meet the requirements of 19 U.S.C. § 1671(b)(3) through other means (i.e., El Salvador, Honduras, Liberia, Nepal, North Yemen, Paraguay, and Venezuela; *see* President's Memorandum of Dec. 14, 1979, Transmitting Determination Regarding the Multilateral Trade Negotiations, 44 Fed. Reg. 74, 81 (1979); S. REP. NO. 249., 96th Cong., 1st Sess. 45, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 431; H.R. DOC. NO. 153, pt. 2, 96th Cong., 1st Sess. 394 (1979). The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988), § 1314 permits the U.S. Trade Representative ("USTR") to revoke the injury test for any country that violates a Subsidies Code commitment it has undertaken with respect to the United States and § 1336 requires a review by the USTR of Subsidies Code commitments undertaken by other countries with respect to the United States. Section 1618 of 4800, 99th Cong., 2d Sess., reintroduced as H.R.3, the "Trade and International Economic Policy Reform Act", *see infra*, note 74, would have retroactively applied the injury test to imports from countries which assumed Subsidies Code or equivalent obligations after the imposition of a countervailing duty or during pending investigations but was dropped by the conferees.

16. Commerce has determined that it disregards any net subsidy which is less than 0.5% *ad valorem* or the equivalent specific rate. 19 C.F.R. § 355.8 (1988).

countervailable benefit has been bestowed on the manufacture, production or exportation of a product, and the ITC should determine that the U.S. producers of the like product have been, or are threatened to be, injured by the subsidized imports. Such ITC determinations are limited to cases involving non-dutiable products where such a determination is required by the international obligations of the United States, or dutiable products originating in a country under the Agreement.[17]

## III. STATUS OF SPECIFICITY UNDER U.S. LAW

### A. *The Statute*

Both sections 303 and 701 of the 1930 Act provide that, once the existence of an injurious benefit has been determined, a countervailing duty should be imposed. In addition to this imperative language, the statutory conferral of an injury investigation to the ITC may constrain Commerce in the factors which it can take into account in its subsidy determination. Since the specificity test restricts the types of government benefits that would qualify as potentially countervailable subsidies, the question arises whether U.S. law grants any discretion to Commerce to formulate its own tests and definitions to interpret the statute. Specifically, can Commerce exclude certain types of government intervention from the statutory concepts of a "bounty or grant" and of "subsidy"?

#### 1) *Section 303(a) of the 1930 Act*

##### a) *General*

Section 303(a)(1), applicable only to goods originating in countries that are not "countries under the Agreement," merely refers to countervailable benefits as a "bounty or grant." What constitutes such "a bounty or grant," however, is unclear.

In 1919, before domestic subsidies were included in the law, the Supreme Court held:

> If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" is conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required. . . .[18]

17. In light of these international obligations, the analysis hereinafter assumes that an injury determination is required in all cases.

18. Nicholas & Co. v. United States, 249 U.S. 34, 39 (1919); *see also* Downs v. United States, 187 U.S. 496 (1903).

This suggested that the terms "bounty" and "grant" should be defined broadly. In 1971, however, the Court of Customs and Patent Appeals provided:

> In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative, or policy spheres. . . . There can be no doubt that the Secretary is under a legal duty to assess countervailing duties if he sees a bounty or grant being paid, but we think he does and must exercise some discretion in defining what acts of foreign governments confer bounties or grants, when the case is doubtful.[19]

Likewise, in 1977, the Court of Customs and Patent Appeals, acknowledged that:

> Congress' intent to provide a wide latitude, within which the Secretary of Treasury . . . may determine the existence or non-existence of a bounty or a grant, is clear from the statute itself, and from the congressional refusal to define the words "bounty" or "grant," or "net amount," in the statute or anywhere else, for almost 80 years.[20]

On appeal, the Supreme Court stated that the case involved a situation where the economic effects and fairness of a practice were controversial. Because there was "a lack of agreement on what constitutes a fair, as opposed to an "unfair" subsidy . . . it [was] not the task of the judiciary to substitute its views as to fairness and economic effect for those of the Secretary."[21] Since the Treasury Department's interpretation of the statute (and thus of a countervailable benefit) was reasonable, the Court upheld its determination. Although the case involved export subsidies, this analysis is equally applicable to domestic subsidies.

In addition to its discretion in determining the existence of a "bounty or grant," the administering authority also had some discretion in calculating the amount of the countervailing duty. In *ASG Industries v. United States*,[22] the court of Customs and Patent Appeals held that, although the Treasury Department in principle lacks discretion to refuse to impose a countervailing duty once it has been determined that a bounty or grant is being paid or bestowed, the provision

19. United States v. Hammond Lead Prods., 440 F.2d 1024, 1030-1031 (1971), *cert. denied*, 404 U.S. 1005 (1971). In United States v. Zenith Radio Corp., 562 F.2d 1209, 1217 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978) the court added judgments in "the eminently important economic sphere."

20. United States v. Zenith Radio Corp., 562 F.2d at 1216. The Court distinguished a more restrictive early case, Downs v. United States, 187 U.S. 496 (1903), but declined to do the same with Nicholas & Co. v. United States, 249 U.S. 34 (1919). Nevertheless, in light of the narrower definition of "bounty or grant" in *Zenith, Nicholas* seems to be of less value now. *But see* ASG Indus. Inc. v. United States, 467 F.Supp. 1200 (Cust. Ct. 1979).

21. United States v. Zenith Radio Corp., 437 U.S. at 459 (quoting S. REP. NO. 1298, 93d Cong., 2d Sess. 183 (1974)).

22. 610 F.2d 770 (C.C.P.A. 1979).

that "there shall be levied . . . a duty equal to the *net amount* of such bounty or grant"[23] implies that "certain deductions may be made from the actual payments to calculate the net bounty or grant and that all relevant circumstances are to be taken into account."[24] *ASG Industries* involved benefits under a regional development program. The court provided that if (and only if) the alleged disadvantages in the region could be proven, they would be deducted from the net amount of the bounty or grant.

### b) *The Specificity Test under Section 303(a)*

The status of a specificity test prior to the enactment of the 1979 Act is unclear.[25] In *Carlisle Tire & Rubber Co. v. United States*,[26] Commerce argued that the Treasury Department, in the last years of its tenure over the administration of the countervailing duty law, in fact applied the rule that a generally available subsidy was not countervailable under section 303. The court, while upholding Commerce's application of the specificity test, rejected this argument. It held that although no generally available domestic subsidy had ever been countervailed, this was the result of a lack of opportunity to address the question, rather than a long-standing and consistent administrative practice.[27] In a subsequent case, Commerce gave specific examples of benefits that were alleged not to be countervailed because of their general availability.[28] The court, however, rejected these determinations as precedents and pointed to another benefit which it considered to be generally available, but which the Treasury Department had deemed countervailable. Consequently, it held that "these determinations, individually or jointly did not convey a coherent rule regarding 'general availability' " and rejected the specificity test.[29]

Whether or not a specificity test was applied before the enactment of the 1979 Act, one should realize that such a test may not have been

23. 19 U.S.C. § 1303(a)(1) (1982) (emphasis added).

24. ASG Industries v. United States, 610 F.2d 770, 777 (1979). *But see infra* notes 34-5 and accompanying text.

25. This is partly due to the fact that determinations which failed to find a countervailable subsidy were not published until 1975 (Trade Act of 1974, Pub. L. No. 93-618, § 331, 88 Stat. 1978, 2050 (codified as amended at 19 U.S.C. § 1303(a)(1-6) (1982)), and that it was not before the 1979 Act that reasons had to be given in countervailing duty determinations (1979 act, Pub. L. No. 96-39, § 101, 93 Stat. 144, 160 (1979) (adding § 705(d) to the 1930 act) (codified as amended at 19 U.S.C. § 1671(d) (1982)).

26. 564 F.Supp. 834, 837 (Ct. Int'l Trade 1983).

27. 564 F.Supp. at 837.

28. *See* Bethlehem Steel Corp. v. United States, 590 F.Supp. 1237, 1244 (Ct. Int'l Trade 1984).

29. 590 F.Supp. at 1244.

necessary (to avoid countervailing certain types of domestic subsidies). Until 1974, the Treasury Department was able to use its administrative discretion to reject countervailing duty petitions where a subsidy had no trade effects.[30]

2) *Section 701 of the 1930 Act*

a) *General*

For products originating in "countries under the Agreement," section 701 applies. In addition to Commerce's subsidy determination, section 701 requires an injury determination by the ITC. As was the case with the pre-1979 legislation,[31] the amendments made by the 1979 Act were based on a concept of "unfair" subsidies, rather than holding countervailable all benefits conferred upon the production of imported products.[32]

While section 303 refers to potentially countervailable benefits as a "bounty or grant", section 701 calls such benefits a "subsidy." The 1979 Act also added section 771(5). Although this section does not define what constitutes such a subsidy, it does give several examples.[33]

The 1979 Act also explicitly limited the deductions allowed in determining the "net subsidy" to those listed in section 771(6).[34] The

30. Horlick, *Current Issues in Countervailing Duty Law*, in THE TRADE AGREEMENTS ACT OF 1979 — FOUR YEARS LATER 7, 20-26 (PLI 1983); G. BRYAN, TAXING UNFAIR INTERNATIONAL TRADE PRACTICES 297 (1979).

31. *See, e.g.*, United States v. Zenith Radio Corp., 437 U.S. 443, 455 (1978).

32. S. REP. NO. 249, 96th Cong., 1st Sess. 37 (1979) [hereinafter 1979 Senate Report]; and 125 CONG. REC. 20,167, 20,171 (1979); *see also* H.R. REP. NO. 317, 96th Cong., 1st Sess. 2 (1979) [hereinafter 1979 House Report].

33. Section 771(5) of the 1930 Act, as amended by § 101 of the 1979 Act, 19 U.S.C. § 1677(5) (1982) provides:

*Subsidy*. The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this title, and includes, but is not limited to, the following:

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

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

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

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

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

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

34. Section 771(6), 19 U.S.C. § 1677(6) (1982) provides:

*Net subsidy*. — For the purpose of determining the net subsidy, the administering authority may subtract from the gross subsidy the amount of —

(A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy, legislative history makes clear that this list is exhaustive and that Commerce is no longer allowed to deduct certain expenses from the aggregate amount of the subsidy. For example, the deduction offsetting regional disadvantages in the case of regional development programs from the aggregate amount of the subsidy found was no longer permitted.[35] In light of these new and more specific provisions, it should be determined whether Commerce retains any discretion in defining a potentially countervailable benefit.

In a recent case, decided under section 303, the Court of Appeals for the Federal Circuit followed *Zenith* and interpreted the term "net amount of the benefit" as giving the administering authority "broad discretion in determining the existence of a bounty or grant under that law."[36] Since section 771(5) provides that the term "subsidy" has the same meaning as the term "bounty or grant" and Congress intended to have "a complete harmony and continuity"[37] between determinations under sections 303(a) and 701, Commerce must have the same discretion with respect to the definition of a subsidy under section 771(5).[38]

### b) *The Specificity Test under Section 771(5)*

Even though the examples of subsidies in sections 771(5)(A) and (B) are not exhaustive, Commerce has interpreted the clause "if provided . . . to a specific enterprise or industry, or group of enterprises or industries" in section 771(5)(B) as a statutory expression of a specificity requirement for domestic subsidies:

> We view the word "specific" in the statutory definition [of a domestic subsidy] as necessarily modifying both "enterprise and industry" and "group of enterprises or industries." If Congress had intended programs of general applicability to be countervailable, this language would be su-

(B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

35. 1979 House Report, *supra* note 32, at 74-75 and 1979 Senate Report, *supra* note 32, at 85-86.

36. Georgetown Steel Corp. v. United States, 801 F.2d 1308, 1318 (Fed. Cir. 1986); *see also* Can-Am Corp. v. United States, 664 F.Supp. 1444, 1448 (Ct. Int'l Trade 1987).

37. 1979 Senate Report, *supra* note 32, at 84.

38. If Sections 303 and 771(5) are "legally interchangeable" (Can Am Corp. v. United States, 664 F.Supp. at 1448), it could be asked why Congress, in enacting the 1979 Act, did not repeal Section 303(a) and, instead, created one provision on subsidies applicable to products originating in both "countries under the Agreement" and other countries. The answer to this probably lies in the fact that the GATT required an injury test for all GATT signatories, whether they were countries under the Agreement or not. As stated above, since the U.S. countervailing duty laws antedated the GATT, it benefitted from grandfather rights. Congress might have preferred not to deal with the old statute at all in order to avoid problems concerning those grandfather rights.

perfluous and different language easily could and would have been used.[39]

Commerce has argued further that this conclusion is supported by "the clear Congressional intent that 'subsidy' be given the same meaning as 'bounty or grant' under section 303 of the Act"[40] and the fact that Congress endorsed the policy of the Treasury Department not to countervail generally available programs.[41]

### B. *The Courts and Specificity*

#### 1) *Scope of Review*

The statutory standards of review in countervailing duty determinations allow the courts to reverse only those final Commerce determinations that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"[42] or, in the case of review of determinations on the agency's record, those that are "unsupported by substantial evidence on the record, or otherwise not in accordance with the law."[43] "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[44] Furthermore, the court must give substantial weight to the statutory interpretation of the agency administering the countervailing duty law[45] and "tremendous deference" to the findings of the agency charged with making determinations under the statute.[46]

#### 2) *Case Law*

The decisions of the Court of International Trade (the "CIT") on the specificity test have been unclear and sometimes inconsistent.[47] The most controversial case, *Cabot Corp. v. United States* added even

39. Certain Steel Products From Belgium, 47 Fed. Reg. 39,304, 39,329 app. 4 (1982).

40. 47 Fed. Reg. at 39,304.

41. *Id. But see supra* notes 26-30 and accompanying text.

42. 19 U.S.C. § 1516a(b)(1)(A) (1982)

43. 19 U.S.C. § 1516a(b)(1)(B) (1982).

44. Federal Trade Comm'n v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1985) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)), *as cited in* Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445, 449 (Ct. Int'l Trade 1987).

45. American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986); Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445, 449 (Ct. Int'l Trade 1987).

46. Carlisle Tire & Rubber Co. v. United States, 622 F.Supp. 1071, 1075 (Ct. Int'l Trade 1985); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445, 449 (Ct. Int'l Trade 1987).

47. *See, e.g.*, Carlisle Tire & Rubber Co. v. United States, 564 F.Supp. 834 (Ct. Int'l Trade 1983), Bethlehem Steel Corp. v. United States, 590 F.Supp. 1237 (Ct. Int'l Trade 1984) and Agrexco, Agric. Export Co. Ltd. v. United States, 604 F.Supp. 1238 (Ct. Int'l Trade 1985).

more confusion.[48] In the case which gave rise to *Cabot*, Commerce had applied the specificity test in the context of natural resources.[49] Petroleos Mexicanos, the government owned petroleum company of Mexico, provided carbon black feedstock (CBFS), a petroleum derivative, and natural gas to Mexican users at rates well below their world market export prices. Both products were available at the same prices to all industrial users within Mexico but, besides the carbon black industry, there were no other *users* of CBFS. Commerce determined that the fact that only the carbon black industry used CBFS was due to "the inherent nature of the product and the current levels of technology" in Mexico.[50] Since the limitations on use were not due to activities of the Mexican government, Commerce held that the benefits were not limited to a specific group of enterprises or industries.[51]

The court rejected the specificity test as applied by Commerce and distinguished between "generalized benefits" which accrue generally to all citizens (such as national defense, education, or infrastructure) and benefits that may be generally available but nevertheless disproportionately benefit specific recipients. It further stated:

> The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits. . . . The definition of "bounty or grant" under section 1303 as intended by Congress remains as it is embodied in the case law and later affirmed by Congress in section 1677(5). This definition requires focusing only on whether a benefit or "competitive advantage" has been actually conferred on a "specific enterprise or industry, or group of enterprises or industries." In the case before the Court, the *availability* of carbon black feedstock and natural gas at controlled prices does not determine whether the benefits actually received by these carbon black producers are countervailable subsidies. The programs appear to effect

48. 620 F.Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

49. Carbon Black from Mexico, 48 Fed. Reg. 29,564 (1983); *see also*, Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522 (1983); Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 43,063 (1983).

50. Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,568 (1983). This "inherent nature" test was first pronounced in Certain Softwood Products From Canada, 48 Fed. Reg. 24,159, 24,167 (1983) as an additional reason to determine that the benefits of cheap lumber rights were not countervailable. That determination was really based on the finding that the benefit of the cheap lumber accrued *de facto* to more than a specific group of enterprises or industries. *See also infra* notes 110-112 and accompanying text.

51. Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,568 (1983). By giving this explanation for its determination, Commerce mixed up issues. Rather than holding that there was no specificity, Commerce should have said that although the low priced CBFS was *de facto* provided only to a specific industry, CBFS was not provided to carbon black producers at a preferential price because comparable petroleum derivatives that served as a benchmark for determining whether it was provided on a preferential basis were provided at substantially equivalent prices to other industries. Although this point was mentioned in the 1983 determination, it was only given its due importance in the 1986 administrative review. For a discussion of the relationship between specificity and preferentiality, see *infra* notes 134-38 and accompanying text.

> specific quantifiable provisions of carbon black feedstock and natural gas to specific identifiable enterprises. That additional enterprises or industries can participate in the programs, whether theoretically or actually, does not destroy the programs as subsidies. The programs are apparently available to Mexican enterprises, but in their actual implementation may result in special bestowals upon specific enterprises.
>
> The rule of not countervailing generally available benefits as developed by the ITA does not render a correct result in this case. The *availability* of carbon black feedstock is not the determinative factor regarding countervailability. Rather, the inquiry for the ITA is whether the rates in fact afford the carbon black producers a benefit or competitive advantage.[52]

At least two fundamentally different views on the meaning of the case developed. The first interpretation was based on a so-called "effects" test whereby a subsidy exists if a benefit has an effect on the competitive position of the recipient vis-à-vis producers of the like product in the importing country. According to this view, a benefit to a producer in the exporting country is potentially countervailable if no similar benefit is available to the producers of the like product in the importing country. Judge Carman's use of the term specificity it is argued refers only to the fact that the group of beneficiaries must be identifiable. Since the users of a road are not easily identifiable, such benefits would presumably be non-countervailable. If, on the other hand, there are only few identifiable users of cheap CBFS, a countervailing duty could be imposed.

According to the second view, *Cabot* upheld the specificity test and only intended to clarify that Commerce could not limit its investigation to a mere nominal general availability of benefits, but also had to look into the possibility of a *de facto* specificity of benefits. The problem with this interpretation was that at the time of *Cabot* Commerce had already been investigating *de facto* specificity in earlier cases, a fact which was expressed poorly in the disputed determination. The *de facto* explanation would thus render much of the language of *Cabot* unnecessary.[53]

The concern underlying the proposals for an effects test is based on

52. Cabot Corp. v. United States, 620 F.Supp. 722, 732, 734 (Ct. Int'l Trade 1985).

53. *See* Hunter & Kuhbach, *supra* note 4, at 510-516; for *de facto* specificity determinations prior to *Cabot, see, e.g.*, Certain Steel Products from the Netherlands, 47 Fed. Reg. 39,372 (1982); Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,320 (1982); Certain Steel Products from the Republic of Korea, 47 Fed. Reg. 57,535, 57,537 (1982); Certain Steel Products from Luxembourg, 47 Fed. Reg. 39,364, 39,371 (1982); Certain Softwood Products from Canada, 48 Fed. Reg. 24,159 (1983); Certain Textile Mill Products and Apparel from Thailand, 49 Fed. Reg. 49,661 (1984) (preliminary determination); Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 5,157 (1984) (preliminary determination); Oil Country Tubular Goods from Mexico, 49 Fed. Reg. 47,054 (1984).

the fact that, under the specificity test, no attention is being paid to whether the producers of like products in the importing country receive the same or similar "benefits." Objections have been made to this approach by the injured industry in the importing country for whom "[a] subsidy does not cease to be a subsidy because it is provided to more than one beneficiary."[54] According to the supporters of an effects test, the definition of a countervailable subsidy should therefore be based on whether a program has the effect of conferring upon the recipient(s) a "competitive advantage in international trade."[55] In other words, under an effects test, a potentially countervailable benefit would exist if the importing industry pays more for a good or service than the exporting industry.

The flaw of this analysis is that it ignores the concept underlying the specificity test. If "benefits" accrue to virtually all industries (e.g., the grant of $10,000 or the provision of petroleum products below the free market price) their effects are mitigated or counterbalanced by other macro-economic factors. A test based on a "competitive advantage" is therefore concerned with effects which, either in whole or in part, have already been offset. In addition, a definition of a countervailable subsidy based on a difference between the prices of an input product in the exporting and the importing country would ignore the principle of comparative advantage under which trade will be beneficial whenever there are international differences in relative costs of production.[56]

In the section 751 administrative review of the determination underlying *Cabot*, Commerce subsequently applied a more rigorous *de facto* specificity test.[57] Nevertheless, it rejected *Cabot* to the extent that it required an effects test[58] and continued to rely on an earlier court decision which had explicitly upheld the specificity test.[59] It also appealed *Cabot*, but this appeal was dismissed on the ground that the remanding order was not a final decision.[60]

Subsequent court decisions have made it reasonably clear that the

54. Proposed Amendments to the Countervailing Duty Law, Subcommittee on Trade of the House Committee on Ways and Means, 98th Cong., 1st Sess. 25 (1983) (statement of Rep. Long).

55. *See infra* note 78; *see also Cabot*, 620 F.Supp. 722, 731.

56. *See generally* KENEN, THE INTERNATIONAL ECONOMY 17 (1985).

57. Carbon Black from Mexico, 51 Fed. Reg. 13,271 (1986) (final results of administrative review); *see* Hunter and Kuhbach, *supra* note 4, at 518; *see also infra* notes 111-113 and accompanying text.

58. *See, e.g.*, Fuel Ethanol from Brazil, 51 Fed. Reg. 3361, 3372 (Dep't. Comm. 1986).

59. Carlisle Tire & Rubber Co. v. United States, 564 F.Supp. 834 (Ct. Int'l Trade 1983).

60. Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986)

courts have rejected the effects test and accepted the specificity test as long as Commerce applies it on a *de facto* basis. In the case underlying *PPG Industries, Inc. v. United States*,[61] Commerce had determined that a government program to restructure private firm foreign debts and the provision of natural gas below world market rates did not constitute countervailable benefits because both were available to more than a specific group of enterprises or industries *within* Mexico. Judge Carman, who had decided *Cabot*, upheld these determinations and, with respect to the provision of natural gas, stated that "[i]t is well established that the mere existence of a price differential between exported and domestic prices does not in and of itself confer a bounty or grant under section 1303."[62] Since Commerce had verified that the Mexican producers paid the published price, its determination appeared to be "in substantial accordance with the statutory standard."[63]

A week later, Judge Tsoucalas upheld the specificity test with respect to benefits provided under the Spanish bankruptcy law.[64] Shortly thereafter, Judge DiCarlo of the CIT decided *Can Am Corp. v. United States*, which, *inter alia*, again involved the Mexican two-tier pricing system for oil products.[65] Commerce had decided not to reinvestigate this practice. The court cited *PPG* as providing that:

> the appropriate standard or test requires Commerce to conduct a *de facto* case by case analysis to determine whether or not a program provides a "subsidy" or a "bounty or grant" to a "specific enterprise or industry, or group of enterprises or industries" . . . . In this case, the Court holds that Commerce acted within its discretion in determining that all industrial users of fuel oil were not a specific group of enterprises or industries within Mexico.[66]

In July, 1988, Judge Carman decided plaintiff's appeal from Commerce's determination in the section 751 administrative review of the case underlying *Cabot*.[67] In *PPG*, he had upheld Commerce's *de facto* specificity test notwithstanding the fact that Commerce had not analyzed the precise effects of the programs. Since Commerce had ap-

61. 662 F.Supp. 258, 264 (Ct. Int'l Trade 1987).

62. 662 F.Supp. at 272 (citing United States v. Zenith Radio Corp., 562 F.2d 1209, 1216 (Fed. Cir. 1977), *aff'd*, 437 U.S. 443 (1978)).

63. 562 F.2d at 272.

64. Al Tech Specialty Steel Corp. v. United States, 66 F.Supp. 1206, 1212 (Ct. Int'l Trade 1987).

65. Can Am Corp. v. United States, 664 F.Supp. 1444 (Ct. Int'l Trade 1987).

66. 664 F.Supp. at 1448-1449; *see also* Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445 (Ct. Int'l Trade 1987); Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F.Supp. 1362 (Ct. Int'l Trade 1987). These cases contain no reference to a specificity standard other than the one applied by Commerce.

67. Cabot Corp. v. United States, 694 F.Supp. 949 (Ct. Int'l Trade 1988).

plied an identical *de facto* specificity test in its administrative review determination, it seemed likely that Judge Carman would also uphold Commerce's determination. Nevertheless, because Commerce had used the phrase "general availability" rather than "*de facto* specificity," he remanded the case. It appears that this decision only instructs Commerce to be more careful with respect to its terminology without affecting the status of the specificity test itself.

Presently, the appeal of *PPG* is pending before the Federal Circuit Court of Appeals. This will be the first time that a Court of Appeals considers the specificity test. Although the case will be decided under the 1979 legislation, it will be interesting to see to what extent the decision will be affected by the legislative developments of 1988. Alternatively, it seems unlikely that the specificity debate will end after a decision by the Court of Appeals regarding *PPG*, since this decision will in theory be limited to the law as it was before the 1988 legislation.[68]

### C. *Congress and the Specificity Test*

The 1982 steel cases and the 1983 Canadian lumber and Mexican carbon black investigations received considerable amounts of public attention. It could therefore be argued that the reasonableness of Commerce's interpretation of the statutes to require specificity is reflected in the fact that Congress did not use the opportunity to clarify or amend the law, for example, when it enacted the Trade and Tariff Act of 1984 (the "1984 Act").[69] Indeed, there are several places in the legislative history of the 1984 Act where the non-countervailability of a benefit is linked to "general availability."[70] Furthermore, in the preparation of this Act, Congress rejected legislative provisions which would have provided that natural resources provided within a country at below world-market rates are countervailable subsidies.[71]

More important, however, are the history and provisions of the

68. *See infra* notes 69-81 and accompanying text.

69. Pub. L. No. 98-573, 98 Stat. 2948 (codified in scattered sections of 19 U.S.C.).

70. *See, e.g.*, Report of House Comm. on Ways and Means, 98th Cong., 2d Sess., SUMMARY OF PROVISIONS OF H.R. 3398 TRADE AND TARIFF ACT OF 1984 AS PASSED BY THE HOUSE AND THE SENATE, 31 (Comm. Print, 1984); H.R. REP. No. 725, 98th Cong., 2d Sess. 27-28 (1984); H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 170 (1984).

71. *See* H.R. REP. NO. 4784, 98th Cong., 2nd Sess., 130 CONG. REC. H7939 (daily ed. July 26, 1984); H.R. REP. NO. 1156, 98th Cong., 2d Sess. 170 (1984); *see generally* Bello & Holmer, *Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test*, 18 GEO. WASH. J. INT'L L. & ECON. 297 (1984); Bello, *Current Subsidy and Antidumping Issues After the Tariff and Trade Act of 1984*, 21 STAN. J. INT'L L. 299 (1985); Bello & Holmer, *The Trade and Tariff Act of 1984: The Road to Enactment*, INT'L LAW. 287 (1985); Barshefsky, Diamond & Ellis, *Foreign Government Regulation of Natural Resources: Problems and Remedies Under United States Trade Laws*, 21 STAN. J. INT'L L. 29 (1985).

specificity test in the Omnibus Trade Act of 1988 (the "1988 Act").[72] Section 1312 of the 1988 Act renames the old section 771(5) as subparagraph (5)(A) and adds the following subparagraph:

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

The provisions on countervailing duty in the 1988 Act are derived from its predecessor bill, H.R. Rep. No. 3,[73] which was vetoed by President Reagan and should be interpreted in light of the legislative history of H.R.3. The House bill[74] contained a provision that was similar in wording to the Senate provision,[75] but whereas the Senate Report[76] explained that, under the Senate's version, Commerce only has to apply a *de facto* specificity test, the House Report[77] suggested that an effects test is required.[78]

While according to the chairman of the House Ways and Means Subcommittee on Trade,[79] the conferees adopted the House version,

72. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

73. The Trade and International Economic Policy Reform Act of 1987, H.R. REP. NO. 3, 100th Cong., 1st Sess. (1987) [hereinafter "1987 House Bill"] was based on H.R. REP. NO. 4800, 99th Cong. 2d Sess. (1986). Following markup by several House Committees and consideration on the floor, the bill was passed by the House of Representatives on May 5, 1987. The Omnibus Trade Act of 1987, S.1420, 100th Cong., 1st Sess. (1987) [hereinafter "Senate Bill"], was based on the provisions of S.490, 100th Cong., 1st Sess., 132 CONG. REC. S1852 (daily ed. Feb. 5, 1987). As reported by the Senate Finance Committee on June 11, 1987, and other Senate committees, the Senate Bill was passed as an amendment to the House Bill on July 21, 1987. The final Omnibus Act was passed by the House on April 21, 1988 by a vote of 312 to 107, and by the Senate on April 27, 1988 by a vote of 63 to 36, with one abstention. After President Reagan vetoed the bill because of the provisions requiring employers to provide employees with notice of plant closings and mass layoffs, the Bill was amended and signed by the President on August, 23, 1988.

74. 1987 House Bill, *supra* note 73, § 153.

75. S. 490, 100th Cong., 1st Sess., § 333, 132 CONG. REC. S1852 (daily ed. Feb. 5, 1987).

76. S. REP. NO. 7, 100th Cong., 1st Sess. 369 (1987).

77. H.R. REP. NO. 40, 100th Cong., 1st. Sess., pt. I, 123-127 (1988) [hereinafter "1988 House Report"].

78. The 1988 House Report provides that a countervailable benefit exists if "there is a sufficient degree of competitive advantage in international commerce being bestowed upon a distinct class of beneficiaries that would not exist but for government action." *Id.* at 124.

79. 134 CONG. REC. H5522 (daily ed. July 13, 1988) (statement of Rep. Gibbons); *see also id.* at S4914 (statement by Sen. Baucus) and 134 CONG. REC. S10,576 (daily ed. August 2, 1988) (statement of Sen. Baucus).

the chairman of the Senate Finance Committee[80] claimed that the enacted provision is based on the Senate version. The text of the enacted provision is identical to the Senate version. Furthermore, the Conference report explicitly provides that the House receded with an agreement by the conferees to direct the ITC to conduct a section 332 investigation identifying countries which maintain investment barriers or other restrictions which effectively prevent foreign capital from claiming the benefit of foreign government programs on the same terms as domestic capital,[81] thereby presumably responding to a concern underlying the House's effects test. It seems correct, therefore, to assume that the 1988 Act is based on the Senate proposal, that it codifies Commerce's (nominal and *de facto*) specificity test, and that it rejects the effects test.

## IV. Determination of Specificity

Now that Congress and the CIT seem to have accepted the specificity test, its actual application has become one of the most critical aspects of each countervailing duty determination. It should be remembered, however, that a specificity determination is, in itself, not necessarily sufficient to establish the countervailability of a benefit. Where a government provides goods or services to a limited group of enterprises, it must still be determined that the government's provision is based on preferential rates.

### A. *Sector-specificity*

#### 1) *General*

The specificity test is a tool to determine which benefits cause a *significant* distortion in a market economy. On the basis of its experience in administering the law, Commerce has found that the specificity test cannot be reduced to a precise mathematical formula.[82] The determination of what constitutes a *significant* distortion of an economy requires line drawing on a case-by-case basis. Commerce will therefore exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether a countervail-

80. 134 Cong. Rec. S4903 (daily ed. Apr. 27, 1988) (statement by Sen. Bentsen); *see also id.*, at S4912 (statement by Sen. Packwood).

81. H.R. Conf. Rep. No. 576, 100 Cong., 2d Sess. 576, *reprinted in* 1988 U.S. Code & Cong. Admin. News 1620.

82. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,456 (1986) (preliminary determination). For a different view, see Cameron & Berg, *The Countervailing Duty Law and the Principle of General Availability*, 19 J.W.T.L. 497, 505 (1985) (authors propose a test under which there is *de facto* specificity if the percentage of the total subsidy absorbed by the industry under a program exceeds that industry's share of the country's gross national product).

able benefit has been conferred.[83] The factors it considers are:

(1) the extent to which a foreign government acts (as demonstrated in the language of the relevant enacting legislation and implementing regulations) to limit the availability of a program;
(2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and
(3) the extent, and manner in which, the government exercises discretion in making the program available.[84]

2) *Government restrictions on availability*

a) *General*

The existence of restrictions on access to its benefits does not make a program specific *per se*. If the criteria for eligibility are based on neutral and objective factors (normally economic in nature and applicable to different sectors of the economy) and eligibility is automatic once the criteria or conditions are met, then the program will in principle not be considered specific or countervailable.[85] It is, however, important that eligibility requirements do not predetermine eligible areas or industries and that no part of the country and no industry is excluded from eligibility.[86] The following examples of eligibility criteria have been determined to constitute a sufficiently broad group of enterprises or industries and may illustrate Commerce's approach.

1) "Small and medium sized businesses,"[87] "small, newly established companies"[88] or large investments that create jobs.[89]
2) Companies unable to meet scheduled payments on government guaranteed direct dollar debt[90] or "firms having long-term debt in foreign currency payable abroad."[91]
3) All users of marine facilities, including pleasure boats and marine transportation facilities.[92]

The importance of the specific facts of each particular case and the

83. Certain Softwood Lumber from Canada, 51 Fed. Reg. 37,456 (1986).

84. Certain Softwood Lumber from Canada, 51 Fed. Reg. 37,456 (1986); Carbon Steel Wire Rod from Malaysia, 53 Fed. Reg. 13,303, 13,304.

85. PPG Industries, Inc. v. United States, 662 F.Supp. 258, 264 (Ct. Int'l Trade 1987).

86. *See, e.g.*, Certain Steel Products from France, 47 Fed. Reg. 39,332, 39,340 (1982).

87. Certain Softwood Products from Canada, 48 Fed. Reg. 24,159 (1983); Certain Textile Mill Products and Apparel from Singapore, 50 Fed. Reg. 9840, 9842-43 (1985); Pork Rind Pellets from Mexico, 48 Fed. Reg. 39,105, 39,106, 39,108 (1983); Forged Undercarriage Components from Italy, 48 Fed. Reg. 52,111, 52,113 (1983).

88. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,061-62 (1986).

89. Certain Steel Products from the Netherlands, 47 Fed. Reg. 39,372, 39,376 (1982).

90. Carbon Steel Products from Brazil, 49 Fed. Reg. 17,988, 17,893 (1984).

91. Unprocessed Float Glass From Mexico, 49 Fed. Reg. 23,097 (1984); PPG Industries, Inc. v. U.S., 662 F.Supp. 258, 264 (Ct. Int'l Trade 1987).

92. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,051 (1986).

fine line between what is and what is not considered specific may be shown by the example of disaster-relief programs, which have been found both countervailable[93] and non-countervailable.[94] Such a program was held countervailable because it included relief in the event of an "economic disaster" such as an unexpected uncontrollable drop in prices or the disappearance of a designated level of production in a designated region beyond the control of producers.[95] Arguably, if the program involves a wide variety of products, benefits to specific producers can be based on neutral and objective factors if they were granted on the basis of an unexpected drop in prices.

b) *Agriculture*

In light of the extensive agricultural subsidies products worldwide, it is not surprising that many countervailing duty investigations have involved agricultural products.[96] Commerce has held that the agricultural sector constitutes more than a single group of enterprises or industries within the meaning of section 771(5).[97] This means that subdivisions of the agricultural sector are allowed as long as, again, the criteria for eligibility are based on neutral and objective factors. Programs containing the following criteria were not considered to benefit only a specific group of enterprises or industries:

1) All beginning farmers, defined as those who have never owned a viable farm or have never spent a majority of their time or earned a majority of their income from farming assets over which they have had control.[98]

2) Livestock producers and other manufacturers that hold reserve stocks for maturity purposes (e.g., manufacturers of wine, brandy and whiskey).[99]

3) Farmers certified by provincial authorities as poor farmers or farmers whose total land area is 10 rai (approximately 4 acres) or less.[100]

93. *See, e.g.*, Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,106-07 (1985).

94. *See, e.g.*, Certain Steel Products from Italy, 47 Fed. Reg. 39,356, 39,360 (1982); Float Glass from Italy, 47 Fed. Reg. 56,160, 56,161 (1982).

95. Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,106 (1985).

96. The importance of agricultural products in the context of subsidies and countervailing duties is also shown by § 1326 of the 1988 Act, *supra* note 72, which adds a special subparagraph E on the definition of the agricultural industry to section 771(4) (19 U.S.C. § 1677(4) (1982)).

97. Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618 (1983); Certain Fresh Cut Flowers from Mexico, 49 Fed. Reg. 15,007, 15,008 (1984). The fishing industry, however, is considered specific. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,067 (1986).

98. Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,108 (1985).

99. Lamb Meat from New Zealand, 50 Fed. Reg. 37,708, 37,712 (1985).

100. Rice from Thailand, 51 Fed. Reg. 12,356, 12,360 (1986).

4) Land development programs that require a minimum area.[101]
5) Users of fertilizers. [102]

A program where benefits are conferred to a specific group of agricultural enterprises may form part of a more general policy under which benefits are conferred upon a wide variety of industries. If there is sufficient linkage between the specific programs and the overall policy, Commerce considers such a program to be non-countervailable. This requires, however, that the different programs involve similar benefits on comparable terms.[103] This issue may be particularly important in cases involving price support and stabilization programs. Such benefits will not be found countervailable if objective and identifiable criteria automatically trigger the aid mechanism for (a sufficient amount of) agricultural products, and the level of support for different commodities at various times is comparable.[104] On the other hand, if payments with respect to certain products are pre-authorized, while payment for others are unpredictable because they need approval, the program may be found countervailable, regardless of whether the administering authority is guided by objective factors in selecting the designated commodities.[105]

According to Commerce, the agricultural price stabilization programs of the European Communities do not contain sufficient linkage between products since production refunds are made available to processors of selected fruits and vegetables in specific amounts relating to the competitiveness of each product in the world market.[106] Likewise, Commerce considered benefits provided under the Canadian Agricultural Stabilization Act countervailable. Even though they were part of a nationwide fabric of programs covering many farm products,

101. Lamb Meat from New Zealand, 50 Fed. Reg. 37,708, 37,712 (1985).

102. Lamb Meat from New Zealand, 50 Fed. Reg. 37,708, 37,711-12 (1985). The low cost fertilizer was provided in order to encourage adequate pasture maintenance by farmers. In another case, Commerce considered benefits under a program for "industries which utilize greenhouse technology in the growth of food and ornamentals" to be limited to specific industries. Certain Fresh Cut Flowers from Canada, 52 Fed. Reg. 2134, 2137 (1987).

103. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. at 10,046, 10,050, 10,052, 10,053, & 10,057 (1986) (holding that the program under investigation was not sufficiently linked to an alleged general policy).

104. *See, e.g.*, Rice from Thailand, 51 Fed. Reg. 12,356, 12,358 (1986); Lamb Meat from New Zealand, 50 Fed. Reg. 37,708, 37,712 (1985).

105. Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097 (1985); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445 (Ct. Int'l Trade 1987). Nevertheless, since the existence of government discretion does not make a program countervailable, *see infra* notes 118-122 and accompanying text, it seems that if a government applies objective criteria no countervailing duty should be imposed.

106. Tomato Products from the European Community, 44 Fed. Reg. 15,825 (1979) (preliminary determination); Dextrines and Soluble or Chemically Treated Starches Derived from Corn Starch from the European Community, 45 Fed. Reg. 18,414 (1980); *see also* Fresh Cut Flowers from Mexico, 49 Fed. Reg. 15,007, 15,010-11 (1984).

benefits under this act were only available to selected agricultural producers, and the level of price stabilization varied from commodity to commodity.[107]

3) *Number of actual users and disproportionate use*

In its case-by-case analysis, Commerce examines both program eligibility and participation. It is generally more difficult to give an abstract description of when a subsidy is considered *de facto* specific than is the case with other factors which are considered relevant for a specificity determination. Nevertheless, it must be remembered that when determining which benefits are countervailable, Commerce will be aware of the fact that in administering its countervailing duty laws it may set a precedent for its trading partners.[108] The determination that all agriculture in Mexico was not a "specific group of enterprises or industries" is an example of this. If Commerce had found the provision of irrigation water to agriculture countervailable, it would have invited the imposition of countervailing duties by other countries or the European Communities on U.S. irrigation-based agricultural exports.[109]

Shortly after *Cabot* was decided, Commerce completed the preliminary results of the section 751 administrative review of the underlying determination, *Carbon Black from Mexico.*[110] It continued to hold that a difference between the domestic and export prices of natural gas

107. Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,100 (1985); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F.Supp. 445 (Ct. Int'l Trade 1987); *see also* Rice from Thailand, 51 Fed. Reg. 12,356, 12,359 (1986); Lamb Meat from New Zealand, 50 Fed. Reg. 37,709, 37,712 (1985).

108. *See, e.g.*, *Proposed Amendments to the Countervailing Duty Law, Hearing before the Subcomm. on Trade of the House Comm. on Ways and Means*, 98th Cong., 1st Sess. 25 (1983) (testimony by Alan F. Holmer, Deputy Assistant Secretary for Import Administration).

109. Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618, 21,621 (1983). *See* Horlick, *Current Issues in Countervailing Duty Law*, in THE TRADE AGREEMENTS ACT OF 1979 — FOUR YEARS LATER 7, 37 (1983). The risk of mirror-legislation was also shown by a threatened countervailing duty investigation in 1980 by the Commission of the European Communities into synthetic fiber exports from the U.S. that benefitted from price controls of natural gas. *Hearing*, *supra* note 108 (statement by Alan F. Holmer, Deputy Assistant Secretary for Import Administration); *see also* G. HUFBAUER & J. ERB, SUBSIDIES IN INTERNATIONAL TRADE 95 (1984). In a later determination, Commerce supported its decision that the agricultural sector in Mexico constituted more than a specific group of enterprises by stating that "approximately one-third of Mexico's labor force is employed in agriculture," Certain Fresh Cut Flowers from Mexico, 49 Fed. Reg. 15,007, 15,008 (1984), but it did not give such figures when it made the same determination with respect to the Brazilian and the Canadian agricultural sectors. Fuel Ethanol from Brazil, 51 Fed. Reg. 3361, 3363-64, 3370 (1986); Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097 (1985); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (1986); Certain Fresh Cut Flowers from Canada, 52 Fed. Reg. 2134, 2135, 2137 (1987).

110. Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,271 (1986) (preliminary determination).

did not itself constitute a domestic subsidy, but changed its position regarding CBFS. It stated that, with respect to the provision of CBFS, it had placed excessive emphasis on the limitations on the amount of potential users inherent to the product and determined that "there are too few users of CBFS for us to find that it is provided on a generally available basis."[111] In its final determination, Commerce affirmed this position.[112]

Commerce also re-investigated imports of softwood lumber from Canada.[113] In its 1983 determination it had found that the low prices for the right to cut lumber (stumpage rights) benefitted a wide variety of industries and concluded that such a benefit was therefore not countervailable.[114] In its 1986 preliminary determination, however, it changed its position. Commerce held that its earlier conclusion was called into question by two facts. First, one of the industries mentioned in its earlier determination, the furniture manufacturing industry, did not benefit much from the stumpage programs. More importantly, the paper and pulp industries, which were the main beneficiaries of the stumpage programs, tended to be horizontally integrated into single enterprises with the lumber industry. Because Commerce also found the existence of governmental discretion, it preliminarily determined that the stumpage programs were limited to a specific group of industries and thus conferred potentially countervailable benefits.[115]

This preliminary determination of disproportionate use seems incorrect. A horizontal integration between industries should be irrelevant in the context of countervailing duty law. Section 771(4)(A)[116] defines the term "industry" strictly on the basis of producers of a "like product." It is therefore possible that certain integrated enterprises remain as several industries for purposes of the countervailing duty law. Furthermore, in the Mexican cases, once agriculture was deter-

111. *Id.* at 13,271. Under an "inherent nature" test not only the amount of recipients, but also the nature of a benefit relevant. In the first *Canadian Lumber* case, for example, Commerce found the "forest products industry" to be not a specific group of industries for purposes of stumpage programs, but held other programs for the same group of enterprises involving benefits which would be of use to other industries as well as being countervailable. Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,182 (1983).

112. Carbon Black from Mexico, Fed. Reg. 30,385 (1986). This case offers an illustration of the situation where a *de facto* specific benefit is not *per se* countervailable. Since similar products were provided on comparable conditions, CBFS was not provided on preferential terms. *See infra* notes 134-38 and accompanying text.

113. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (1986) (preliminary determination).

114. Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,167 (1983).

115. *See infra* notes 119-21 and accompanying text.

116. 19 U.S.C. § 1677(4)(A) (Supp. V 1987).

mined to be a field that included more than a specific group of enterprises and industries, Commerce should have rejected petitions against programs that affect a significantly wider segment of a country's industry, such as stumpage rights in Canada.

4) *Government discretion in conferring the benefit*

If a program does not give specific guidelines to be followed by the administering authority, Commerce will review the procedures for approving or rejecting applications for benefits. If no standard criteria are applied, Commerce will hold the benefits to be countervailable. Furthermore, if a government does not provide sufficient information to enable Commerce to determine whether a program is being administered in a manner that limits the benefits to specific industries, Commerce will hold the program to be countervailable.[117] Finally, the mere possibility of judicial review is not considered sufficient to prevent a government from using its discretion to target certain industries.[118]

As discussed above, after *Cabot*, Commerce revisited its 1983 determination regarding Canadian stumpage rights. Although its determination was influenced by the fact that the defendants had not provided adequate responses, Commerce preliminarily determined that the exercise of governmental discretion had led to the provision of stumpage to a specific group of enterprises and industries.[119] In addition to making this controversial determination concerning the use of the stumpage programs, Commerce also incorrectly analyzed the existence of governmental discretion. An examination of the use of discretion is, in fact, aimed at determining the intent of a foreign government. Commerce should only investigate such intent if the effects of a measure or program are unclear.[120] Therefore, Commerce should

117. *See, e.g.*, Carbon Steel Wire Rod from Malaysia, 53 Fed. Reg. 13,303, 13,304 (1988).

118. Certain Steel Products from The Netherlands, 47 Fed. Reg. 39,372, 39,374 (1982).

119. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,457 (1986) (preliminary determination). The preliminary determination had sufficient impact to cause the Canadian government and exporters to accept a settlement under which the lumber exports to the United States were subjected to a special export tax. *See generally*, 4 Int'l Trade Rep. (BNA) 6 (Jan. 7, 1987); Holmer and Bello, *The U.S.-Canada Lumber Agreement: Past as Prologue*, 21 INT'L LAW. 1185 (1987). After the plaintiffs had withdrawn their petition, Commerce terminated the investigation and stated that the preliminary affirmative determination was henceforth "without legal force and effect." Certain Softwood Products from Canada, 52 Fed. Reg. 2751 (1987) (termination of investigation). Two Commerce officials have stated, however, that the preliminary determination is still "an accurate description of how Commerce applies the specificity test." Hunter & Kuhbach, *supra* note 54, at 523; *see, e.g.*, Carbon Steel Wire Rod from Malaysia, 53 Fed. Reg. 13,303 (1988).

120. The countervailing duty law is concerned with the effects of foreign government practices, not with its purposes or intentions. ASG Industries v. United States, 467 F.Supp. 1195

first investigate whether a benefit in fact accrues to a wide range of industries. If so, the benefit is non-specific and cannot be countervailed. If, however, there is no evidence whether a program benefits different sectors in the economy, Commerce may further investigate whether the granting government has any discretion and how such discretion is exercised.

In the second Canadian lumber case, however, Commerce reversed this order. It determined, first, the existence of a discretionary allocation of stumpage rights and only then discussed the question of how many industries benefitted from the stumpage rights.[121] Again, the existence and use of discretionary powers for the granting authority under a program are irrelevant provided that more than a limited group of industries benefit from it. Where the effect of a program is non-distortive because the benefits accrue to many industries, an investigation into the intent of the granting authority becomes superfluous and only risks reducing the objectivity of the outcome of an investigation.

### B. *Regional subsidies and specificity*

Commerce presently deals with regional subsidies by considering each program in which benefits are limited to less than all regions of a relevant jurisdiction. If the program is limited to a specific group of enterprises or industries, it is thus potentially countervailable.[122] Hence, benefits granted by local governments throughout their jurisdiction are not countervailable, whereas benefits from the federal government to all industries in exactly the same area (or, in the case of a joint federal-local program, the federal shares of the benefits) are considered specific and thus potentially countervailable.[123]

If all regions get a benefit from the federal or national government, Commerce will determine the existence of a subsidy by comparing the benefit under investigation with the average level of assistance provided to companies in the region with the lowest benefit.[124] Further-

(Cust. Ct. 1979); *see also* Saudi Iron and Steel Co. (Hadeed) v. United States, 675 F.Supp. 1362 (Ct. Int'l Trade 1987).

121. For an evaluation of the *de facto* specificity in this case, see *supra* notes 113-16 and accompanying text.

122. In another instance, Commerce held countervailable a Mexican program that provided benefits to all areas of Mexico with the exception of Mexico City and environs. Portland Hydraulic Cement Clinker from Mexico, 51 Fed. Reg. 44,500, 44,502 (1986); *see also* Fuel Ethanol from Brazil, 51 Fed. Reg. 3361, 3363 (1986).

123. *See, e.g.*, Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345, 39,345 (1982); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,048 (1986).

124. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,045 (1986).

more, it is not sufficient for a non-specificity determination that the designation of regions is based on neutral criteria. Unless such designations are merely used for administrative convenience,[125] all benefits conferred by programs where the region of the applicant is determinative of the level of assistance will in principle be countervailable.[126] The CIT has upheld Commerce's determinations concerning regional subsidies on several occasions.[127]

In the 1982 steel cases, the Commission of the European Communities argued that regional aids did not affect international trade and could not be considered countervailable.[128] Commerce rejected this argument and held:

> While there is no agreed definition of the term 'normal competition' in the context of the GATT, the term can be reasonable constured [*sic*] to include comparative advantage, a concept about which there is little, if any, serious dispute among economists. The argument of the E.C. flows against the logic of comparative advantage. Subsidies used to alter the comparative advantage of certain regions with respect to the production of a certain product or products are by definition distortive of trade and the allocation of resources, and, therefore must affect normal competition, including competition with producers in the market of the importing country.

Commerce's analysis of regional subsidies has at least two fundamental flaws. First, the appropriate test for the determination of a distortive benefit is based on discrimination between producers, not between regions. In theory, as long as a government does not favor one sector over another, neither the pattern of production nor the pattern of trade will be affected. Only the pattern of location of industries changes.[129] If the benefits of a regional development program overcompensate the initial disadvantages of the area, enterprises from all different sectors would locate in that area and the benefits would be

---

125. *See, e.g.*, Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345, 39,349 (1982).

126. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,065-66 (1986). The Canadian respondents are challenging this decision before the CIT on the basis that the classification of regions was based on neutral factors (poverty), just like the German Steel case, *supra* note 125.

127. *See, e.g.*, Carlisle Tire & Rubber Co. v. United States, 564 F.Supp. 834, 838, n.6 (Ct. Int'l Trade 1983); United Steel Corp. v. United States, 5 Ct. Int'l Trade 245 (1983); Hercules, Inc. v. United States, 673 F.Supp. 454, 477 (Ct. Int'l Trade 1987).

128. Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,329 (1982).

129. Arguably, the producers which already had a comparative advantage in the region will be able to benefit more from the development program than producers which did badly in that area in the first place. However, just like all governmental measures of a general nature will affect certain sectors more than others, these types of benefits should not be considered countervailable since they will normally not cause any *significant* distortions. Furthermore, this analysis may be different if there is only a specific group of industries in the subsidized region and high costs prevent other industries from locating in that area.

offset by other macro-economic factors (*e.g.*, inflation or a tax increase), similar to a situation where the government gives a 10% production "subsidy" to all enterprises in the whole country.[130] Programs under which benefits are conferred upon all enterprises and industries in a specific region should therefore not be countervailable. There is nothing in the statutory law or case law that prevents Commerce from determining which regional development schemes which do not discriminate between different sectors of an economy provide benefits to more than a specific group of industries and are therefore non-countervailable.[131]

Commerce's assumption that regional subsidies necessarily affect competition in the importing country's market is incorrect for a second reason. Even if a government limits the benefits of a regional development program to a specific enterprise in industry, and therefore distorts the pattern of production, international trade is not necessarily affected. If, for example, the cost of production for widgets in the importing country is 150 and in regions A and B of the exporting country 100 and 110, respectively, a subsidy of 10 or less on the widgets from region B will normally have no effects on international trade. Although the regional development program may reduce the welfare of the exporting country as a whole, neither the export price of the widgets nor international trade will be affected. Such trade effects

---

130. Development grants that overcompensate the initial disadvantages of a region attract investment from other parts of the country until the moment in time where there are no additional benefits in investing there. Where the benefits are so large that they cause all industry of the country located in that area to relocate, the effect of the program would be the same as giving a grant to all industries on a country wide basis.

131. Commerce already applies a similar analysis in the case of infrastructure. Infrastructure is, by its very nature, available only for use by companies and individuals located in the vicinity of such facilities. Commerce has therefore determined that the provision of basic infrastructure should be subject to a test that is less rigid than one generally applicable to regional subsidies. Carbon Steel Wire Rod from Saudi Arabia, 51 Fed. Reg. 4206, 4210 (1986); Certain Textiles and Textile Mill Products from Malaysia, 50 Fed. Reg. 9852 (1985); Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 43,063, 43,065 (1985); 51 Fed. Reg. 44,500 (admin. review) (1986). The provision of basic infrastructure will not be considered a countervailable subsidy when the following three conditions are met:

(i) The government does not limit who can move into the area where the infrastructure has been built.

(ii) The infrastructure is in fact used by more than a specific enterprise or industry, or group of enterprises or industries and thus benefits more than a specific enterprise or industry.

(iii) The enterprises that locate in the area should have equal access or receive the benefits of the infrastructure on equal terms or on the basis of neutral criteria. *See, e.g.*, Carbon Steel Wire Rod from Saudi Arabia, 51 Fed. Reg. 4206, 4210 (1986); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,053, 10,062, 10,065, 10,067-68 (1986); Rice from Thailand, 51 Fed. Reg. 12,356, 12,360 (1986).

Thus, even if there are no other trains, roads or railways in any other part of a country, as long as the benefits accrue to a wide range of industries in the region with a developed infrastructure, Commerce would find no countervailable benefit.

only occur to the extent that regional benefits overcompensate the dislocation costs.[132] As will be discussed in detail below, under the present system of the countervailing duty law, the ITC's injury determination cannot adequately deal with these effects on trade. An amendment to the statute would therefore be required to enable Commerce to subtract dislocation costs from the *net* amount of the sector-specific regional subsidy found.[133]

## V. *Specificity and Preferentiality*

The concept of a countervailable benefit is based upon discrimination between market participants by government in favor of a specific group of industries. Thus, when a government provides goods and services, a potentially countervailable benefit exists to the extent that such goods and services are provided to a specific group of industries at preferential prices.[134] However, where there are no other users of a good or service provided by government, the question of whether certain producers have been favored over others because of preferential treatment becomes complicated. In such cases, the selection of a benchmark for the purpose of determining preferentiality may, in fact, determine whether a countervailable benefit will be found. In the carbon black case, for example, specificity and preferentiality were the same issue. The appropriate question was not whether there was *de facto* specificity, but whether other industries obtained similar benefits. After an imprecise original determination, Commerce corrected itself in its administrative review, determining that although the *use* was limited to a specific industry, CBFS was not provided at preferential rates, because other industries obtained comparable products at simi-

132. There are, of course, several caveats to this analysis. The first is that it may be impossible in each countervailing duty investigation to assess accurately the difference in costs of production between two regions, because the local disadvantages of the underdeveloped area may already be partially or completely offset by other advantages. In Michelin Tire Corp. v. United States, 2 Ct. Int'l Trade 143, 164-5, *vacated as moot*, slip op. 85-11 (Ct. Int'l Trade 1981), for example, the wages in the disadvantaged region (Nova Scotia) were alleged to be only 81.3 percent of those in Ontario. The court found that the wage advantage of locating in Nova Scotia outweighed all disadvantages it might have experienced. In addition, it found several intangible benefits of the disadvantaged region: (1) it was not a stronghold of competitive interests, so that, in general, the locating enterprise could expect a closer cooperation from local government, (2) there was no separatist movement which would have presented special difficulties and (3) the relatively remote location would make it easier to safeguard trade secrets.

Second, it is possible that an expansion of the widgets plant in A would have caused the input products or labor to become more expensive in that region and, thus, could only have occurred at higher than 100 per unit cost. The location in other areas may take away such upward pressures on the prices of inputs in region A. An accurate calculation of the difference in costs of production between the different regions would have to take these effects into account as well.

133. *See supra* note 34-35 and *infra* notes 152-3 and accompanying text.

134. § 771(5)(B)(ii), 19 U.S.C. § 1677(5)(B)(ii) (1982).

lar prices.[135]

As explained above, the question of whether a government measure distorts competition or is offset by other macro-economic factors should be viewed within the economy of the jurisdiction in which the benefit is conferred. For the purpose of calculating preferentiality, comparisons within the same political jurisdiction are also the most appropriate measure of the existence of preferentiality, "regardless of whether those actions cause prices within the jurisdiction to differ from prices elsewhere."[136] In its preliminary determination in the administrative review of *Carbon Black from Mexico*,[137] Commerce gave a list of alternatives with which it compares the price of a good or service in order to determine whether the recipients had been given preferential treatment:

> 1) Prices charged (to users within the same jurisdiction) by the same seller for a similar or related good.
> 2) Prices charged within the jurisdiction by other sellers for an identical good or service.
> 3) The same seller's cost of producing the good or service.
> 4) External prices, such as the export or world market price.[138]

Under the first three alternatives, the goods and the price for the goods that are used as a preferentiality benchmark have to be generally available in that jurisdiction, but not necessarily outside that jurisdiction. In the case of carbon black, for example, it would not have mattered if there were a difference between the export price and the price for domestic use of "number six fuel," the petroleum derivative that was considered a similar good. As long as a country provides similar petroleum derivatives to all domestic users at similarly low prices, the effects of such measures are presumably counterbalanced or mitigated by other macro-economic factors.

## VI. SPECIFICITY AND GATT

Neither articles VI or XVI of the GATT nor the Subsidies Code[139] contain a detailed definition of a countervailable subsidy. The only reference to specificity is made in article 11 of the Subsidies Code. In the third paragraph of this provision, the signatories of the code recognize that legitimate social and economic policy objectives may be achieved "by means of subsidies granted with the aim of giving an

135. *See supra* note 51.

136. Preferentiality Appendix to Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,272 (1986) (preliminary results of admin. review).

137. *Id.* at 13,272.

138. *Id.* at 13,272-73.

139. *See supra* note 12.

advantage to certain enterprises" and "note that the above form of subsidies are normally granted either regionally or by sector." Nevertheless, article 11 is, strictly speaking, unrelated to the rules relating to the imposition of countervailing duties; it belongs to Part II of the Subsidies Code which, interpreting articles XVI and XXIII of the GATT, provides international rules concerning the *use* of subsidies.

In Commerce's opinion, the recognition of the legitimacy of the use of sectoral or regional subsidies in article 11 does not prohibit any country to impose countervailing duties on sector or region-specific subsidies.[140] It has taken the position that, absent an internationally agreed upon definition, it may define a potentially countervailable subsidy on the basis of specificity and include sectoral or regional aids.[141]

An international agreement on specificity was nearly reached on April 25, 1985, when the GATT Group of Experts on the Calculation of the Amount of a Subsidy submitted draft guidelines on specificity to the GATT Committee on Subsidies and Countervailing Measures.[142] These guidelines adopt a specificity requirement and provide that a benefit provided by government accrues to a wide range of industries should not be countervailable. Apparently, the continuing controversy in the United States over the specificity test in the context of natural resources has prevented the adoption of the GATT guidelines.

One of the reasons to adopt a narrow concept of a countervailable benefit is to reduce the trade friction caused by the imposition of countervailing duties. The more such a concept is based on generally accepted and fairly objective standards, the more it will serve this purpose. The fairly wide consensus regarding the appropriateness of the specificity test which exists among trading partners of the United States increases its practical importance.

## VII. A SECOND STAGE SPECIFICITY TEST FOR UPSTREAM SUBSIDIES?

### A. *General*

A subsidy on one product can indirectly affect the production or manufacture of another good. One form of such an indirect subsidization occurs when a subsidized product is used as an input in the pro-

140. Appendix 4 to Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,330 (1982). Nevertheless, in the controversy on natural resources, it argued that the specificity test was required by the Subsidies Code. *See e.g.*, *supra* note 108.

141. Appendix 4 to Certain Steel Products from Belgium, 47 Fed. Reg. 39,330 (1982). The CIT has upheld this position. *See* Hercules, Inc. v. United States, 673 F.Supp. 454, 477 (Ct. Int'l Trade 1987).

142. SCM/W/89. These guidelines are reprinted as an appendix hereto.

duction of another product. To the extent that the subsidy to the input producer (the "upstream industry") causes the price of the input to be lower than the market rate absent such a subsidy, it will confer a benefit to the producer of the final merchandise (the "downstream industry") and may be considered as an indirect subsidy to the latter.

The specificity test may play a role in two stages of an investigation involving such "upstream subsidies." First, the benefit provided to the input producer must accrue to not more than a limited group of enterprises and, second, the artificially depressed price of the input product should not benefit a wide variety of industries. In the case of a grant to steel producers, for example, a first stage specificity test will question whether this benefit has been granted exclusively to that specific industry. Alternatively, a second stage specificity test will be concerned with the question how many downstream enterprises or industries benefit from the subsidized steel. This section deals with the question whether U.S. countervailing duty law does or should contain such a second stage specificity test. In other words, should it make a difference in a countervailing duty investigation concerning imported tools whether the subsidized steel used as an input to the tools is also used for the production of cars?

### B. *Trade effects of upstream subsidies*

For an analysis of the possible trade distorting effects of a "pass through" of a subsidy on an input product to the producer of the final merchandise, one should distinguish between the situation in which the subsidy has resulted in a price for the input product that is lower than the free market price for that input, and where it has not had this effect. For example, a subsidy on the domestic production of steel in country A which does not result in an undercutting of the price of other available suppliers, but merely offsets a disadvantage of country A's domestic steel industry, may displace sales of foreign steel on that market. It need not, however, affect production of, and trading in, any downstream product. Since steel is not the "like product" of tools, countervailing duties may not be imposed on cars or imported tools in order to protect the injured steel industry of the importing country.[143]

If, on the other hand, the subsidized input product undercuts the market price for such products, one may further investigate to what

143. According to GATT article VI:6, countervailing duties may only be imposed on imported products to protect the domestic industry of the "like product" of the product under investigation. It is debatable whether the same is true in cases where, under U.S. law, no injury test is required. Arguably, the concept of "like product" is irrelevant in such cases.

extent the subsidy to the input producer has been passed through to the producer of the merchandise under investigation.

### C. *Second/stage Specificity*

The 1984 Act added specific provisions on the countervailability of upstream subsidies to the 1930 Act.[144] Section 771A(a) defines the term "upstream subsidy" as:

> any subsidy described in section 771(5)(B)(i), (ii), or (iii) . . . that (1) is paid or bestowed with respect to a product . . . that is used in the manufacture or production . . . of merchandise which is the subject of countervailing duty proceeding; (2) in the judgment of the administering authority bestows a competitive benefit on the merchandise; and (3) has a significant effect on the cost of manufacturing or producing of the merchandise.[145]

In one of the first determinations under this provision, Commerce rejected the argument that a second stage specificity test was required under section 771A.[146] It preliminarily determined that "nothing in the statute or legislative history supports this contention."[147] In its final determination, however, Commerce determined that the passing on of the benefit, if any, to a downstream producer did not have a significant effect on the cost of tool production. Therefore, Commerce did not have to make any final determination concerning the need for second stage specificity and the preliminary findings remain the only indication of Commerce's position on this issue.

Supporting Commerce's preliminary determination is the notion that the practical justification for a specificity requirement, *i.e.* the administrative and political need to limit the definition of a countervailable subsidy, is not equally applicable in the case of benefits passed on to downstream producers, given the statutory definition of an upstream subsidy. The "competitive benefit" and "significant effect" requirements of section 771A(a) will normally prevent the countervailability of many potential upstream subsidies. For example, even if a subsidy to steel producers is passed on, and benefits a wide

144. 19 U.S.C.A. § 1677-1 (1982). *See generally* Bello, *Current Subsidy and Antidumping Issues After the Trade and Tariff Act of 1984*, 21 STAN. J. INT'L L. 299, 322-328; Giesen, *Upstream Subsidies: Policy and Enforcement Questions after the Trade and Tariff Act of 1984*, 17 LAW & POL'Y INT'L BUS. 241 (1985).

145. It is unclear why subsection (iv) of Section 771(5)(B) was omitted in this reference.

146. Agricultural Tillage Tools from Brazil, 50 Fed. Reg. 24,270, 24,272 (1985) (preliminary determination).

147. *Id. But see* Letter from Secretary of Commerce Malcolm Baldridge and U.S. Trade Representative William E. Brock to the Hon. Dan Rostenkowski, Chairman, Committee on Ways and Means (April 3, 1984).

range of industries, it will, in practice, probably not have a significant effect on the cost of production of many downstream products.

Nevertheless, second-stage specificity should be required before countervailing duties can be imposed on products that benefit from an upstream subsidy. First, in enacting the upstream subsidy provisions in the 1984 Act, Congress, *inter alia*, intended to codify Commerce's prior practice.[148] Since Commerce had applied a second stage specificity test in the 1982 steel cases, Congress arguably endorsed such a test.[149] Second, it would be inconsistent to require specificity for the imposition of countervailing duties where the government chooses to subsidize directly, for example, through the provision of steel produced by government-owned enterprises, while not applying such a test where the same benefit is conferred upon the downstream industry through subsidization of an input produced by a third party.[150]

## VIII. Limitations of the Specificity Test

### A. *Sector-specific Subsidies and Efficiency*

As noted above, the definition of a countervailable subsidy is based on the concept that the market forces of supply and demand provide the most profitable allocation of resources. Since measures of a general nature do not (significantly) affect such allocation of resources, they should not be considered countervailable. Alternatively, governmental provision of benefits to only a specific group of enterprises or industries encourages inefficient production and thereby reduces welfare.

Although this might be true with regard to perfectly competitive free markets, it is incorrect to assume that all benefits accruing to a specific group of enterprises or industries are inefficient in practice. There are many instances where the market forces of supply and demand are distorted and fail to provide for the most efficient and profitable allocation of scarce resources. Such distortions may be caused, for example, by the existence of positive external economies or market rigidities. A positive external economy exists where the benefits to society as a whole of the production of a good exceed the private marginal benefits for a producer. To illustrate, an industry may draw many

148. 130 Cong. Rec. S11,371 (daily ed. Sept. 18, 1984).

149. *See, e.g.*, Prestressed Concrete Steel Wire Rod from Spain, 47 Fed. Reg. 28,723, 28,726 (1982); Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 26,321, 26,325 (1982) (preliminary determination); Certain Carbon Steel Products from The United Kingdom, 47 Fed. Reg. 39,384, 39,390 (1982); *see also supra* note 148.

150. *See also* H. Beseler and N. Williams, Anti-Dumping and Anti-Subsidy Law, The European Communities 127 (1986).

tourists to the region where it is located. In the case of market rigidities, the supply and demand for resources do not respond smoothly to price inducements. This may be the case where the influence of unions drives up the price of labor. In such circumstances, a government subsidy may be the most appropriate solution to correct such a market distortion or failure, thereby increasing the profitability of the allocation of resources.[151]

When such a distortion or market failure occurs across the different sectors of an economy, benefits granted to correct such a distortion or market failure would normally accrue to different industries and therefore not be held countervailable. However, even if such market distortion or failure (or the government action to correct it or compensate for its effects) is limited to a specific industry, a subsidy to that specific industry may increase the profitability of the allocation of scarce resources and could therefore be considered efficient. However, because a subsidy granted to correct a distortion limited to specific industries will only affect a limited group of enterprises, it will be considered potentially countervailable under the present countervailing duty. The specificity test does not deal with, and is not aimed at, preventing the imposition of countervailing duties to offset sector-specific subsidies that are intended to increase the efficiency of the allocation of resources.

### B. *Subsidies that do not affect trade*

In addition to subsidies that affect international trade but cannot be considered inefficient, there are subsidies which may reduce a country's welfare but do not necessarily affect competition abroad. This may be the case when subsidies are granted to encourage investment in certain parts of a country. As long as the price or volume of the exported goods is not affected, it should not matter for the United States whether the goods are produced in region A or in region B of the exporting country.[152]

Subsidies for research and development (R&D) may provide another illustration that all subsidies do not necessarily distort trade. Under certain programs, results of the R&D have to be published and thus made available to foreign competitors. Whether or not the R&D

151. Barcelo, *Subsidies and Countervailing Duties — Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 794-835 (1977); Denton & O'Cleiracrain, *Subsidy Issues in International Commerce* 5-16 (Trade Policy Research Centre, 1972); Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 229-32 (1989).

152. For a more extensive discussion of regional subsidies, see *supra*, note 132 and accompanying text.

subsidy itself is inefficient, it is difficult to understand how such a program which provides an equal benefit to the industry of the like product in the importing country could distort international competition.[153] In such cases, if the producers of the importing country (who also benefit from the R&D results) are nevertheless injured by other advantages of the imported goods, protection should be given through safeguard measures rather than through the imposition of countervailing duties.

### C. *Commerce should be allowed to subtract more types of benefits from the gross amount of subsidies found*

In most investigations, no countervailing duties can be imposed unless the ITC determines that imported goods, through the effects of the subsidy, injure the producers of the like product in the importing country. One would expect that the determination would therefore include an analysis of the trade effects of the subsidy under investigation. Indeed, the trade effects of subsidies could in theory be taken into account in the ITC's analysis of the cause of the injury. In practice, however, such causation analysis is complicated by the existence of multiple causes of an industry's injury.[154]

Nevertheless, even if an effective analysis for the causation of the injury were applied by the ITC, the issue of subsidies not affecting trade could still not be dealt with satisfactorily under U.S. law. The

153. Although Commerce holds regional subsidies countervailable, it does not consider these types of R&D benefits countervailable, thereby acknowledging the need for a concept of a subsidy that also requires a distortion in trade. *See, e.g.*, Fuel Ethanol from Brazil, 51 Fed. Reg. 3361, 3366, 3372 (1986); Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 30,319 (1982); Certain Steel Products from Italy, 47 Fed. Reg. 39,356, 39,358 (1982); Certain Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,053 (1986). *But see also* Agrexco, Agric. Export Co. v. United States, 604 F.Supp. 1238, 1242 (Ct. Int'l Trade 1985).

154. To isolate the effects of the subsidy one may apply a so-called "margins analysis." Under this analysis, the investigating authority considers the impact of the amount of the subsidy as a margin of the price and the competitive advantage of the imported product. If, for example, the U.S. market price of a widget is 150 and imported widgets cost 75, a subsidy of 2 bestowed on the production of widgets abroad would probably not be considered a material cause of injury to the U.S. producers under a margins analysis. However, while the subsidy margin is an important consideration, it may not always suffice for an accurate causation determination. A margins analysis does not take into consideration other relevant economic factors, such as the price-elasticities of supply of and demand for the products and, presently, only a minority of the ITC commissioners seems to apply a margins analysis. The others investigate whether the *imports*, rather than the subsidy alone, cause injury, an analysis not fundamentally different from that applied for the purpose of safeguard measures.

The courts have provided that the statute does not mandate a margins analysis, but does not prohibit it either. Maine Potato Council v. United States, 613 F.Supp. 1237, 1241-43 (Ct. Int'l Trade 1982); Copperweld Corp. v. United States, 682 F.Supp. 552 (Ct. Int'l Trade 1988). A recent development is the additional attention that is paid to the price elasticities of the supply and demand of the product under investigation. *See, e.g.*, Alberta Pork Producers' Mktg. Bd., 669 F.Supp. 445 (Ct. Int'l Trade 1987); USX Corp. v. United States, 698 F.Supp. 234 (Ct. Int'l Trade 1988).

present system of the countervailing duty law divides the responsibility for determinations between two different agencies. After Commerce has determined the existence and calculated the amount of a countervailable benefit, the ITC has to determine that U.S. producers have been, or are threatened to be, injured. Most countervailing duty investigations, however, involve benefits provided under different programs. Commerce has to determine whether and to what degree these benefits have been bestowed on the imports under investigation without being able to distinguish between different types of benefits involved.[155] The ITC, however, is only concerned with the aggregate amount of the subsidies found by Commerce. Hence, if Commerce finds both injurious and trade-neutral benefits, and the injury determination is in the affirmative, a duty will be imposed at the rate of the aggregate amount of subsidies found. Since, the injury investigation by the ITC is not aimed at determining the efficiency aspect of subsidies and is not always capable of dealing with the issue of benefits that do not affect trade, Commerce should be allowed to apply additional tests in its subsidy determination.

Since it is administratively impossible for Commerce to make detailed analyses of the economic effects of each specific subsidy, it has to rely on abstract principles. The present assumption that subsidies are inefficient and distort trade is fair and should remain. The exporting country, however, should be able to rebut this presumption by proving that a benefit is efficient or, more importantly, does not affect trade. Commerce should subsequently be able to deduct those benefits from the aggregate amount of subsidies found. Under the present law, this is possible only in a limited amount of cases. The Treasury Department apparently used its administrative discretion to handle cases in such a way that no countervailing duties were imposed to offset subsidies that did not affect trade.[156] In 1974, however, Congress, frustrated with the lax enforcement of the countervailing duty law and conscious of the need for more import protection after the lowering of U.S. tariff barriers, imposed specific time limits within which the Treasury Department (and later Commerce) had to make its determinations.[157] The 1979 Act subsequently explicitly limited the types of deductions from the gross amount of benefits found.[158] Unless this list is expanded to include efficiency-enhancing benefits that are sector-specific, and benefits that do not affect international trade, counter-

155. *See, e.g.*, Rice from Thailand, 51 Fed. Reg. 12,356, 12,358, 12,364 (1986).

156. *See supra* note 30.

157. *See supra* note 30.

158. *See supra* note 34.

vailing duties will be imposed to offset practices that do not warrant the application of the countervailing duty law.

## IX. Conclusions

The specificity test is now firmly rooted in U.S. countervailing duty law and practice. After many confusing decisions, it seems reasonably clear that the courts have accepted the appropriateness of this standard. Likewise, it appears that Congress has codified the specificity test in the provisions of the 1988 Act.

The specificity requirement is, generally speaking, a useful test. It has a sound economic rationale. Furthermore, without creating an impossible administrative burden, it creates a fairly objective and operational standard for determining which benefits should be non-countervailable since they do not distort the patterns of production in a country significantly. The fact that outside the United States there appears to be a consensus regarding the appropriateness of the test may help to further reduce political frictions caused by the application of the countervailing duty laws.

Nevertheless, Commerce's present policy of holding benefits that are provided on a non-discriminatory basis to all industries within a specific region potentially countervailable is incorrect. Generally, such benefits only affect the location of industries, not the patterns of production, and therefore, they do not affect the patterns of trade. As in the case of benefits which accrue to many industries, these regionally specific benefits should also be non-countervailable. It seems that no amendment of the statute would be necessary to enable Commerce to determine that these benefits are not countervailable because they do not benefit specific sectors of an economy.

Although benefits that accrue to a wide range of industries should not be countervailable, the fact that a benefit is conferred upon a specific industry does not *per se* mean that countervailing duties should be imposed if the subsidized imports cause injury to U.S. producers of a like product. One cannot always rely on the ITC's injury determination to prevent imposition of countervailing duties upon those sector- and/or region-specific subsidies that are efficient or do not affect international trade. This is especially important where an investigation involves both harmful and harmless subsidies and Commerce has to aggregate the amounts of the respective benefits. Since Commerce does not have the time, resources, and information to perform the detailed economic analyses to show the efficiency or trade effects of each particular subsidy, the burden of proof should be placed on the authority that grants the subsidy. Present U.S. countervailing duty law does not contain sufficient possibilities to rebut this presumption of inefficiency and distortive effects of subsidies. These grounds should therefore be expanded. If the government of an exporting country is able to prove that a particular benefit is efficient or does not affect international trade, Commerce should be able to deduct the amount of such benefits from the aggregate amount of any subsidies it had determined.

## APPENDIX

## SPECIFICITY GUIDELINES FROM GATT COMMITTEE OF SUBSIDIES AND COUNTERVAILING MEASURES.[159]

I

It is recognized that the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade intended that only certain government financial assistance measures — those measures which are granted "with the aim of giving advantage to certain enterprises" and which "are normally granted either regionally or by sector" (Article 11) — were to be considered subsidies.

II

In seeking to determine whether government financial assistance measures (hereinafter referred to as a measure) are specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as certain enterprises) and as such grant an advantage to those enterprises or industries over those available to other enterprises or industries the following considerations shall be taken into account:

(a) A measure may be specific to certain enterprises to the extent that restrictions on access are placed by the granting authority;
(b) In determining whether any restrictions on access to a measure exist, only those restrictions which affect access within the jurisdiction of the granting authority are to taken into account;
(c) Where the granting authority explicitly limits access to a measure to certain enterprises, such a measure would be specific;
(d) Where the granting authority acts to exclude certain enterprises from access to a measure, specificity may or may not exist;
(e) Where the granting authority establishes certain criteria or conditions for eligibility, no specificity would normally exist to the extent that the criteria or conditions for eligibility were based on neutral factors[160] and eligibility was automatic once the criteria or conditions were met;
(f) Evidence based in the above may not in certain cases give sufficient guidance for a finding of non-specificity. It may be necessary in those cases for the investigating authority to look beyond any nominal non-specificity of a measure to determine whether the measure is, nonetheless, *de facto* deliberately granting an advantage to certain enterprises. Any determination of specificity must be clearly substantiated;[161]

---

159. SCM/W/89, *reprinted in* Inside U.S. Trade, April 8, 1988.

160. Neutral factors would normally be economic in nature, and horizontal in application (i.e. not restricted to certain enterprises or industries); examples would be levels of unemployment, average *per capita* income, number of employees, amount of equity or revenues, but could also include such factors as incidence of pollution or health and safety standards.

161. It remains for the signatories to address the issue of regional specificity.

(g) Where neutral criteria are used by governments to determine access to a measure, they must be clearly spelled out in law or regulation and be capable of verification. In this regard, the granting authority should ensure that assistance is granted on the basis of the criteria established.

## III

In calculating the amount of the subsidy determined to exist in cases where the different potential subsidy programmes under consideration involve different levels of granting authority (*e.g.*, national, regional, local), only measures found to be specific within the jurisdiction of the granting authority for that measure shall be considered.