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James D. Southwick

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The Lingering Problem with the Specificity Test in United States Countervailing Duty Law

Virtually every product and service moving in international trade is affected by a government action that could be considered a subsidy in the broadest sense of the term.\(^1\) Technically, any government action, such as taxing, spending, or regulating, that reduces a producer's costs below what they would be absent government intervention is a subsidy.\(^2\) Almost every industry and product benefits from some such government action.

Despite the ubiquity of subsidies, United States law\(^3\) and international agreements\(^4\) recognize that certain subsidies in one country can injure industries in another country and that the injured country may have the right to protection from the harmful subsidy. Protection usually takes the form of a countervailing duty\(^5\) levied on an imported product to offset the subsidy received by its producers.\(^6\) Both United States countervailing duty law and the Subsidies Code,\(^7\) a multilateral agreement negotiated under the auspices of the General Agreement on Tariffs and Trade (GATT),\(^8\) take the view that a subsidy specifically designed to increase exports from one country

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2. See infra note 119 and accompanying text.
5. A countervailing duty is a tax on an import equal to the amount of the net subsidy on that import. 19 U.S.C. § 1671(a)(2)(B) (1983 & Supp. IV 1986). For example, in Certain Softwood Lumber Prods. from Can., 51 Fed. Reg. 37,453 (ITA 1986) (preliminary determination) (discussed infra note 50 and accompanying text), the Commerce Department's International Trade Administration (ITA) found that Canada's sale of lumber-cutting rights to Canadian lumber industries at less than market prices resulted in a subsidy of 14.542% of the price of the lumber imported into the United States. Id. at 37,458. The ITA thus recommended that a countervailing duty, or tax, of that amount be placed on the lumber imported from Canada. Id. at 37,453.
7. Supra note 4.
into others (an export subsidy) is unjustifiable.\textsuperscript{9} A subsidy calculated primarily toward achieving a domestic policy objective (a domestic subsidy), however, presents difficult legal and policy questions when it also indirectly causes injury to another country's industry. The right to protection from injury must be balanced against the realization that virtually every import—as well as every export—has benefited from some form of domestic subsidy.\textsuperscript{10}

Although the Subsidies Code presents no precise formula to achieve this balance,\textsuperscript{11} United States law limits potential actions against domestic subsidies in part by defining subsidy narrowly so that only certain kinds of government actions become countervailable subsidies.\textsuperscript{12} This Note argues that better results would follow from changing United States law to define domestic subsidy broadly and using de minimis limits on the subsidy's size to exclude certain government practices from the scope of protection. Part I of the Note summarizes the GATT structure for dealing with subsidies and United States countervailing duty law. Part II analyzes recent cases and bills and argues that the present law makes politically and economically unreasonable distinctions. Part III proposes that adoption of a new de minimis line would better meet the policy objectives underlying the countervailing duty law.

I. THE TREATMENT OF SUBSIDIES UNDER THE PRESENT LAW

A. GATT LAW AND UNITED STATES COUNTERVAILING DUTY LAW

United States countervailing duty law is constrained by United States obligations under the GATT Subsidies Code.\textsuperscript{13} The Code allows the individual signatory countries to enact countervailing duties to offset the effects of both export and domestic subsidies provided they find a subsidy, material injury, and a causal link between the subsidy and the injury.\textsuperscript{14} The Subsidies Code, however, does not precisely define subsidy.

\textsuperscript{9} 19 U.S.C. §§ 1671a, 1677(5)(1982 and Supp. IV 1986); Subsidies Code, supra note 4, at Art. 9(1).
\textsuperscript{11} See discussion of the Subsidies Code infra notes 13-19 and accompanying text.
\textsuperscript{12} See infra notes 24-25 and accompanying text.
\textsuperscript{13} Supra note 4.
\textsuperscript{14} Id. at Art. 2(1).
Further, although it gives examples of possible domestic subsidies, the Code does not suggest that these examples by themselves would constitute counteravailable subsidies. The Code also lists examples of export subsidies and prohibits their use. Generally, this list describes government practices that reward or otherwise favor exporters over producers for the domestic market.

In addition to allowing the individual countries to pursue their own countervailing duty actions within the broad limits just described, the Subsidies Code sets up procedures whereby a country claiming injury from another's subsidy may request consultations and bring the dispute before a committee of the GATT for resolution.

United States countervailing duty law authorizes the

15. Id. at Art. 11(3) (signatories recognize that objectives mentioned above may be achieved, inter alia, by means of subsidies granted with aim of giving advantage to certain enterprises; examples are government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programs; fiscal incentives; and government subscription to, or provision of, equity capital).

16. Id. at Art. 11(4).

17. Id. at Art. 9. The Annex to the Subsidies Code, supra note 4, provides an extensive list of examples of export subsidies. Id. at Annex. Some examples are: the provision by governments of direct subsidies to a firm or industry contingent upon export performance; the provision of transport charges to export shipments at a more favorable rate than to domestic shipments; the provision of inputs to manufacturers of export products at favorable rates; exemption from taxes or fees for exporters; the reduction of import charges for inputs to export industries; and special export finance programs.

18. Id. at Art. 9.

19. Id. at Art. 12-13. Because export subsidies are prohibited under the Code, id. at Art. 9, a country may invoke the GATT dispute settlement procedures whenever it "has reason to believe that an export subsidy is being granted or maintained by another signatory ...." Id. at Art. 12(1). Domestic subsidies are not prohibited, and a country may invoke dispute settlement procedures only when it has reason to believe that the subsidy either causes injury, nullifies or impairs benefits accruing to it under GATT, or causes serious prejudice to its interests. Id. at Art. 12(3).

20. 19 U.S.C. §§ 1671-1677g (1983 & Supp. IV 1986). Section 1671(a) reads as follows:

(a) 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 country, or a corporation, association, or other organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the
Commerce Department's International Trade Administration (ITA) to determine whether a country is subsidizing a product imported into the United States and the amount of the subsidy. If the ITA finds a subsidy, the International Trade Commission (ITC) decides whether the subsidy has materially injured the American producer. If the ITC finds material injury, it must impose a countervailing duty on the subsidized import to offset the value of the subsidy.

United States law thus erects two barriers to limit the number of claims that American producers can potentially bring for countervailing duties: the required finding of a subsidy and proof of material injury. In the case of domestic subsidies, the law makes the first barrier quite formidable by using a narrow meaning of subsidy. The statute defines domestic subsidy to mean only a subsidy conferred on a specific enterprise,

manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, 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, or by reason of sales (or the likelihood of sales) 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.

Id. § 1671(a).

The phrase "country under the Agreement" refers to countries that have signed the Subsidies Code, or a substantially equivalent agreement, or have otherwise been determined to meet certain requirements. § 1671(b)(1)-(3). For countries not "under the Agreement", § 303 of the Trade and Tariff Act of 1930 (TAA) applies. 19 U.S.C. § 1303 (1982). The definition of subsidy in § 303 has the same legal meaning as under the TAA. Cabot Corp. v. United States, 620 F. Supp. 722, 730 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986). Section 303, however, has no material injury requirement. See Bello & Holmer, Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test, 18 GEO. WASH. J. INT'L L. & ECON. 297, 297 n.1 (1984).

22. §§ 1671(a)(2), 1677(2).
23. § 1671(a).
24. § 1677(5). The definition of "subsidy" actually encompasses both "export subsidy" and "domestic subsidy." §§ 1677(5)(A)-(B). The statute explains the meaning of export subsidy by referring to an illustrative list of export subsidies contained in an annex to the Subsidies Code. Id. (referring to illustrative list of export subsidies found in Subsidies Code, supra note 4, at Annex; list is summarized supra note 17).
industry, or group of enterprises or industries.\textsuperscript{25}

\section*{B. The Specificity Test: Cases and Congressional Response}

Based on the statutory definition of domestic subsidy, the ITA and the United States Court of International Trade (CIT) have developed a specificity test to determine whether a government program constitutes a domestic subsidy. The specificity test states that only a government program conferring benefits on specific enterprises or industries is a domestic subsidy.\textsuperscript{26} Thus, a government program generally available to many or all producers in the country is not a domestic subsidy giving rise to countervailing duties.\textsuperscript{27}

The ITA created a political controversy in the early 1980s by using the specificity test to deny countervailing duty protection to some American industries hard hit by import competition. Several American producers faced foreign competition that received natural resource inputs at prices considerably lower than the Americans had to pay for similar resources at

\textsuperscript{25} 19 U.S.C. § 1677(5)(B). The definition in full reads as follows:

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

(A) Any export subsidy 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.

\textit{Id.} § 1677(5).

\textsuperscript{26} PPG Indus. v. United States, 662 F. Supp. 258, 264 (Ct. Int'l Trade 1987) (holding that government program is not countervailable unless it bestows benefit on specific class of industries); Cabot Corp. v. United States, 620 F. Supp. 722, 732 (Ct. Int'l Trade 1985) (same), \textit{appeal dismissed}, 788 F.2d 1539 (Fed. Cir. 1986); Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 837-38 (Ct. Int'l Trade 1983) (upholding ITA's determination that government program was not subsidy within meaning of countervailing duty law unless conferring benefit upon specific enterprise or industry).

\textsuperscript{27} Carlisle, 564 F. Supp. at 837-38.
home or on the world market. The American producers claimed the lower foreign prices were subsidies. The ITA, however, refused to impose countervailing duties because the low-priced resources were generally available programs and therefore did not meet the definition of a domestic subsidy under the specificity test.

In Carbon Black from Mexico (Carbon Black I), for example, the government-controlled oil company PEMEX sold carbon black feedstock to Mexican carbon black producers at a price well below the world market price. The Mexican price was reportedly two dollars per barrel while the world market price was twenty-six dollars, and the feedstock reportedly accounted for about seventy percent of the cost of producing carbon black. Nevertheless, the ITA held that the cheap sales of feedstock did not amount to a countervailable domestic subsidy because the program was not specific. Indeed, "all industrial users of carbon black feedstock and natural gas in Mexico [could] obtain these goods at the same price." The ITA reached this conclusion even though only two users in all of Mexico were buying the cheap feedstock, both of which were carbon black plants.

In another controversial case, Certain Softwood Lumber Products from Canada (Softwood I), United States lumber


29. See cases cited supra note 28.


producers claimed that Canadian federal and provincial governments sold rights to cut timber, called stumpage rights, to the lumber industry at prices amounting to a subsidy.\textsuperscript{37} They argued that Canadian stumpage rights were sold at about one-tenth of the price of comparable stumpage rights in the United States.\textsuperscript{38} Paralleling its conclusion in the \textit{Carbon Black I} case, the ITA determined that the Canadian programs did not provide cheap lumber rights “only to a ‘specific enterprise or industry, or group of enterprises or industries’” because all industries interested in the lumber could obtain rights to it at the same price.\textsuperscript{39} Thus, the stumpage programs were generally available and not countervailable.

In response to \textit{Carbon Black I}, similar cases involving Mexico’s sales of cheap energy to its industries,\textsuperscript{40} and \textit{Softwood I}, in 1983 and 1985 members of Congress considered actions that would have specifically excluded natural resource subsidies from the requirements of the specificity test, thereby allowing countervailing duties against generally available natural resource programs.\textsuperscript{41} Both measures eventually failed\textsuperscript{42} because Congress feared that passing the bills might invite mirror legislation by trading partners against United States export industries,\textsuperscript{43} especially if the bills were viewed as violations of the

\begin{itemize}
\item \textsuperscript{37} \textit{Id.} at 24,167.
\item \textsuperscript{38} \textit{United States–Canadian Trade: Hearings Before the Subcomm. on Monetary and Fiscal Policy of the Joint Economic Comm. of the Congress of the United States, 99th Cong., 2d Sess. 2} (1986) (statement of Sen. Symms) [hereinafter \textit{Hearings on U.S.–Canadian Trade}]; Memorandum Concerning the Appropriate Measure of Canadian Lumber Subsidies: The Preferential Pricing of Canadian Government Timber at 16 (submitted by the petitioners, the Coalition for Fair Lumber Imports, to the ITA Sept. 9, 1986).
\item \textsuperscript{39} \textit{Softwood I}, 48 Fed. Reg. at 24,168.
\item \textsuperscript{41} See Bello & Holmer, supra note 20, at 316-19 (discussing actions considered).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 327-28; see also Dual Pricing of Natural Resources, Hearing Before the Subcomm. on International Trade of the Comm. on Finance of the United States Senate, 99th Cong., 2d Sess., 39 (1986) (statement of Gilbert Kaplan, Ass’t Secretary for Import Admin., Dep’t of Commerce) (arguing that if Congress passes natural resources provision before it, other governments are likely to use mirror legislation to strike at United States resource practices); \textit{id.} at 27 (statement of Alan Holmer, Deputy U.S. Trade Rep.) (arguing that following course of pending bills and disregard specificity standard will open Pandora’s box, and other countries could and would use mirror legislation to
GATT Subsidies Code.\textsuperscript{44}

Amidst this controversy surrounding the natural resource subsidy cases and the natural resource subsidy bills, the CIT issued a decision in the fall of 1985 that modified the specificity test. \textit{Cabot Corp. v. United States}\textsuperscript{45} involved an appeal to the CIT of the ITA's final determination in the \textit{Carbon Black I} case.\textsuperscript{46} Cabot argued, among other things, that the ITA had incorrectly applied the specificity standard.\textsuperscript{47} Because only two Mexican producers used carbon black feedstock, Cabot argued, the program to sell feedstock below the world market price was a specific subsidy regardless of whether the Mexican law on its face made the cheap feedstock generally available to all Mexican industries.\textsuperscript{48} The CIT agreed with Cabot, holding that when a government program, nominally available to all industries, only works to confer a benefit on specific enterprises or industries, the program meets the test for a countervailable subsidy.\textsuperscript{49}

\textsuperscript{44} Hearing on Dual Pricing, supra note 43, at 27. Debate has raged on the question of whether the Subsidies Code actually requires the specificity test. Consider this discussion between Senator Baucus and Alan F. Holmer, Deputy United States Trade Representative:

\textit{Senator BAUCUS:} Mr. Holmer, you seem to say, in fact expressly say that this bill is GATT-illegal, whereas I am sure you know, in the GATT subsidies code, there is no language which requires the kind of specificity which you claim it requires . . . . Where is the language that requires it?

\textit{Mr. HOLMER:} Lawyers, both American and non-American, look at that language [in the Subsidies Code and GATT] and can, fairly say, “it is not crystal clear; you could argue that countervailing generally available benefits is permissible.”

\textit{Id.} at 43.

Mr. Holmer nevertheless argued that a tacit international understanding surrounded the specificity test and that any action by Congress which could be construed as a violation of that understanding would lead to retaliation against United States exports. \textit{Id. at} 25-27; see also \textit{Note, The Natural Resources Subsidy Bills: Should They Be Adopted?}, 20 CORNELL INT'L L.J. 197, 217-18 (1987) (arguing that excepting natural resources from specificity test would not violate Subsidies Code).

\textsuperscript{46} \textit{Id.} at 725-28.
\textsuperscript{47} \textit{Id.} at 728-29.
\textsuperscript{49} 620 F. Supp. at 732. The court stressed that a law making benefits generally available on its face could in practice accrue benefits to specific in-
The Cabot decision's change in the specificity test led to the reversal of two earlier controversial natural resource decisions—Carbon Black I and Softwood I.\textsuperscript{50} The reversal of the

dustries. \textit{Id.} at 731. The appropriate standard focused on "the \textit{de facto} case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." \textit{Id.} at 732.

50. The first reversal involved the carbon black feedstock sales that were the subject of Carbon Black I, 48 Fed. Reg. 29,564 (ITA 1983) (final determination) and Cabot. The Cabot court did not actually decide that Mexico's subsidies on carbon black feedstock were countervailable, but only that the ITA had used the wrong test to determine specificity. 620 F. Supp. at 731-33. The court ordered the case remanded to the ITA for determination whether the subsidized sale of carbon black feedstock to the carbon black producers in fact benefited a specific industry under the new test the court prescribed. \textit{Id.} at 734. The ITA applied the new standard and held that the carbon black program applied to a specific industry, Carbon Black from Mexico (Carbon Black II), 51 Fed. Reg. 13,269, 13,271 (ITA 1986) (preliminary review), \textit{affirmed}, Carbon Black from Mexico (Carbon Black III), 51 Fed. Reg. 30,385 (ITA 1986) (final results), but that the program did not provide preferential prices within the meaning of the definition of subsidy. \textit{Carbon Black II}, 51 Fed. Reg. at 13,271. The Cabot case also led the ITA to reverse its determination in the Softwood I case, which had held the Canadian lumber programs were not countervailable. \textit{Softwood I}, 48 Fed. Reg. 24,159, 24,167 (ITA 1983) (final determination). Based on the Cabot decision and the petitioner's finding of new evidence, the ITA decided to rehear the case. Certain Softwood Lumber Prods. from Can. (\textit{Softwood II}), 51 Fed. Reg. 37,453, 37,455 (ITA 1986) (preliminary determination). The ITA found that the stumpage program did amount to a countervailable subsidy. \textit{Id.} at 37,457. The United States and Canada agreed to a settlement of the dispute before the ITA made its final determination. 4 Int'l Trade Rep. (BNA) No. 1, at 6 (Jan. 7, 1987). Under the settlement, Canada agreed to impose a 15% export tax on its softwood lumber exports to the United States. \textit{Id.}

Although the ITA in \textit{Softwood II} stated that the Cabot case had influenced its decision to reconsider the \textit{Softwood I} determination, 51 Fed. Reg. at 37,455, the reversal of \textit{Softwood I} arguably depended on a finding of new facts applied to legal standards in existence before Cabot and not necessarily on Cabot's expanded specificity test. In \textit{Softwood I} the ITA had denied the petitioners relief for several reasons: the government made the subsidies nominally available to any Canadian user; the subsidies in fact benefited several industries including the lumber and wood products industry, the paper and pulp industry, and the furniture manufacturing industry; any actual limit on the number of industries benefiting from the subsidy was due to the inherent nature of the product and technology; and the pricing scheme for lumber-cutting rights employed by the Canadian government was not "preferential" within the meaning of the TAA. 48 Fed. Reg. at 24,167.

In \textit{Softwood II} the ITA stressed new evidence that the provincial administrators of the stumpage rights programs exercised discretion to distort the benefits of the programs in favor of the lumber industry to the detriment of the pulp industry. 51 Fed. Reg. at 37,456. In other cases the ITA has held that a domestic benefit program is countervailable whenever the government does not employ neutral criteria in deciding who will benefit from the program. Carbon Steel Wire Rod from Saudi Arabia, 51 Fed. Reg. 4206, 4210 (ITA 1986) (final determination) (providing of basic infrastructure does not confer
Carbon Black and Softwood I cases apparently helped placate Congress. Rather than seeking legislation to exclude natural resource programs from the specificity test as in 1983 and 1985, members of Congress introduced bills, presently pending, that would codify the Cabot version of the specificity test as the statutory definition of a domestic subsidy. Several members of countervailable subsidy if government does not limit who can move into area where infrastructure has been built); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,061-62 (ITA 1986) (final determination) (same). The ITA had not found the neutral criteria test violated in its first determination of the case. The fact that the ITA found new evidence that the neutral criteria test was violated in its second determination, Softwood II, 51 Fed. Reg. at 37,456, would have been sufficient grounds to find the subsidy countervailable even without the Cabot case.

The ITA also found new evidence that brought the Softwood II case within the Cabot rule. The ITA reversed its earlier conclusion that the benefits of the stumpage program were generally available. Id. In fact, the ITA decided, the program did benefit a specific industry or group of industries. Id. Although in its earlier determination the ITA found that the stumpage program bestowed benefits on several different industries, including the lumber and wood products industry, the paper and pulp industry, and the furniture industry, Softwood I, 48 Fed. Reg. at 24,167, the ITA in its second determination found that the furniture industry received no significant benefit and that the wood, wood products, paper, and pulp industries were essentially one industry. Softwood II, 51 Fed. Reg. at 37,456-57. As a result of this conclusion, together with the ITA's next finding that the prices under the stumpage program were in fact preferential, id. at 37,457, the ITA held that the stumpage program satisfied the specificity test and was a countervailable subsidy. Id. at 37,457-58.

The case becomes more confusing, however, because this alternative holding conflicts with the ITA's first holding, that the stumpage program violates the neutral criteria test. To find that the neutral criteria test was violated, the ITA had to conclude that the stumpage program discriminated in favor of the wood and wood products industry to the detriment of the paper and pulp industry. See id. at 37,456. This implied that the wood and wood products industry was a separate industry from the paper and pulp industry. In the alternative holding, however, the ITA concluded that the wood and wood products and paper and pulp industries were one horizontally integrated industry, together constituting a specific industry receiving a government benefit. Id. at 37,456-57. Within the same opinion, then, the ITA has asserted both that the wood and wood products and the paper and pulp industries were two separate industries and that they were part of one industry. The precedential value of the opinion is therefore questionable.

Congress have expressed their approval of the *Softwood I* re-

the Senate Committee on Finance May 5, 1987, and was incorporated into S. 1420 on June 24, 1987. S. 1420, 100th Congress, 1st Sess. (1987). S. 1420 was introduced June 24, 1987 and debated on the Senate floor without referral to a committee. After H.R. 3 passed the House and was sent to the Senate, the Senate incorporated S. 1420 into H.R. 3 and passed that bill on July 21, 1987. As of April 4, 1988, the bills remain in conference committee. Both would amend the definition of domestic subsidy found in 19 U.S.C. § 1677(5) (1982) by adding a special rule to interpret the old definition. The special rule states the *Cabot* rule. The relevant section of the Senate bill reads as follows:

(5) **SUBSIDY.**—

(A) IN GENERAL.—The term “subsidy” has the same meaning as the term “bounty or grant” as that term is used in section 303, and includes, but is not limited to, the following:

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

(ii) 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 expense of manufacture, production, and distribution.

(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.


Subparagraph A of this section is identical to the previous law under 19 U.S.C. § 1677(5) (1982), except that the subsection headings are ranked to accommodate the addition of the special rule of subparagraph B. The Senate Committee on Finance expressly stated its intent that this special rule codify the holding of *Cabot Corporation v. United States*. *Id.* at 122.

The relevant section of the House bill also leaves the previous definition of subsidy untouched, except for the addition of its own special rule similarly, though not identically, worded to the Senate version:

(B) **SPECIAL RULE.**—In applying subparagraph (A), the administering authority, in each investigation, shall determine whether the benefits under the bounty, grant, or subsidy are actually paid to or bestowed on a specific enterprise or industry, or group of enterprises or industries. A nominal general availability, under the terms of the law
or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not cause for determining that the bounty, grant, or subsidy cannot be, or has not been, paid or bestowed on a specific enterprise or industry, or group thereof.

H.R. 3, supra.

The report of the House Committee on Ways and Means also explicitly states the Committee’s intention to codify the holding of the Cabot case. HOUSE COMM. ON WAYS & MEANS, REPORT TO ACCOMPANY H.R. 3, H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 123 (1987) [hereinafter WAYS AND MEANS REPORT ON H.R. 3]. The House bill goes beyond the Senate bill by creating a new rule on the determination of preferential rates. In the past the ITA took a narrow view of what constituted preferential rates for the purposes of § 677(5)(B)(ii) of the TAA. 19 U.S.C. § 1677(5)(B) (1982). This section states that “[t]he provision of goods or services at preferential rates” to a specific enterprise or industry, or groups thereof, [is] a countervailable subsidy. Id. In cases such as Carbon Black I, 48 Fed. Reg. 29,564, 29,566 (ITA 1983) (final determination), and Softwood I, 48 Fed. Reg. 24,159, 24,168 (ITA 1983) (final determination), the ITA had ruled that preferential pricing existed only when different industries in the same country had paid different prices for the same good or service. The ITA had not determined preferential pricing to exist when a government sold its goods or services at home for less than its export price or for less than commercial considerations would otherwise allow. See WAYS AND MEANS REPORT ON H.R. 3, supra, at 124-25. The Cabot court criticized the ITA’s reasoning as being tautological. Cabot, 620 F. Supp. at 732-33. The ITA subsequently introduced the preferentiality appendix in its reconsideration of the Carbon Black case. Carbon Black II, 51 Fed. Reg. 13,269, 13,272-73 (ITA 1986) (preliminary determination). Under the preferentiality appendix, the ITA stated that to find a preferential price it would look first at whether the government generally sold similar goods or services at a higher price to another domestic firm. Id. at 13,272. If the government did not sell the same good or service to other buyers, the ITA would look next to whether other sellers sold similar goods or services, comparing their price to the government’s price. Id. at 13,272-73. The third alternative would be to look to the government’s cost of producing the goods or services to determine whether the government sold the goods or services below cost. Id. at 13,273. The final comparison would be to external prices, such as the export price or the world market price. Id. H.R. 3 would codify a similar preferentiality index into law:

(C) DETERMINATION OF PREFERENTIAL RATES.—For purposes of determining under subparagraph (A)(ii)(II) whether the rate at which goods or services are provided is preferential, the administering authority shall compare such rate with the following:

(i) The freely available and market-determined rate at which such or similar goods or services are provided within the country.

(ii) If a rate cannot be determined under clause (i), an appropriate rate applicable to external transactions regarding such or similar goods or services, including, but not limited to—

(I) the rate (if different from the rate subject to investigation) at which the government provides such or similar goods or services for export;

(II) the world market rate if any, for such or similar goods or services; or

(III) the freely available and market-determined rate at which such or similar goods or services are provided within another country that has a market for the goods or service
versal and their belief that enacting the Cabot test would adequately tighten United States countervailing duty law, thereby avoiding the kind of conflicts arising over the earlier natural resource cases.

A recent case, however, suggests that the Cabot expanded specificity test will not prevent the recurrence of controversial natural resource cases similar to those Congress had considered unacceptable. In PPG Industries v. United States, the CIT reviewed a pre-Cabot ITA determination that the Mexican government's sale of natural gas to Mexican float glass producers at below world market prices did not amount to a countervailable subsidy because the natural gas was generally available to all Mexican industries. The appellant argued that the specificity test conflicted with "the legislative history and purpose of the countervailing duty law" and that any government program that had the effect of reducing the cost of producing or exporting a good must be countervailed. The CIT rejected the petitioner's contention and applied the Cabot de facto specificity standard. Using this lower specificity standard, the court up-

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that is similar to the market of the country subject to the investigation.

(iii) If a rate cannot be determined under clause (ii), a rate determined by the administering authority, on the basis of the best information available to it, that reflects—

(I) the cost of producing the goods or providing the services;

and

(II) a reasonable profit for such production or provision.


52. See, e.g., WAYS AND MEANS REPORT ON H.R. 3, supra note 51, at 126 (favoring the broader Cabot interpretation).

53. Id.; see also FINANCE COMMITTEE REPORT ON S. 490, supra note 51, at 122-23 (expressing Committee's approval of Cabot standard).

54. 662 F. Supp. 258 (Ct. Int'l Trade 1987). PPG Industries was decided May 15, 1987. The House trade bill, H.R. 3, supra note 51, passed the House floor on April 30, 1987. The Senate trade bill, S. 490, supra note 51, passed its final committee, the Senate Finance committee, on May 7, 1987. It was incorporated into S. 1420 on June 24, 1987, and S. 1420 was then incorporated into H.R. 3, which passed the Senate on July 21, 1987. It is therefore safe to assume the PPG Industries case received no consideration from the House and little if any from the Senate.

55. Float glass, a type of flat glass, is produced by floating molten glass over a bed of molten tin. PPG Indus., 662 F. Supp. at 260 n.1.


57. PPG Indus., 662 F. Supp. at 264.

58. Id.

59. Id. at 265.
held the ITA's finding that "the float glass companies paid the published price for natural gas that was available to all industries and therefore received no countervailable benefit." 60 PPG Industries thus clarified the Cabot rule to mean that when a government program is nominally generally available and in fact widely used, the program is not a countervailable subsidy. Two cases immediately following PPG Industries further reinforced this reading of Cabot. 61

In upholding the ITA's determination that the Mexican natural gas program did not warrant countervailing duties, the CIT implicitly reaffirmed several pre-Cabot cases involving precisely the same Mexican energy policies. 62 These and other Mexican energy decisions like Carbon Black I had contributed greatly to the controversy in Congress leading to the introduction of the 1983 and 1985 bills. 63 The fact that the PPG Industries decision implicitly reaffirmed these earlier unpopular decisions suggests that the potential for controversy over the specificity test continues, even in its post-Cabot form. The likelihood that the specificity test will continue to generate politically unpopular decisions highlights the need to consider alternatives to the test. A proposal to change the specificity

60. Id. at 272.
61. See Can-Am Corp. v. United States, 664 F. Supp. 1444, 1448-49 (Ct. Int'l Trade 1987) (Mexican government's sale of fuel oil to Mexican lime producers at price significantly below export price of Mexican fuel oil did not amount to countervailable subsidy because all domestic industrial users could obtain fuel oil at same price, group of domestic industrial users was not specific group, and lime producers did not benefit as specific enterprise or industry even though they used significantly more fuel oil than many other industries benefiting from cheap sales of fuel oil); Al Tech Specialty Steel Corp. v. United States, 661 F. Supp. 1206, 1212-13 (Ct. Int'l Trade 1987) (benefits conferred on Spanish steel producer in bankruptcy reorganization were not countervailable subsidies because benefits were not limited to specific industries but accrued generally to industries in bankruptcy).
62. Specifically, in the cases of Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 43,063, 43,066 (ITA 1983) (final determination) and Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522, 28,524 (ITA 1983) (final determination), the ITA had denied the petitioners protection from imports benefiting from the natural gas and petroleum programs because they were generally available. Because these subsidies were the same as in the later Float Glass case, the ITA made its decision in the Float Glass case simply by referring to the earlier decisions. 48 Fed. Reg. at 56,095-96.
63. See Hearing on Dual Pricing, supra note 43, at 3 (while dual pricing of natural resources is practiced by many countries, Mexico's practices have received most attention); see also Bello & Holmer, supra note 20, at 316-17 (aim of proposals to reform specificity test in 98th Congress was to overturn Mexican natural resource decisions).
test can best be developed by looking to the policies underlying the specificity test.

C. RATIONALE FOR THE SPECIFICITY TEST

Three policy goals underlie the specificity test. First, the test supposedly serves as a practical limit on the number of possible claims United States industries can bring against subsidies in foreign countries. Such a practical limit on the number of countervailing duty actions is needed because all industries in every country receive some direct or indirect government benefits.64 A rule that made every government benefit a countervailable subsidy would mean that every product imported into the United States potentially would be tainted by a subsidy.65 If other countries adopted similar rules, virtually every United States export also would be tainted by a subsidy.66 As a result, the United States and its trading partners would face essentially no limit in enacting countervailing duties against one another's exports. This possibility made it necessary to define subsidy narrowly to include only specific benefits.67 Indeed, concern that mirror legislation by other countries would damage United States exports if this country

65. Id.
66. Id.
67. Id. at 838-39. In Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int'l Trade 1984), the court in dicta criticized the specificity test because it denied American producers protection from imports receiving a government advantage just because the program conferring the advantage was generally available in the competitor's country. Id. at 1241-45. The Bethlehem court wrote:

Can it be argued that financial assistance which is inconsistent with commercial considerations is no longer a subsidy when it is part of the basic policy of a government and available to all businesses? This approach cannot be reconciled with the fundamental purpose of the law which must extend to certain commercial advantages even when a country has chosen to make them universally available. The question is not what is normal in the economy under investigation, but rather what is reconcilable with the standards of commercial fairness envisioned by the countervailing duty law.

Id. at 1242. The court further contended that the specificity test has "no support in logic or law." Id. In spite of this dicta, the CIT has continued to be concerned with the Carlisle absurdity and has repeatedly cited the Carlisle court's reasoning to support a decision requiring some degree of specificity to find a countervailable subsidy. See, e.g., PPG Indus. v. United States, 692 F. Supp. 255, 266 (Ct. Int'l Trade 1988); Cabot Corp. v. United States, 620 F. Supp. 722, 731-32 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986).
discontinued adherence to the specificity test strongly influenced Congress's decision not to pass bills eliminating the test.  

Second, some scholars maintain that the specificity test minimizes the distortive economic effects of countervailing duties by separating subsidies which distort economic efficiency from those that do not. The economic theory of comparative advantage suggests that gains from international trade are maximized when countries export goods that they can produce relatively more efficiently than producers in other countries and import goods that other countries can produce more efficiently. A specific subsidy supposedly misallocates resources away from a country's efficient industries into its inefficient ones, thereby raising prices for importers of the affected products. An example concisely illustrates the argument:

68. See supra notes 42-44 and accompanying text.

69. See Panzarella, supra note 32, at 423-24 & n.30 (citing ITA determinations and Commerce Department paper).

70. See id. (describing theory as rationale for specificity test).


72. See id. at 13-14 (defining concept of comparative costs). The theory can be stated more formally: Efficiency for purposes of this theory is defined in terms of opportunity cost, or the number of units of the production of one good a country must give up to gain one additional unit of production of another good. Id. A difference in opportunity costs among countries brings advantages from trade. Id. Consider this example from Pen's discussion:

Suppose that in one country (call it the United States) the mass production of cars is highly efficient and that there is a good deal of automation in the industry. The production of bicycles is somewhat less developed and less efficient than the automobile industry. In another country, a small one (call it Bicyclia)—the situation is the other way round. [Suppose Bicyclia is highly efficient at producing bicycles.] . . . And suppose that all this results in a cost ratio of 1 car to 50 bicycles in the United States and of 1 car to 100 bicycles in Bicyclia.

If that is the case, a little thought will show that it is to the advantage of the United States to specialize in the production of cars, export some of them to Bicyclia, and then get back a number of bicycles. For if the Americans manufacture[d] their own bicycles, they would have to sacrifice 1 car for every 50 bikes produced. But the Bicyclians will be prepared to offer more than 50 bicycles (but less than 100) for 1 American car. This is a profitable deal for the American economy as a whole [and for the Bicyclian economy].

Id. at 14-15. A domestic subsidy creates inefficiencies by distorting the natural opportunity costs within the country. If the United States government in Pen's example were to subsidize the production of bicycles so that after the subsidy the cost ratio between cars and bicycles in the United States were 1 to 100, the importation of bicycles from Bicyclia would cease because no price differential would exist. Cf. id. at 14 (arguing that difference in costs brings gains from trade). The protected United States producers of bicycles would receive increased profits from the subsidy, but all United States taxpayers would have to pay for the subsidy. See L. Winters, International Economics 70
[Suppose a country, Utopia, offers a subsidy on domestic shoe production.] The misallocation of resources to shoe production in Utopia would generate higher costs and hence higher prices for some other Utopian product, for example, widgets. If the United States is an importer of Utopian widgets, it will be hurt by the higher widget prices. 73

Scholars assert that a generally available benefit, on the other hand, does not distort the allocation of resources within a country because the benefit accrues to all industries equally. 74 Thus in the shoe and widget example, a generally available subsidy would reduce the shoe makers’ and widget makers’ costs by exactly the same percentage. As a result the generally available subsidy would not induce a reallocation of resources from the widget industry to the shoe industry and would not raise the price paid in the United States for imported Utopian widgets. 75

Finally, the specificity test is based on notions of fairness regarding the appropriate role for government in the economy. United States producers generally consider it unfair to have to compete against foreign rivals run or propped up by their governments when at home United States producers must follow the “survival of the most efficient” rule of free competition. 76

(3d ed. 1985). The amount of the increased taxes needed to pay for the subsidy would exceed the amount of increased profits to the bicycle industry. See id. But see Brander, Rationales for Strategic Trade and Industrial Policy, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS 23, 28-29 (P. Krugman ed. 1986) (arguing that when conditions of oligopolistic competition, as opposed to perfect competition, prevail, subsidy will result in increased profits to domestic producers in excess of cost to taxpayers supporting subsidy). Bicyclia also would suffer because it would no longer be able to buy American cars for a cheaper price (in terms of bicycles) than it pays for its own inefficiently made cars. Cf. J. PEN, supra note 71, at 18 (bicycles will be cheaper in Bicyclia only in absence of barriers to trade); Barceló, The Two-Track Subsidies Code—Countervailing Duties and Trade Retaliation, in NON-TARIFF BARRIERS AFTER THE TOKYO ROUND 121, 132 (J. Quinn & P. Slayton eds. 1982) (inefficient subsidy in one country can have negative impact in another). Even if the United States government in this example did not provide a subsidy large enough to eliminate all difference in opportunity costs between the United States and Bicyclia, global wealth would still be reduced by the subsidy. On the United States side, the amount of the subsidy would still exceed the extra profits gained by United States bicycle producers because of the subsidy. See L. WINERS, supra, at 70. Bicyclians also would pay more in terms of bicycles to get one American car. J. PEN, supra note 71, at 12-21; Barceló, supra, at 132.

73. Barceló, supra note 72, at 132.
75. See id. (generally available domestic subsidies accrue benefits to all industries in economy).
76. Barceló, Subsidies, Countervailing Duties and Antidumping After the
At the same time, United States producers expect their government to provide certain kinds of generally available benefits, such as education, defense, and roadbuilding.\textsuperscript{77} It therefore seems fair to enact countervailing duties only against specific foreign subsidies that are not analogous to the generally available programs considered acceptable aims of government.\textsuperscript{78}

II. THE OPERATION OF THE SPECIFICITY TEST

Although the specificity test is based on three policy objectives—providing a practical limit to the number of countervailing duty actions, combating economic distortion, and bringing fairness to trade—in operation the test serves only the first goal well.


America continues to pursue market-based policies, emphasizing that government plays a major role in setting overall economic policy and regulating domestic and international markets, but that decisions on production, research, wages, investments, sale of technology, and long-term industrial strategy should be left to private companies.

Many countries take another approach. France and Japan are the leading examples of industrial countries that relied on extensive government guidance and intervention. Even in free-market Germany, government spending and government policy play a far greater role than they do in the United States.

\textit{Id.; see also Hearing on Dual Pricing, supra} note 43, at 47 (statement of Sen. Baucus) (on per capita basis subsidies in most every other country greatly exceed all subsidies in this country); \textit{G. Hufbauer & J. Shelton-Erb, Subsidies in International Trade 3,} tables 1.1 & 1.2 (1994) (giving statistics showing United States has fewer subsidies than its major trading partners).

\textit{77. See PPC Indus. v. United States, 662 F. Supp. 258, 265 (Ct. Int’l Trade 1987) (mentioning infrastructure, education, and national defense as generalized public benefits); Cabot Corp. v. United States, 620 F. Supp. 722, 731 (Ct. Int’l Trade 1985) (same), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986); Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 838 (Ct. Int’l Trade 1984) (public highways and bridges, as well as generalized tax credit for expenditures on capital investment, should not give rise to countervailing duties); see also Hearing on Dual Pricing, supra} note 43, at 46 (statement of Gilbert Kaplan, Deputy Ass’t Secretary for Import Admin., Dep’t of Commerce) (“If you talk about a public highway or if you talk about hospitalization or if you talk about public education, these are things that governments do, and they are not really subsidies.”).

\textit{78. Hearing on Dual Pricing, supra} note 43, at 42 (Gilbert Kaplan, Deputy Ass’t Secretary for Import Admin., Dep’t of Commerce) (broad-scale interventions in economy should not create countervailing duties because every nation, including United States, uses them).
A. The Practical Limit on the Number of Countervailing Duty Actions

The specificity test has served effectively as a practical limit on the number of successful actions for countervailing duties against domestic government benefit programs. Indeed, the ITA and CIT in several cases have used the specificity test to deny petitioners the protection they sought.79 Members of Congress and the executive branch also have recognized the specificity test's role in drawing a line to prevent too many countervailing duty actions against subsidies.80 In fact, the fear of having no practical limit on the number of possible countervailing duty actions, and of thereby creating a vicious cycle of protection, was the primary reason Congress hesitated to discard the specificity test for natural resource subsidies.81

1. The Economic Objective

The argument that specific domestic subsidies distort trade while generally available programs do not ignores that, in practice, many generally available government programs do distort trade because they do not affect all industries' costs equally.82 For example, the ITA ruled that the Mexican government's sale of natural gas to its industries at less than the world market price was a generally available program not countervailable under United States law.83 Yet common sense suggests that Mexico's natural gas price controls reduced costs in industries that used a large amount of natural gas in their production more than in industries that used less or even no

79. See supra notes 26-31 and accompanying text.
80. See Hearing on Dual Pricing, supra note 43, at 43 (statement of Sen. Baucus) ("[D]oesn't this really come down to where you draw the line? That is what this is all about."); id. at 42 (statement of Gilbert Kaplan, Deputy Ass't Secretary for Import Admin., Dep't of Commerce) ("[Y]ou have got to draw the line at some point, and we think this bill goes too far.").
81. See supra note 43 and accompanying text (discussing reasons for Congress's failure to pass earlier natural resource bills).
82. See supra notes 70-75 and accompanying text.
83. Panzarella, supra note 32, at 424 (even generally available subsidy will distort resource allocation if it accrues greater relative benefit to certain sectors of economy).
natural gas. By affecting costs in different industries disparately, a generally available program such as Mexico's cheap natural gas sales induces a reallocation of resources into the industries benefited by the program—those that use a large amount of the subsidized resource—and away from the industries not benefited—those that use little or none of the subsidized resource. This reallocation of resources distorts the operation of comparative advantage by artificially inducing a shift in the use of resources away from the more efficient users. 85

Even among the Mexican industries that used significant amounts of natural gas in their manufacturing processes, the reduced price affected each industry’s costs differently. For example, ammonia producers claimed that natural gas comprised 80% of the cost of producing ammonia, 86 whereas a float glass producer stated that natural gas constituted only 20 to 30% of the cost of manufacturing float glass. 87 Witnesses before Congress claimed that the Mexican government sold the natural gas at a price 90% below world market price. 88 At that level of price reduction, the Mexican ammonia producers’ costs would be reduced by 72% (90% savings on 80% of costs), while the Mexican float glass producers would receive a 18 to 27% reduction (90% savings on 20-30% of costs). The variant cost structure in these two industries demonstrates how a so-called generally available program can disparately affect costs even among industries that use a large quantity of the resource and hence distort the operation of comparative advantage by inducing inefficient shifts in the allocation of resources among various uses. Because virtually no government program, no matter how generally available, affects all industries’ costs equally, the specificity test fails to distinguish government programs that distort the operation of comparative advantage from those that do not.

85. See supra notes 70-75 and accompanying text (discussion of comparative advantage theory).


87. Telephone interview with Glenn Miller, Counsel for PPG Indus. (Sept. 20, 1987).

88. Mexicans paid $.44 per MMBtu, while foreigners paid $4.94 per MMBtu. Hearing on Dual Pricing, supra note 45, at 3 (Finance Committee Trade Staff Memorandum of June 25, 1986).
B. THE FAIRNESS PRINCIPLE

In theory the specificity test serves a vague popular notion of fairness based on American producers' belief that government benefits bestowed on specific industries create unfair competitive advantages but that generally available domestic programs are acceptable at home and therefore should be tolerated abroad.89 Yet the Canadian and Mexican governments' programs to provide natural resources to their industries at less than world market prices did not seem fair to United States producers even though the ITA found that these programs were generally available.90 Arguably, the results in Carbon Black I 91 and Softwood I 92 seemed unfair because the government programs under scrutiny in those cases appeared more specific than generally available.93 Mexico's sale of natural gas to its industries at below world market prices, however, was a much more generally available program than those in the Carbon Black I and Softwood I cases.94 Nevertheless, Congress still viewed the outcomes of these natural gas cases as unfair.95 Congress was apparently undisturbed by its own record of controlling natural gas prices at less than market prices for a period of over forty years.96

89. See supra notes 76-77 and accompanying text.
90. See supra notes 28-39 and accompanying text.
93. See supra notes 45-49 and accompanying text (carbon black subsidy benefited only two industrial plants); supra note 50 (stumpage subsidy affected only wood and wood products and paper and pulp industries).
94. The cases discussed in this Note alone demonstrate the diversity of industries that use natural gas as an important input: the ammonia, float glass, and carbon black industries all claimed injury from the Mexican programs. See supra note 62. Evidence exists that Congress regards a subsidy on natural gas as a generally available subsidy. See Ways AND Means REPORT ON H.R. 3, supra note 51, at 124 (stating that natural gas subsidy freely available to all purchasers in country without government restriction would not "likely" be countervailable subsidy).
95. Congress's attempt to exempt natural resource subsidies from the specificity test, see supra note 41 and accompanying text, shows that it considered the specificity test unfair in the natural resource cases. Congress ultimately decided not to pass these exemptions, however, because of the threat of mirror legislation, see supra notes 42-44 and accompanying text, and not because it accepted the specificity test as fair.
96. Congress imposed natural gas price controls in 1938 and began to phase them out in 1978. During much of this time the price was held below market price. See Note, Deregulation and Natural Gas Purchase Contracts:
Arguably, Congress and United States producers are more concerned about the size of the competitive threat posed by a foreign government program than whether the program applies specifically or generally. They perceive the specificity test as unfair when it bars protection against imports receiving large advantages while allowing the imposition of countervailing duties against much smaller subsidies. For example, comparing the magnitude of the competitive threat faced by the successful petitioners in 

*Certain Softwood Lumber Products from Canada (Softwood II)*

with that faced by the unsuccessful petitioners in 

*PPG Industries v. United States*

and 

*Anhydrous and Aqua Ammonia from Mexico*

shows that the unsuccessful petitioners were at least as threatened by the challenged practices as the successful petitioners. According to the figures calculated above, the Mexican natural gas program gave Mexican float glass producers a competitive advantage of 18 to 27% over *PPG Industries* and gave the Mexican ammonia producers a cost advantage of 72% over their United States counterparts.

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97. For example, the ITA in *Carbon Black II* found the total countervailable subsidy from several government programs (not counting the carbon black feedstock program) totaled 0.80%. 51 Fed. Reg. 13,269, 13,272 (ITA 1986). Gary Hufbauer and Joanna Shelton-Erb mention a case in which the ITC found material injury on a subsidy of 0.000%. G. HUFBAUER & J. SHELTON-ERB, supra note 76, at 89; *see also* Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,044-59 (ITA 1986) (final determination) (several government programs conferred subsidy on fishing industry of less than one percent, but when added together net subsidy was 5.82%); Unprocessed Float Glass from Mexico, 48 Fed. Reg. 56,095, 56,095 (ITA 1983) (preliminary determination) (government finance program conferred countervailable benefit of 1.63%). In *Softwood I*, 48 Fed. Reg. 24,159, the ITA found that several benefit programs conferred countervailable specific subsidies on the Canadian lumber industries (though not the stumpage programs), including regional development programs and tax incentives. *Id.* at 24,160-67. The total value of all the subsidies on softwood lumber was 0.349% ad valorem. *Id.* at 24,159. The ITA declined to find the stumpage rights programs countervailable because the benefits were not specific. *Id.* at 24,167. When the ITA later reversed its decision in Certain Softwood Prods. from Can. (Softwood II), 51 Fed. Reg. 37,453 (ITA 1986) (preliminary determination), it found the stumpage subsidy to confer a benefit of 14.542% ad valorem on softwood lumber products. *Id.* at 37,458. Thus the earlier Softwood I case had followed the specificity test to a result giving protection from a very small subsidy while offering no protection from the rather sizeable cumulative subsidy the ITA later found to exist.


101. *See supra* notes 86-88 and accompanying text.

102. *See supra* notes 87-88 and accompanying text.
That program was ruled generally available and therefore not countervailable. In comparison, the lumber companies in *Softwood II* alleged that the Canadian stumpage program gave Canadian lumber producers a weighted average cost advantage of 27% on the production of lumber. The ITA in *Softwood II* found that the actual amount of the stumpage subsidy was 14.542% ad valorem. That subsidy was held specific and therefore countervailable. Thus, the generally available programs in *PPG Industries* and *Anhydrous and Aqua Ammonia from Mexico*, although not subject to countervailing duties, actually gave greater cost advantages than the specific subsidy that was countervailable.

Moreover, the specific subsidy held countervailable in *Softwood II* was relatively large compared to the small specific subsidies of less than two percent that the ITA in many cases has found countervailable. Thus, under the current specificity test, a United States producer may receive protection from a subsidy of less than two percent if the subsidy is specific, but may not obtain protection from imports benefiting from a seventy-two percent cost reduction due to a generally available government program such as the low-price sale of natural gas. At a common sense level these results seem unfair.

The perceived inequity of the specificity test is magnified further by the similarities between the injuries suffered by unsuccessful petitioners and those claimed by successful petitioners. For example, the United States lumber companies, which succeeded in their lawsuit, faced a surge of imports in the early 1980s as well as flat sales and prices in times of high demand.

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104. *Softwood II*, 51 Fed. Reg. at 37,453. The fact that this figure is nearly half what petitioners claimed suggests that figures taken from the petitioners might be overstated. Even if the figures just calculated for *PPG Industries* and the ammonia producers were cut in half, however, they would still show a sizeable competitive threat, on par with or greater than the subsidy that the ITA found in the *Softwood II* case and greater than many subsidies found countervailable in other cases. See supra note 97.

105. See supra note 97.

106. Between 1984 and 1985 Canadian lumber imports jumped from supplying 29% to 32% of the United States market. During those years Canadian sales volume was up 10% while the sales and prices for United States firms remained flat despite good economic conditions. *Hearing on U.S.–Canadian Trade*, supra note 38, at 18 (statement of Alfred Eckes, Comm'r, ITA).
United States float glass producers, who did not succeed on their subsidy claim, nonetheless experienced similar conditions. Imports of Mexican float glass products into the United States rose dramatically during the first half of the 1980s, while in the middle 1980s prices and employment among United States float glass producers have remained flat despite increasing demand.

Because the specificity test is likely to continue to yield results denying United States producers protection against foreign governments' generally available programs that give large advantages, while allowing protection from small specific subsidies, United States producers will perceive the specificity test as unfair in its operation. A test viewed as unfair could lead to pressure on Congress for strongly protectionist measures, similar to the 1983 and 1985 bills proposing the elimination of the specificity test for natural resource cases. Bills eliminating the specificity test would invite mirror legislation from trading partners and threaten to expose United States exports to increased countervailing duties from other countries attempting to offset the effects of United States subsidies.

The recent reaffirmation in *PPG Industries* of the past controversial natural gas decisions evinces the lingering fairness problem with the specificity test and points out the possibility of renewed attack on this barrier against excessive countervailing duties. To avoid these problems, a new standard is needed that would be perceived as more fair while maintaining the present rule's effectiveness as a practical limit on countervailing duty actions. A standard that limited countervailing du-

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108. *Id.* at 2-10. The number of United States production workers in the float glass industry declined 5.4% in the years 1979-1984 and remained unchanged from 1984-1986. *Id.* at 2-12.

109. See *supra* notes 69-68 and accompanying text.

110. Several members of the House Ways and Means Committee recently called the issue of domestic subsidies "unresolved." WAYS AND MEANS REPORT ON H.R. 3, *supra* note 51, at 456. The Committee specifically called for improvements in the GATT "to deter, and to provide greater discipline regarding, unfair trade practices .... These practices include subsidizing or dumping of downstream materials or components, resource subsidies, displacement of sales in third country markets through unfair practices, and export targeting." *Id.* at 40.
ties in a more economically rational manner would also benefit the United States.

III. A NEW PRACTICAL LIMIT

Part I of this Note described the countervailing duty law as erecting two barriers to limit the potential number of countervailing duty actions against domestic subsidies. The first barrier is the definition of domestic subsidy as a specific subsidy. The second barrier is the material injury requirement. Although the specificity test presents a formidable barrier, it leads to politically controversial and economically unsound results.

In theory the specificity test could be made less politically controversial by relaxing it so that only government programs that affected hundreds of clearly distinct industries, and thus approached the theoretical ideal of perfect general availability, were not considered specific subsidies. Under such a test, the Mexican natural gas program, for example, would be considered specific if less than a significant majority of industries used natural gas as a major input. Under a test with such a low threshold, only subsidies to very broad-based programs, such as education and roadbuilding, would be generally available.111 This lowered specificity test might achieve better results in terms of perceived fairness because the broadly available programs, such as education and roadbuilding, which supporters of the specificity test suggest are acceptable programs for government,112 would not become countervailable, but the troublesome natural resource subsidies would give rise to countervailing duties.

The major problem with relaxing the specificity test to such an extent is that such a low-level test would fail to serve as an adequate practical limit. United States industries could potentially bring many more countervailing duty actions than under the present regime, and foreign industries would lose no time in pushing for a similar relaxed standard in their countries to increase protection against United States exports.113

111. One can speculate that education and roadbuilding affect virtually all industries—though not equally—while natural gas subsidies benefit a large but lesser number. Almost every industry needs educated people and a transport system to function, while not as many use natural gas as an input. Therefore, at some very low level, natural gas subsidies could be more specific than education and roadbuilding subsidies.

112. See supra notes 77-80 and accompanying text.

113. See supra note 43 (discussing problems of mirror legislation).
Instead of relaxing the specificity test, the practical limiting effect of the current test could be achieved by a new test leaving the material injury requirement intact, but eliminating the specificity test barrier and replacing it with a new de minimis barrier. The proposed de minimis barrier also would reach better results in terms of fairness and perhaps economics as well.

A. POLICY ADVANTAGES OF A DE MINIMIS BARRIER

The policies underlying the specificity test would be better served by replacing the present definition of subsidy under United States countervailing duty law with a broad economic definition of the word and restricting the possible number of claims for protection by setting minimum quantitative limits on the size of subsidies considered countervailable.

Instead of defining a domestic subsidy as a benefit conferred by a government program on a specific industry, as under the present law, the law should simply define subsidy as a benefit conferred on an industry by a government program, regardless of whether the program is specifically addressed to that industry or generally available. The law should, however, treat any subsidy resulting in a certain percent reduction in the costs of manufacturing the product under investigation (five percent, for example) as de minimis and not countervailable.

On balance, the de minimis test would not necessarily permit more successful countervailing duty actions than the specificity test. On the one hand, the numerous cases in which the ITA found specific subsidies of two percent or less would no longer result in countervailing duties. On the other hand, this new rule would allow the imposition of countervailing duties against large subsidies not countervailable under the present specificity test. For example, under this rule the ITA could have imposed a countervailing duty on Mexican float glass for

114. See supra notes 24-25 and accompanying text (explaining present law's definition of subsidy).

115. The concept of a de minimis subsidy is not foreign to present United States countervailing duty law. In Carlisle Tire & Rubber Co. v. United States, 517 F. Supp. 704 (Ct. Int'l Trade 1981) (bicycle tires and tubes from Taiwan), the ITA found a net subsidy of .28%, which it held to be de minimis. Id. at 705. The court on review held that a de minimis rule could be applied to countervailing duty investigations. Id. at 706.

116. See supra note 97 (mentioning, among others, case in which ITA found subsidy of 0.000% and material injury).
its natural gas subsidy. Assuming the Mexican government sold Mexican float glass producers natural gas at a price reduced by a 90% subsidy and that the natural gas made up 30% of the input costs, the effective subsidy was 27% of the costs of producing the float glass, well above the suggested de minimis line of 5%. If the ITC also found material injury, Mexico's natural gas program would become a countervailable subsidy. Thus, although the de minimis test would allow countervailing duties in different cases than the specificity test, this test would still operate as an effective practical limit on countervailing duty cases.

The new approach would grant or deny countervailing duties in a way that would achieve results perceived as fairer than those reached under the present specificity test. Producers denied protection from a domestic subsidy below the de minimis line would in effect be told that the subsidy its foreign competition received simply was not large enough to warrant protection. They would not be told, as under the present specificity test, that the tremendous advantage that a foreign government plainly conferred on their competitor was not a subsidy. These results would accord better with a popular understanding of the meaning of subsidy. A United States producer arguably views any action taken by a foreign government clearly leading to a result different from what would occur under market conditions as a subsidy. United States industries can probably accept the notion that all governments interfere with the operation of the market to a very large degree and that therefore not all subsidies should give rise to countervailing duties. They would probably complain less forcefully to Congress, however, if the countervailing duty law protected against the largest and most threatening subsidies, instead of the ones, large or small, that fell inside the counterintuitive legal definition of subsidy as a specific subsidy.

117. See supra notes 87-88 and accompanying text.
118. See, e.g., supra notes 54-60 and accompanying text (discussing holding in PPG Indus. v. United States that Mexican natural gas program is not subsidy).
119. See G. HUFBAUER & J. SHELTON-ERB, supra note 76, at 90 (quoting broad market-based definition of subsidy). Even a tax can be viewed as a negative subsidy. Cf. L. WINTERS, supra note 72, at 91 (subsidy is negative tax).
120. The two-part nature of the present law's definition of subsidy, see supra notes 24-25 and accompanying text, arguably combines an intuitive definition of subsidy (a government benefit) with a legal limit on when the definition may be applied (when the benefit accrues to a specific industry). In a give-with-one-hand-take-with-the-other approach, the definition states that
From an economic point of view, a de minimis standard could do no worse than the present specificity test, and it might result in an improvement. Government programs never achieve perfect general availability in practice, and consequently virtually all subsidies cause distortions in the operation of comparative advantage. Logic would seem to suggest that the largest subsidies cause the worst economic distortions. Because a de minimis test would allow the imposition of countervailing duties against the largest subsidies—as opposed to the specificity test, which allows countervailing duties against both large and small subsidies provided they are specific—the de minimis test would address the worst cases of distortion.

Some scholars assert, however, that it is very difficult to distinguish subsidies that distort trade away from the free market ideal from subsidies that merely counteract other distortions. If these scholars are correct, large subsidies might not

certain kinds of practices are subsidies—such as providing goods at preferential rates, providing loans or capital at terms inconsistent with commercial considerations, granting funds, forgiving debt, or assuming costs to benefit an industry, 19 U.S.C. § 1677(5) (1982)—but only if provided to specific industries; id. Arguably, the list of practices considered subsidies is the intuitive definition of subsidy, and the secondary requirement of specificity is a counterintuitive limit placed, for practical purposes, see supra notes 64-68 and accompanying text, on the intuitive definition.

Even the CIT has observed that it defies logic to state that a government program is not a subsidy simply because it applies to a specific industry, enterprise, or group thereof. Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237, 1242 (Ct. Int'l Trade 1984). The CIT itself has occasionally used the term subsidy when referring to a generally available benefit. See, e.g., id. at 1241 ("The primary object of the law is the removal of the advantage of a subsidy . . . [T]he extent to which subsidization is practiced in the country of production is immaterial."); Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 837 (Ct. Int'l Trade 1983) (no generally available domestic subsidy [an oxymoron] has ever been countervailed).

121. See supra notes 82-88 and accompanying text.

122. A large subsidy would tend to shift resources among industries faster and to a greater extent than a small subsidy, therefore making a larger effect on relative costs and export prices. See supra note 72 and accompanying text (describing operation of comparative advantage theory).

123. Barceló, supra note 72, at 131; Goetz, Granet & Schwartz, The Meaning of "Subsidy" and "Injury" in the Countervailing Duty Law, 6 INT'L REV. L. & ECON. 17, 17-18 (1986). Barceló argues that it is difficult to determine which subsidies are actually inefficient and which are not. Barceló, supra note 72, at 131. He further argues that even assuming a subsidy is not inefficient because it merely compensates for some government-created cost, a subsidy abroad can still cause disruptions for United States industries that face transition costs to move resources and workers out of industries declining in international competitiveness. Offsetting these costs is the benefit foreign subsidies provide to the United States in the form of cheap imports for consumers. Id. at 132. Barceló suggests that it is very difficult to determine whether the in-
necessarily cause the worst economic distortions, because they might simply offset other large distortions. Under this analysis the de minimis test could lead to countervailing duties against both distortive and nondistortive subsidies. Yet such a result would be no worse than the results under the specificity test, which does not impose countervailing duties against generally available benefits that might be distortive, but allows countervailing duties against specific subsidies that might not be distortive.124

B. PROBLEMS WITH ENACTING A DE MINIMIS TEST INTO UNITED STATES LAW

Although a de minimis test would better meet the policies underlying United States countervailing duty law, Congress could not unilaterally eliminate the specificity test without risking international legal and political opposition. Some have argued that the specificity test is required by the language of the GATT Subsidies Code.125 If the United States's trading

creased costs from the foreign subsidy outweigh the benefits of cheap imports. Id. Barceló concludes from this analysis that an economic rationale does not justify the imposition of countervailing duties against cheap imports. Rather, he asserts, cheap imports should give rise to countervailing duties only when they cause a high level of short-term injury that is politically unacceptable. Id.

In essence, then, Barceló makes a political judgment. He admits that economics does not provide a good rationale for or against countervailing duties, except that at some level it is better for global efficiency to have fewer subsidies rather than more. Id. at 132. He allows politics to govern the decision of when countervailing duties are desirable to deter the proliferation of subsidies and offset injury to producers. He does not convincingly argue, however, that his high-level injury line is a better balance among cheap imports, deterrence, and compensation for injury than the present line. Rather, he seems to assert that tipping the balance more toward cheap imports for consumers would be politically desirable. The problem with his proposal is that the likely result of such a change would be to fuel the fire of those who think American industry receives inadequate protection from foreign subsidies. In addition, such a passive stance toward subsidies might not provide adequate deterrence.

This Note argues that the present net balance among deterrence, compensation, and cheap imports should not be altered, at least insofar as that balance is represented by the total number of successful countervailing duty actions. Instead of altering the total number of successful countervailing duty actions, this Note suggests changing which kinds of actions can be successful. By focusing on a de minimis test, the more controversial cases involving large subsidies will give rise to countervailing duties, thereby reducing protectionist pressure and perhaps taking care of the cases with the highest transition costs as well.

124. See supra notes 82-88 and accompanying text (criticizing economic argument for specificity test).
125. See supra note 44.
partners viewed the elimination of the specificity test as a violation of international agreements, they would quickly retaliate against United States exports.\textsuperscript{126} Even if the Subsidies Code does not require the specificity test, unilateral action on the part of the United States to replace the test might bring retaliation by its trading partners.\textsuperscript{127} Even though sufficiently high de minimis standards could prevent an increase in the total number of countervailing duty actions successfully brought against foreign subsidies over the number under the current specificity test,\textsuperscript{128} different kinds of subsidies would justify countervailing duties under the de minimis test than under the specificity test.\textsuperscript{129} The change in the kind of subsidy giving rise to countervailing duties might in itself provoke other countries to unilaterally restructure their countervailing duty laws in ways that serve their own interests at the expense of United States exports.

The United States could avoid the possibility of violating an international agreement, and of touching off a vicious cycle of increased protectionism against subsidies, by negotiating a new rule on domestic subsidies in an international forum such as the present round of multilateral trade negotiations taking place under the auspices of the GATT.\textsuperscript{130} If the GATT member countries agreed to set a de minimis rule for domestic subsidies, Congress could enact it without concern for its legality under the GATT and without fear of retaliatory legislation in other countries.

Negotiating minimum limits for domestic subsidies within the GATT forum would also provide the contracting parties with the opportunity to agree to treat different kinds of subsidies differently. For some products, a small cost and price advantage translates quickly into large swings in sales. For

\begin{footnotesize}
\begin{enumerate}
\item[126.] See supra note 43 and accompanying text (discussing problems of mirror legislation and trade retaliation).
\item[127.] See supra note 43 and accompanying text.
\item[128.] In theory a de minimis line could be drawn at a point selected so that roughly the same number of cases did not meet the de minimis standard as did not meet the specificity standard.
\item[129.] See supra notes 114-124 and accompanying text (discussing effects of de minimis test).
\item[130.] Ministerial Declaration on the Uruguay Round, reprinted in Results of the GATT Ministerial Meeting Held in Punta del Este, Uruguay, Hearing Before the Subcomm. on Trade of the Comm. on Ways and Means, United States House of Representatives, 99th Cong., 2d Sess. 17 (1986). The Ministerial Declaration states that the negotiations will discuss subsidies. \textit{Id.} at 21. A separate negotiating group will be established to deal with subsidy issues. \textit{Id.}
\end{enumerate}
\end{footnotesize}
example, softwood lumber is a fungible product in that pine trees from Quebec differ little qualitatively from pine trees cut in Maine. Thus, if a subsidy makes Quebec lumber a little less expensive than Maine lumber, the Maine lumber companies will quickly lose sales to Quebec companies. In contrast, for certain other products a small change in price due to a subsidy will not cause purchasers to switch suppliers as quickly. For example, the quality and chemical makeup of carbon black feedstock can vary among producers, and a particular carbon black plant is adapted to use the particular feedstock available to it. It is not as likely, therefore, that a small change in price due to a subsidy would cause purchasers to switch to new sources. The contracting parties could take into account these kinds of qualitative differences among industries and products in negotiating various de minimis limits on subsidies.

If the GATT signatories could not agree on appropriate minimum subsidies for specific industries, they might be able to reach agreements for certain broad categories of subsidies. The signatories to the Subsidies Code have already agreed to treat export subsidies differently from domestic subsidies. New agreements could distinguish among domestic subsidies by setting different de minimis thresholds for different broad categories of domestic subsidies. For example, the contracting parties might agree that research and development subsidies are particularly injurious and therefore should be countervailable at

131. Post Conference Brief, supra note 103, at 43 & n.36.
133. Post Conference Brief, supra note 103, at 43 n.36.
135. The Subsidies Code separated out export subsidies and made them countervailable regardless of any question of specificity: “Signatories shall not grant export subsidies on products other than certain primary products.” Supra note 4, at Art. 9(1).
136. Some scholars argue that technological innovation creates valuable spillovers in the economy, so that if governments are able to retain more research and development activities at home, they will improve the welfare of their country at the expense of others. Paul Krugman writes,

Innovation, because it involves the generation of knowledge, is particularly likely also to generate valuable spillovers. So there is now good reason to suspect that trade policy can be used to encourage external-
a low level of subsidy. Similarly, the United States might press the other members to agree to treat natural resource subsidies separately.\footnote{Separate treatment for natural resources was the approach Congress took in the 1983 and 1985 trade bills. \textit{See supra} notes 40-44 and accompanying text.}

Breaking down domestic subsidies according to groups, however, creates the opportunity for each country to press its own subsidy agenda. For example, although the United States would desire a more relaxed regime for protecting against subsidized natural resources,\footnote{\textit{See supra} notes 40-44 and accompanying text.} many developing countries that rely on their natural resources to drive their development efforts would oppose such a relaxed regime. Similarly, some nations, such as France, view government-sponsored research and development as an important strategy to retain a strong industrial base and military independence.\footnote{Carliner, \textit{Industrial Policies for Emerging Industries}, in \textit{STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS}, \textit{supra} note 135, at 161-64.} Such nations might oppose a separate treatment of government research and development subsidies. The disparity of interests would make difficult an agreement that any one kind of domestic subsidy merits different status.

This problem is difficult but not insurmountable. A country might concede to some limits on its favorite subsidy in exchange for a similar commitment from a trading partner, especially if the discussion focused on reducing the subsidy without eliminating it altogether. Bargaining could take place more easily if the countries began by agreeing to a base line de minimis percentage applicable to all domestic subsidies and then searched for categories in which they could “horse trade” for lower limits. For example, France might not object to a lower de minimis level for research and development subsidies

\begin{quote}
\textit{Krugman, Introduction: New Thinking about Trade Policy, in STRATEGIC TRADE POLICY AND THE NEW INTERNATIONAL ECONOMICS} 13-14 (P. Krugman ed. 1986); \textit{see also} FOREIGN AFFAIRS REPORT ON H.R. 3, \textit{supra} note 76, at 62 (urging change in trade policy to counter advances in other countries).
\end{quote}
if the United States agreed not to object to a lower de minimis level for subsidies related to space or defense programs.

The GATT contracting parties might agree that certain kinds of domestic subsidies should never give rise to countervailing duties and thus should not be subject to any de minimis test. For example, government support for higher education and government provision of physical infrastructure are subsidies widely practiced in all countries. The specificity test was developed in part to prevent the enactment of countervailing duties against these kinds of commonly practiced subsidies.140 A simple agreement to exclude these subsidies from countervailing duties would achieve this objective of the specificity test without creating the fairness problems associated with that test when it is applied to other kinds of subsidies, such as stumpage subsidies, not practiced as universally as education and roadbuilding subsidies.

CONCLUSION

The definition in United States countervailing duty law of a subsidy as a specific subsidy limits the number of potential countervailing duty cases against domestic subsidies. Although the definition achieves this limiting function, it creates political controversy because it is viewed as unfair, and it fails to combat economic inefficiency as its supporters claim. Eliminating the specificity test and imposing a de minimis test would limit the number of possible countervailing duty actions as effectively as the present specificity rule, but this new test would do so in a more equitable fashion, and possibly with more sensible economic results as well. The cases falling on the noncountervailable side of the line would no longer be ones in which the

140. See supra notes 76-78 and accompanying text (discussing fairness rationale for specificity test). The ITA has been reluctant to impose countervailing duties against government programs to build infrastructure, even when the infrastructure has not been as widely available as a major interstate highway, for example. In Certain Fresh Atlantic Groundfish from Can., 51 Fed. Reg. 10,041 (ITA 1986) (final determination), the ITA held that Canada's provision of small harbor facilities was not a countervailable subsidy because it was generally available. Id. at 10,064-65. The petitioner had alleged that the small harbors benefited only two specific industries, the commercial fishing and recreational boating industries. The ITA found that in addition to these industries the program affected ferries, seaplanes, tourists, commercial transport vessels, and boats and ships seeking shelter from storms. Id. This made the program generally available. See also Carbon Steel Wire Rod from Saudi Arabia, 51 Fed. Reg. 4206, 4210 (ITA 1986) (final determination) (infrastructure program generally available).
complaining party faced a major threat from a foreign competitor receiving a sizeable benefit from its government, such as the *PPG Industries* case. Rather, noncountervailable subsidies would be those which simply were not large enough to warrant protection.

*James D. Southwick*