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COMPUTER SOFTWARE AS ARTICLES OF COMMERCE IN INTERNATIONAL TRADE: THE SURPRISING STUDY OF SINGAPORE'S SOFTWARE SUBSIDIES¹

By LAWRENCE M. FRIEDMAN² AND MARK E. WOJCIK³

I. INTRODUCTION

In today's world, industries often compete with little regard to national borders. As with all competition, some practices in international trade are considered acceptable, and others are considered unfair. Under international agreements, when a nation or an industry identifies an unfair trading practice being exercised by a foreign country or competitor, it may be entitled to protection from injury. The provision of bounties or grants (subsidies) to producers or exporters is one widely recognized unfair trading practice.⁴ In the United States and other

1. © 1991 L.M. Friedman and M.E. Wojcik. An earlier version of this article appeared in the October 1990 issue of the *COMPUTER LAWYER*. The opinions expressed in this article are those of the authors.

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4. Another widely recognized practice is dumping (selling at less than fair value). The antidumping laws of the United States are "directed to foreign products that are sold in the United States at less than fair value." *N.A.R., S.p.A. v. United States*, 14 C.I.T. —, —, 741 F. Supp. 936, 939 (1990) (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 901 F.2d 1089, 1091 (Fed. Cir. 1990), and *Smith-Corona Group v. United States*, 1 Fed. Cir. (T) 130, 713 F.2d 1568 (1983), *cert. denied*, 465 U.S. 1022 (1984)). The United States antidumping laws, as succinctly summarized in the American Law Institute's *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* [hereinafter *RESTATEMENT*], provide that "an antidumping duty will be imposed if imported goods are sold at a price that is lower than the foreign market value and such sales cause

countries, countervailing duty (anti-subsidy) laws are used to offset the provision of subsidies.

For an import to be subject to countervailing duties, it must be an "article or merchandise . . . manufactured or produced" in a foreign country.⁵ The International Trade Administration of the United States Department of Commerce recently investigated whether a countervailable subsidy was provided to a computer-aided software engineering (CASE) product from Singapore. Commerce determined that the Government of Singapore did not provide a countervailable subsidy to develop or market the software. Consequently, the CASE software from Singapore will continue to be imported into the United States without the added cost of a countervailing duty. If a countervailing duty had been imposed (in addition to any other applicable customs duties), the additional cost would most likely have been passed on to the end-user.

This article examines Commerce's software subsidy investigation with particular emphasis on Commerce's decision to treat computer software as merchandise for purposes of the countervailing duty laws.⁶ While the domestic software industry is divided over whether the decision is correct, the fact that computer software was even considered to be a proper subject for a countervailing duty investigation will unquestionably impact the way domestic and foreign software publishers do business. Through this investigation and determination, the Department of Commerce unambiguously announced that it has entered the arena of international trade in computer software.

II. THE FRAMEWORK OF INTERNATIONAL TRADE REMEDIES

Under the General Agreement on Tariffs and Trade (GATT),⁷ a nation may impose countervailing duties on imports of goods or products

or threaten material injury to a domestic industry." RESTATEMENT § 807(2) (1987). As with countervailing duty (anti-subsidy) investigations, an injury determination is required only when the exporting country is a signatory to the General Agreement on Tariffs and Trade (GATT). The general distinction between the antidumping and "anti-subsidy" practices is that in dumping an exporter sells a product abroad at prices lower than it charges in the domestic market, while a subsidy is a benefit bestowed upon producers or exporters. *Id.* at § 806, comment a.

5. 19 U.S.C. § 1303(a) (1988).

6. Computer software refers to the set of instructions that tell the computer what to do. The term "software" is contrasted with "hardware," which refers to the physical machines that make up a computer system. The hardware by itself is of little value without instructions telling it what to do. M.C. COVINGTON & D. DOWNING, *DICTIONARY OF COMPUTER TERMS* 288 (2d ed. 1989).

7. The General Agreement on Tariffs and Trade (GATT) is a multilateral agreement designed to facilitate the mutual and advantageous reduction of tariffs and other barriers to trade in goods and to eliminate discriminatory treatment in international com-

that benefit from a subsidy, whether or not the subsidy was related to exports or resulted in a price lower than the home market price in the exporting country, provided the imports cause or threaten material injury to a domestic industry. Additionally, the countervailing duty may not exceed the amount of the subsidy.⁸ Also under GATT, a nation may not grant a subsidy on the export of any product (other than a primary product)⁹ that results in an export price that is lower than the comparable domestic price.¹⁰ Under the GATT Agreement on Subsidies and Countervailing Measures, however, a state (other than a developing country)¹¹ may not grant any subsidy on the export of a product (other than certain primary products).¹² Thus, while the GATT prohibits export subsidies only when the result is an export price lower than the comparable domestic price, the GATT Subsidies Code prohibits export subsidies without regard to a differential effect on prices.¹³

United States law allows the imposition of countervailing duties on imports of goods or products that have "benefited from a subsidy, whether on manufacture, production, or export."¹⁴ If the imports originate from a country that is a signatory to the GATT Agreement on Subsidies and Countervailing Measures (or a "comparable agreement"), a countervailing duty may be imposed only if the imports are determined to cause, or threaten to cause, material injury to a domestic industry.¹⁵

In accordance with these principles, the United States has developed a complex scheme of laws, regulations, administrative procedures, and judicial precedent addressing both the initial investigation of subsidies and conduct of annual reviews¹⁶ of these trade actions. Two agencies administer the countervailing duty laws: the International Trade

merce. The treaty first became effective in 1948 when twenty-three nations became signatories. See generally 2 R. STURM, CUSTOMS LAW & ADMINISTRATION § 62 (3d ed. 1990).

8. RESTATEMENT, *supra* note 4, § 806(3).

9. A *primary product* is "any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." GATT, Annex I, Ad. Art. XVI, § B(2), reprinted in 1 K. SIMMONDS & B. HILL, *Law and Practice Under the GATT*, BASIC DOCUMENTS (1988).

10. RESTATEMENT, *supra* note 4, at § 806(1).

11. A developing country is defined as a country "the economy of which can only support low standards of living and is in the early stages of development . . ." GATT, Article XVIII, ¶ 4(a), reprinted in 1 K. SIMMONDS & B. HILL, *LAW AND PRACTICE UNDER THE GATT* (1988).

12. RESTATEMENT, *supra* note 4, § 806(2).

13. *Id.* § 806, comment b.

14. *Id.* § 806(4)(a), comment (4)(a).

15. *Id.* § 806(4)(b).

16. Once an administrative order has established a countervailing or antidumping duty on a given imported product, that order is subject to annual review. See 19 U.S.C. § 1675 (1988); 19 C.F.R. § 353.22 (1990). Following annual review, the order may be ad-

Administration of the United States Department of Commerce (ITA or Commerce) and the United States International Trade Commission (ITC or Commission), which is an independent agency. Commerce generally determines whether imported goods have benefitted from a subsidy. If Commerce reaches an affirmative determination, and the country of export is a signatory to the GATT Subsidies Code, the Commission will determine whether the subsidy harms or threatens harm to an existing or potential domestic industry.¹⁷ For countries which are not signatories to the GATT Subsidies Code, no material injury determination is required. Singapore is not a signatory to the GATT Subsidies Code and has not accepted any other comparable multilateral trade agreement.¹⁸

When an "interested party" files a petition "on behalf of" a domestic industry seeking the imposition of countervailing duties,¹⁹ Com-

justed to change the duty rate or revoked entirely. See also *infra* notes 66-67 and accompanying text.

17. *Suramericana de Aleaciones Laminadas, C.A. v. United States*, 14 C.I.T. —, —, 746 F. Supp. 139, 141 (1990), *appeals docketed*, Nos. 91-1050, 91-1055 (Fed. Cir. 1991).

18. See 19 U.S.C. § 1303 (1988); 19 U.S.C. § 1671(b) (1988) (defining "a country under the Agreement"). In *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1318 (1990), the United States Court of Appeals for the Federal Circuit discussed whether a country that becomes a signatory to the GATT Subsidies Code after an investigation has been initiated is entitled to an injury determination. Settling a split of authority within the United States Court of International Trade, the Federal Circuit held that such a country is not entitled to an injury determination.

The conflicting cases dealt with cement imported from Mexico. An investigation into possible countervailing duties in Mexican cement was initiated on March 28, 1983. *Cementos Guadalajara, S.A. v. United States*, 12 C.I.T. 307, 309, 686 F. Supp. 335, 337 (1988). On April 30, 1985, the Office of the United States Trade Representative published notice that Mexico had assumed obligations equivalent to the GATT Subsidies Code and was, therefore, a "country under the agreement." *Id.* at 311, 686 F. Supp. at 338. Later, on August 24, 1986, Mexico formally acceded to the GATT. *Id.* at 313, 686 F. Supp. at 340. Plaintiffs then argued that Commerce could not issue a countervailing duty order against Mexican cement in the absence of an injury determination.

In *Cementos Guadalajara*, the Court of International Trade (through Judge Carman) held that the relevant time was the time of importation. Accordingly, the Court held no injury determination was required. *Id.* at 327, 686 F. Supp. at 352. Under substantially identical facts, the Court of International Trade (through Judge Aquilino) reached the opposite conclusion in *Cementos Anahuac del Golfo, S.A. v. United States*, 12 C.I.T. 401, 687 F. Supp. 1558 (1988). In *Cementos Anahuac*, the Court found the relevant time to be when the countervailing duties are imposed. *Id.* at 405, 687 F. Supp. at 1562. On appeal, the Federal Circuit adopted Judge Carman's reasoning and affirmed *Cementos Guadalajara* and reversed *Cementos Anahuac*. A third decision, following Judge Carman's position, *Cementos Anahuac del Golfo, S.A. v. United States*, 12 C.I.T. 525, 689 F. Supp. 1191 (1988), was also affirmed.

19. If the country of export is a signatory to the GATT Subsidies Code, concurrent petitions are filed with the Commerce Department and the International Trade Commission. If the country of export has not signed the GATT Subsidies Code or a similar agreement, the petition is filed only with the Department of Commerce. See *infra* note 101 and

merce must determine, within twenty days, whether the petition "alleges the elements necessary for the imposition of [such duties] and contains information reasonably available to the petitioner supporting those allegations."²⁰ If the petition is insufficient, it may be amended at "such time, and upon such conditions" as Commerce (and the International Trade Commission) may permit.²¹ Alternatively, Commerce may self-initiate a countervailing duty proceeding.²²

If Commerce accepts a petition or self-initiates a proceeding, the agency must commence an investigation to determine whether a subsidy has been provided to the imported merchandise.²³ Commerce must publish a notice in the *Federal Register* announcing that it has commenced an investigation.²⁴

If Commerce determines that the petition is insufficient, it will dismiss the petition and notify the petitioner in writing of the reasons for the negative determination.²⁵ Commerce must publish a notice in the *Federal Register* announcing that the petition has been dismissed and the proceedings terminated.²⁶

If an injury determination is necessary, Commerce is required to notify the Commission of any determination it makes with respect to the commencement of an investigation; if an investigation is begun, Commerce must make available to the Commission such information as it may have relating to the matter under investigation.²⁷

If the petition is found to be sufficient and an injury determination is necessary, the focus of the proceedings shifts from Commerce to the Commission. The Commission preliminarily determines, based upon the best information available at the time of the determination, whether there is a reasonable indication that an industry in the United States is materially injured, or is threatened with material injury, by reason of imports of the merchandise which is the subject of the investigation.²⁸ The Commission may also determine that the establishment of an industry in the United States is "materially retarded" by reason of imports of certain imported merchandise or by reason of sales (or the

accompanying text for a discussion of the requirement that a petition be filed "on behalf of" the domestic industry.

20. 19 U.S.C. § 1671a(c) (1988); *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 141; see also Mock, *Cumulation of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 Nw. J. INT'L L. & BUS. 433, 436 (1986) [hereinafter Mock].

21. 19 U.S.C. § 1671(b)(1) (1988).

22. *Id.* § 1671a(a).

23. *Id.* § 1671a(c)(2); *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 141.

24. 19 U.S.C. § 1671a(c)(2) (1988).

25. *Id.* § 1671a(c)(3).

26. *Id.*

27. *Id.* §§ 1671a(d) and 1673a(d); *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 141.

28. 19 U.S.C. § 1671b(a)(1) (1988).

likelihood of future sales) of that merchandise for importation.²⁹

The Commission must make its preliminary determination within forty-five days of the date a petition is filed on behalf of a domestic industry or within forty-five days of receiving notice that Commerce has self-initiated an investigation.³⁰ The Commission conducts a hearing, termed a "conference," very shortly after Commerce initiates an investigation. At the conference interested parties may present evidence concerning the existence or likelihood of material injury. If the Commission's preliminary determination is negative, the investigation will be terminated.³¹ A negative preliminary determination can be appealed to the United States Court of International Trade.³²

After the Commission makes an affirmative preliminary determination, the focus of the proceedings returns to Commerce where the International Trade Administration makes a preliminary determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable basis to believe or suspect that a subsidy is being provided.³³ The results of the preliminary determination must be published in the *Federal Register*.³⁴

29. *Id.* § 1671(b)(a)(2).

30. *Id.* § 1671(b)(a).

31. *Id.* To avoid having a petition dismissed at the Commission's preliminary stage, eligible petitioners may wish to consult with the Trade Remedy Assistance Office of the International Trade Commission. The Trade Remedy Assistance Office was established under the Omnibus Trade and Competitiveness Act of 1988 to expand the assistance made available by the International Trade Commission to the public and to small businesses seeking benefits or relief under the United States Trade laws. *Id.* § 1339. The Trade Remedy Assistance Office replaced the Trade Remedy Assistance Center which was part of the ITC's Office of Unfair Import Investigations. United States International Trade Commission, *Annual Report 21* (1989).

The Trade Remedy Assistance Office is directed to provide full information to the public upon request and is to provide, to the extent feasible, assistance and advice to interested parties concerning remedies and benefits available under the trade laws, as well as the petition and application procedures, along with the appropriate filing dates with respect to remedies and benefits. 19 U.S.C. § 1339(a) (1988). In coordination with other agencies responsible for administering international trade laws, the Trade Remedy Assistance Office is also to provide technical and legal advice to eligible small businesses to enable them to prepare and file petitions and applications and to seek the remedies and benefits available under the trade laws, including any administrative review or administrative appeal. *Id.* § 1339(b). An eligible *small business* is defined in the statute as any business concern which, due to its small size, has neither adequate internal resources nor the financial ability to obtain qualified outside assistance in preparing and filing petitions and applications for remedies and benefits under the trade laws. *Id.* § 1339(c). Within the framework of this statute, the ITC has determined eligibility for technical assistance by reference to the size standards for small businesses established by the Small Business Administration. United States International Trade Commission, *Annual Report 21* (1989).

32. 28 U.S.C. § 1581(c) (1988).

33. 19 U.S.C. § 1671b (1988).

34. *Id.* § 1671b(f).

Commerce generally makes a preliminary determination within eighty-five days of the date on which a countervailing duty petition was filed or an investigation self-initiated.³⁵ The time period for Commerce's preliminary determination can be lengthened if the petitioner makes a timely request for an extension of time, or in "extraordinarily complicated" cases.³⁶ A case can be found to be "extraordinarily complicated" based on the number and complexity of transactions to be investigated or adjustments to be considered, the novelty of the issues presented, or the number of firms whose activities must be investigated.³⁷ If a case is "extraordinarily complicated," or if the petitioner has properly requested an extension of the time period, preliminary determination may be postponed until not later than 150 days after the date on which the petition was filed or the investigation self-initiated.³⁸

If Commerce's preliminary determination is affirmative, it orders the United States Customs Service to suspend liquidation of all entries of merchandise subject to the determination which are entered, or withdrawn from a customs warehouse for consumption, on or after the date of publication of the notice in the *Federal Register*.³⁹ Commerce will also order the Customs Service to collect a cash deposit, bond, or other security for each entry of the merchandise concerned.⁴⁰

Within seventy-five days after the date of its affirmative preliminary determination, Commerce makes a final determination whether a subsidy is being provided.⁴¹ The time for this final determination can be postponed when the merchandise involved is also subject to an antidumping investigation.⁴² In such cases, the petitioner may request that the final subsidy determination be delayed until the date of the final dumping determination.⁴³

In most instances, if Commerce reaches a final affirmative determination that there is a subsidy, then it must make available to the Commission "all information upon which such determination was based and

35. *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 141.

36. 19 U.S.C. § 1671b(c)(1)(A) (1988).

37. *Id.* § 1671b(c)(1)(B)(i).

38. *Id.* § 1671b(c)(1).

39. *Id.* § 1671b(d)(1).

40. *Id.* § 1671b(d)(2).

41. *Id.* § 1671d.

42. Dumping is the practice of selling merchandise at less than fair value. *See, e.g., N.A.R., S.p.A. v. United States*, 14 C.I.T. —, 741 F. Supp. 936 (1990). The general distinction between antidumping and countervailing duty investigations is that in dumping, an exporter sells products abroad at prices lower than it charges in the domestic market, while countervailing duty investigations attempt to determine whether subsidies are conferred upon producers or exporters. *See* RESTATEMENT, *supra* note 4, § 806, comment a.

43. 19 U.S.C. § 1671d(a)(1) (1988).

which the Commission considers relevant to its determination."⁴⁴ Again, the Commission proceedings only occur when the affected country has signed the GATT Subsidies Code. In such cases, the Commission makes a final determination of whether an industry in the United States is suffering, or is threatened with, material injury, or whether the establishment of a domestic industry is materially retarded by reason of those subsidies.⁴⁵

If Commerce's preliminary determination is affirmative, then the Commission must make its final determination before the 120th day after Commerce's preliminary determination. If Commerce's preliminary determination is negative, but the final determination is affirmative, then the Commission must make its final determination before the seventy-fifth day after Commerce's affirmative final determination.⁴⁶

In order for countervailing duties to be imposed upon exports from a GATT signatory nation, the Commission must determine that an industry in the United States is either "materially injured" or "threatened with material injury," or that the establishment of an industry in the United States is "materially retarded" by reason of imports of certain imported merchandise or by reason of sales (or the likelihood of future sales) of that merchandise for importation.⁴⁷ Under the Commission's mandated inquiry, *material injury* is defined as "harm which is not inconsequential, immaterial, or unimportant."⁴⁸ In determining whether there is material injury, the ITC will consider the volume of imports of the merchandise which is the subject of the investigation, the effect of imports on prices in the United States for like products, and the impact of imports of the merchandise on domestic producers of like products in the context of production operations within the United States.⁴⁹

Each of these mandatory determinations is complex. An extensive factual record is developed for the administrative proceedings. As examples of information examined under the statute, the Commission is directed to consider the significance of the volume of imports of the merchandise, or any increase in that volume in absolute terms or relative to production or consumption in the United States.⁵⁰ In evaluating the effect of imports on prices, the Commission is directed to consider

44. *Id.* § 1671d(a)(c)(1)(A).

45. *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 142. See generally *Mock*, *supra* note 20.

46. *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 141-42.

47. 19 U.S.C. § 1671(2) (1988); *Metallwerken Nederland B.V. v. United States*, 14 C.I.T. —, 744 F. Supp. 281 (1990).

48. 19 U.S.C. § 1677(7)(A) (1988).

49. *Id.* § 1677(7)(B)(i).

50. *Id.* § 1677(7)(C)(i).

whether there has been significant price underselling by the imported merchandise (as compared to prices of like products in the United States) and also whether the effect of imports of the merchandise otherwise depresses to a significant degree or prevents to a significant degree price increases which otherwise would have occurred.⁵¹ In evaluating the impact on the affected domestic industry, the Commission evaluates all relevant economic factors bearing on the state of the industry in the United States.⁵² These factors include, but are not limited to:

1. the actual and potential decline in output, sales, market share, profits, productivity, return on investments, and capacity utilization;
2. factors affecting domestic prices;
3. actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; and
4. actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

The ITA examines each of these factors within the context of the "business cycle" and conditions of competition that are distinctive to the affected industry.⁵³ In addition to the mandatory analysis of the volume, price, and impact on the affected domestic industry, the Commission is also permitted to consider other economic factors it finds relevant to its determination regarding whether there is material injury to a domestic industry by reason of imports.⁵⁴

If the Commission does not find that a domestic industry is materially injured by reason of the imports under investigation, it may nevertheless find an affirmative threat of material injury. The threat of injury determination must be based upon "positive evidence tending to show an intention to increase the levels of importation."⁵⁵ The determination of whether a threat of material injury to a domestic industry is "real and imminent" is established through analysis of the threat factors identified in 19 U.S.C. § 1677(7)(F)(i) (1988).⁵⁶ The "essence" of the threat to an industry in the United States "lies in the ability and incentive to act imminently."⁵⁷

51. *Id.* § 1677(7)(C)(ii).

52. *Id.* § 1677(7)(C)(iii).

53. *Id.*

54. *Id.* § 1677(7)(B)(ii).

55. See, e.g., *Metallwerken*, 14 C.I.T. —, 744 F. Supp. at 287.

56. *Id.*; *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 C.I.T. 634, 642, 693 F. Supp. 1165, 1171 (1988).

57. *Metallwerken*, 14 C.I.T. at —, 744 F. Supp. at 287; *Republic Steel Corp. v. United States*, 8 C.I.T. 29, 41, 591 F. Supp. 640, 650 (1984).

In determining whether an industry in the United States is threatened with material injury by reason of imports or by sales of the merchandise for future importation into the United States, the Commission considers, among other relevant economic factors, any increase in production capacity or existing unused capacity in the exporting country (or countries) likely to result in a significant increase in imports of the merchandise into the United States.⁵⁸ Foreign capacity alone is an insufficient basis for an affirmative threat determination where excess foreign capacity is the only relevant economic factor indicating a threat of material injury to an industry in the United States.⁵⁹ The Commission must also consider:

1. any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level;
2. the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices;
3. any substantial increase in inventories of the merchandise in the United States;
4. the existence of underutilized capacity for producing the merchandise in the exporting country or countries;
5. any other demonstrable adverse trends which indicate the likelihood that the importation (or sale for importation) of the goods will be the cause of actual injury, whether or not the merchandise is actually being imported at the time;
6. the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers are also used to produce the merchandise under investigation; and
7. the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

In examining the threat of material injury to the domestic industry, the ITC must also consider the availability of other export markets.⁶⁰ The Commission has "broad discretion" in assigning the weight given to a particular factor; on judicial review, the United States Court of International Trade generally presumes the Commission considered all the evidence in the administrative record.⁶¹

If Commerce's final determination, and when necessary also the International Trade Commission's, is affirmative, then the merchandise

58. 19 U.S.C. § 1677(7)(F)(i)(II) (1988).

59. See *Metallwerken*, 14 C.I.T. at —, 744 F. Supp. at 284-85.

60. *Metallwerken*, 14 C.I.T. at —, 744 F. Supp. at 285; S. REP. NO. 249, 96th Cong., 1st Sess. 89, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 475.

61. *Metallwerken*, 14 C.I.T. at —, 744 F. Supp. at 286; National Ass'n of Mirror Mfrs. v. United States, 12 C.I.T. 771, 779, 696 F. Supp. 642, 645-48 (1988).

will be subjected to a countervailing duty which must be paid in addition to any other duties owed on the merchandise. The countervailing duty will be equal to the amount of the benefit conferred.⁶² The law can also apply to arrangements for the leasing of foreign merchandise that are considered to be the functional equivalent of a sale of the foreign merchandise.⁶³

Although the administrative proceedings are complicated, relief is automatic once a subsidy and material injury, or threatened injury, have been found.⁶⁴ Within seven days of an affirmative Commission injury determination, Commerce must direct the Customs Service to collect deposits of the additional duties at the same time as estimated normal customs duties are deposited. The order must describe the class or kind of merchandise in "such detail as the administering authority deems necessary"⁶⁵

Annual administrative reviews are conducted if an interested party files a proper request with Commerce.⁶⁶ Among other requirements, the request must state why a review is being requested.⁶⁷ Notice of the opportunity for interested parties to request an annual review is published in the *Federal Register*.

Except for investigations involving Canada,⁶⁸ final subsidy determinations of Commerce and material injury determinations of the International Trade Commission are subject to judicial review before the United States Court of International Trade.⁶⁹ Final decisions of the Court of International Trade may be appealed to the United States Court of Appeals for the Federal Circuit, and ultimately to the United States Supreme Court.

In reviewing final determinations in countervailing duty investigations, the Court of International Trade holds unlawful those determinations found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."⁷⁰ Under this standard of review,

62. If the proceeding had involved an antidumping duty, the duty would be in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise. 19 U.S.C. § 1673 (1988).

63. *Id.* § 1671(a).

64. Mock, *Economic Advantage in East-West Trade: Abandoning Market Fictions in Trade with Nonmarket Economy Countries*, 14 N.C. J. INT'L L. & COM. REG. 55, 60 (1989).

65. 19 U.S.C. § 1671e(a)(2) (1988).

66. *Id.* § 1675(a)(1)(B).

67. See 19 C.F.R. § 353.22(a)(1) (1990); *Asociacion Colombiana de Exportadores de Flores v. United States*, 901 F.2d 1089 (Fed. Cir. 1990).

68. See *infra* notes 76-78 and accompanying text for a discussion of practice under the United States-Canada Free Trade Agreement.

69. 28 U.S.C. § 1581(c) (1988).

70. 19 U.S.C. § 1516a(b)(1)(B) (1988); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 6 Fed. Cir. (T) 57, 837 F.2d 465, 467, *cert. denied*, 109 S. Ct. 60

the Court of International Trade accords substantial weight to an agency's interpretation of a statute it administers.⁷¹ In order to be affirmed, agency findings must be supported in the record by such relevant evidence as a reasonable mind may accept as adequate to support a conclusion.⁷² Furthermore, the court defers to the expertise of the administrative agency regarding factual findings.⁷³ The "traditional deference" which courts pay to agency interpretation is not to be applied, however, to alter the clearly expressed intent of Congress.⁷⁴ Additionally, the Court of International Trade has recognized that its judicial overview is necessary to check the "'overly sweeping view of the authority [the agencies] are granted' to administer the [trade] laws of the United States."⁷⁵

Pursuant to a free-trade agreement between the United States and Canada,⁷⁶ a special bi-national panel has been established to review United States determinations involving Canadian products (and Canadian determinations involving United States products).⁷⁷ In effect, the judicial review formerly provided by the United States Court of International Trade has been replaced with an arbitration panel with regard to importations from Canada. This facet of administrative review may be carried over into other countries in the future as other free trade

(1988); *Kerr-McGee Chem. Corp. v. United States*, 14 C.I.T. —, —, 741 F. Supp. 947, 949 (1990); *N.A.R., S.p.A. v. United States*, 14 C.I.T. —, —, 741 F. Supp. 936, 939 (1990); *Gold Star Co. v. United States*, 12 C.I.T. 707, 708, 692 F. Supp. 1382, 1383 (1988), *aff'd*, 873 F.2d 1427 (Fed. Cir. 1989).

71. *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978), and *Udall v. Tallman*, 380 U.S. 1, 85 (1964)).

72. *Kerr-McGee*, 14 C.I.T. at —, 741 F. Supp. at 949.

73. *N.A.R.*, 14 C.I.T. at —, 741 F. Supp. at 939.

74. *K-Mart Corp. v. Cartier*, 486 U.S. 281, 290 (1988); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Alhambra Foundry Co. v. United States*, 12 C.I.T. 343, 345, 685 F. Supp. 1252, 1255 (1988).

75. *American NTN Bearing Mfg. Corp. v. United States*, 14 C.I.T. —, —, 739 F. Supp. 1555, 1557 (1990) (citing *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1571 (Fed. Cir. 1990)), *appeal docketed* No. 90-1434 (Fed. Cir. July 7, 1990).

76. *United States-Canada Free-Trade Agreement*, Jan. 2, 1988, 27 I.L.M. 293 (1988).

77. *United States-Canada Free-Trade Agreement Implementation Act of 1988*, Pub. L. 100-419, § 401, Sept. 28, 1988, 102 Stat. 1851, 1878; Cannon, *Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade, in United States Court of International Trade, Proceedings of the Seventh Annual Judicial Conference* (Oct. 15, 1990). Because producers often manufacture merchandise in more than one country, issues may be raised as to what constitutes a "Canadian product" or a "United States product." See Maxwell, *Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test*, 23 GEO. WASH. J. INT'L L. & ECON. 669, 691-93 (1990) (discussion of rules of origin under the U.S.-Canada Free-Trade Agreement).

agreements are negotiated.⁷⁸

III. THE SINGAPORE SOFTWARE INVESTIGATION

The investigation of computer-aided software engineering products from Singapore was initiated after Visible Systems Corp. of Waltham, Massachusetts, filed a petition with Commerce alleging that manufacturers, producers, or exporters of CASE software in Singapore were receiving a subsidy susceptible to a countervailing duty under section 303 of the Tariff Act of 1930, as amended. Under the Act:

whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . then upon the importation of such article or merchandise into the United States . . . there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same shall be paid or bestowed.⁷⁹

According to the petitioner, the Government of Singapore conferred 18 different grants or bounties on the manufacture, production, or export of CASE software.⁸⁰

CASE products are application programs used to automate certain aspects of software development. These tools help the programmer in the planning, analysis, design, documentation, prototyping, and construction phases of software production.⁸¹ This investigation concerned front-end CASE tools designed to help define end-user requirements, to conduct systems analysis, and to create design specifications. Front-end tools are distinct from back-end products, which automate coding, code testing, and maintenance.⁸²

A programmer using the CASE product at issue in this investigation begins by creating a graphical representation of the desired software. Once the logical structure of the system is designed, the CASE software lets the user test the underlying assumptions about the

78. The United States, Canada, and Mexico are presently engaged in preliminary negotiations directed toward a North American free trade agreement. See generally *AFL-CIO Officials Blast Proposed Agreement at Senate Finance Hearings*, 8 INT'L TRADE REP. 232 (1991) (Bureau of National Affairs); *Mosbacher Says Mexico FTA Will Improve Both Economies and Create More U.S. Jobs*, 8 INT'L TRADE REP. 249 (1991) (Bureau of National Affairs); *U.S., Canada and Mexico to Negotiate A North American Free Trade Pact*, Wall St. J., Feb. 6, 1991, at 9, col. 2.

79. 19 U.S.C. § 1303 (1988) (as amended).

80. See *Initiation of Countervailing Duty Investigation: Certain Computer Aided Software Engineering Products From Singapore*, 54 Fed. Reg. 37,013, 37,014-15 (1989) [hereinafter *Initiation*].

81. *Making a Case for CASE*, BYTE, Dec. 1989, at 154.

82. *Initiation*, supra note 80, at 37,014.

logical connections in the program.⁸³ CASE tools do not generate flawless code from a diagram of a software system. Nevertheless, they provide valuable design guidance and reduce the time spent in finding and repairing errors.

The key question facing Commerce was whether computer software of any kind is an "article or merchandise" within the meaning of the countervailing duty statute. This question is essentially identical to the goods versus services debate in early commercial litigation over contracts involving computer software. Like the majority of courts, Commerce looked to the tangible aspects of software stored on a carrier medium (generally a diskette or tape) and found that it is an article or merchandise for purposes of the trade laws.

In the notice of initiation, Commerce found the CASE products under investigation are sold in pre-packaged units and are not created for any particular end-user. In addition, the software is marketed like other merchandise by retailers who keep a supply in inventory.⁸⁴ In the preliminary determination, Commerce elaborated on this reasoning by noting that software is similar to books, newspapers and magazines, which derive the majority of their value from the intangible components they embody.⁸⁵ These items are clearly articles or merchandise within the meaning of the statute. Congress has specifically provided for import duties on books and other printed materials by including them within the Harmonized Tariff Schedule (HTS) of the United States.⁸⁶

Commerce also noted there have been several court decisions holding that software stored on a tangible medium is goods.⁸⁷ Although it did not specify what opinions it was referring to, Commerce stated that software had been held to be subject to sales tax⁸⁸ and to fall within the

83. See generally *Pose*, BYTE, Dec. 1989, at 170.

84. *Initiation*, supra note 80 at 37,013-14.

85. *Preliminary Affirmative Countervailing Duty Determination: Certain Computer Aided Software Engineering Products from Singapore*, 55 Fed. Reg. 1596, 1598 (1990) [hereinafter *Preliminary Determination*].

86. Pursuant to section 1204 of the Omnibus Trade and Tariff Act of 1988, Pub. L. 100-418, the Harmonized Tariff Schedule (HTS) replaced the previous Tariff Schedules of the United States (TSUS) for merchandise entered or withdrawn from consumption on or after January 1, 1989. The change was meant to facilitate international trade by conforming the terminology and numbers used in the tariff schedules. See Harmonized Tariff Schedule of the United States, United States International Trade Commission Pub. 2232, chapter 49 (1990); Harmonized Tariff Schedule of the United States, United States International Trade Commission Pub. 2333, chapter 49 (1991); see also 19 U.S.C. § 1202 (1988) (enacting the HTS); U.S. Customs Service, *Guidance for Interpretation of the Harmonized System*, T.D. 89-80, 54 Fed. Reg. 35,127 (Aug. 23, 1989).

87. *Initiation*, supra note 80, at 37,014.

88. Every one of the 45 states and the District of Columbia with a sales tax taxes

definition of *goods* set out in section 2-105 of the Uniform Commercial Code.⁸⁹ The U.C.C. defines *goods* as "all things (including specially manufactured goods) which are movable at the time of identification to the contract"⁹⁰

transactions in pre-written software; 15 of the states also tax the sale of custom software. 1 Guide to Computer L. (CCH) ¶ 12,200 (May 10, 1990).

89. The Uniform Commercial Code applies to "transactions in goods." U.C.C. § 2-102 (1962). See *infra* note 90 for U.C.C. cases concerning computer software.

90. U.C.C. § 2-105 (1962). The intangible nature of a computer program stored on a tangible medium led to significant debate regarding whether the U.C.C. applies to transactions in software. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765, 769 (E.D.N.Y. 1978), *aff'd in part and rev'd in part on other grounds*, 604 F.2d 737 (2d Cir. 1979), is the leading case finding software to be goods for U.C.C. purposes. Most of the opinions addressing this question have been consistent with *Triangle Underwriters*. See, e.g., *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985); *Chatlos Sys., Inc. v. National Cash Register Corp.*, 479 F. Supp. 738 (D.N.J.), *rev'd in part and remanded on other grounds*, 604 F.2d 737 (3d Cir. 1979). But see *Data Processing Servs., Inc. v. Smith Oil Corp.*, 492 N.E.2d 314 (Ind. App. 1986) (contract for sale of custom software was for services and did not fall within scope of U.C.C.); see also Rodau, *Computer Software Contracts: A Review of the Caselaw*, 2 SOFTWARE L.J. 77 (1987) (provides a thorough review of cases dealing with software and the scope of the U.C.C.).

It is interesting to note that Commerce did not also consult the United Nations Convention on the International Sales of Goods. U.N. Doc. A/Conf. 97/19, *reprinted in*, BUSINESS LAWS, INC., GUIDE TO THE INTERNATIONAL SALES OF GOODS CONVENTION 201.03 (1990). The Convention entered into effect for the United States on January 1, 1988, and thus was the governing law in effect at the time of the Commerce Department's determination. Nevertheless, because the Convention leaves the definition of goods up to local law, it would not have been helpful to Commerce.

The Convention governs international sales made between the United States and other signatory nations. Article 1 of the Convention states:

- (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States;
 - (a) when the States are Contracting States; or
 - (b) when the rules of private international law lead to the application of the law of a Contracting State.
- (2) The fact that the parties have the places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties any time before or at the conclusion of the contract.
- (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

The Convention does not define "goods" for purposes of determining whether a particular transaction falls within its scope. Nevertheless, the Convention provides, in Article 3, that it does not apply "to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labor or other services." Consequently, the Convention sows the seeds of the goods versus services controversy which occurred under the Uniform Commercial Code.

What constitutes goods for purposes of the Convention will be decided under the law of the Contracting state applicable in the action construing the Convention. Consequently, an American court trying to determine whether software falls within the Convention will likely look to cases under the U.C.C. and find that it does. This decision,

As a final element in its determination, Commerce found that the United States Customs Service assesses duties on imported software based on the recording area of the storage medium on which it is imported. If the same media entered the country blank, it would be subject to a lesser duty.⁹¹ This increase in duty is attributable to the value of the intangible software separate from the tangible medium.⁹² The fact that software on a carrier medium is subject to import duties supports Commerce's conclusion that it is merchandise within the meaning of the statute. Finding that the software is an "article or merchandise," Commerce agreed to initiate the investigation.

On January 17, 1990, Commerce published its preliminary affirmative determination that the Government of Singapore had bestowed a single countervailable subsidy to the exporter.⁹³ Commerce preliminarily found that Singapore's Information Technology Institute (ITI), a governmental entity, had developed the software and then sold the worldwide marketing and distribution rights to the private company Computer Systems Advisors Research Pte., Ltd. (CSAR) in return for royalties from future sales. Working from the best information available,⁹⁴ Commerce determined that ITI's arrangement with CSAR would not permit it to recoup the expenses it had incurred developing the CASE software.⁹⁵ Commerce further found that the difference between the royalty rate necessary for ITI to recoup its expenses and the rate CSAR agreed to pay was 15.25 percent.⁹⁶ According to Commerce, this amount represented the estimated net bounty or grant to be offset by a countervailing duty.

Commerce published its final negative determination on April 2, 1990.⁹⁷ In the final determination, Commerce reexamined the prelimi-

however, will presumably depend on the specific nature of the transaction. Factors to consider include whether the transaction is an outright sale or a license and the amount of labor the seller exerts.

For an excellent discussion of the treatment of software under the Convention, see Fakes, *The Application of the United Nations Convention on Contracts for the International Sale of Goods to Computer, Software, and Database Transactions*, 3 SOFTWARE L.J. 559 (1990).

91. Compare subheading 8523.20.00.00 of the Harmonized Tariff Schedule (HTS) (setting duty on unrecorded magnetic disks at 4.2% ad valorem) with subheading 8524.90.40.80 of the HTS (setting duty on recorded media not otherwise specified at 9.7 cents per square meter of recording surface). See *supra* note 86 for general citation to the Harmonized Tariff Schedules.

92. *Initiation*, *supra* note 80, at 37,014.

93. *Preliminary Determination*, *supra* note 85, at 1599-1600.

94. See 19 U.S.C. § 1677(b) (1988); 19 C.F.R. § 355.37 (1989).

95. *Preliminary Determination*, *supra* note 85, at 1600.

96. *Id.*

97. *Final Negative Countervailing Duty Determination: Certain Computer Aided Software Engineering Products from Singapore*, 55 Fed. Reg. 12,248 (1990). It is impor-

nary determination that the agreement between ITI and CSAR constituted a bounty or grant because it was not made on commercially reasonable terms. This time, Commerce found that ITI's projected revenues from 1986 and 1988 sales were in excess of the development costs already incurred and the discounted future maintenance costs. Consequently, Commerce concluded that the agreement was commercially reasonable and that no net benefit had been bestowed on CSAR.⁹⁸

In the final determination Commerce also discussed whether an alleged loan of \$15 million from the Government of Singapore to CSAR and the re-assignment of governmental employees to CSAR constituted "operational subsidies." Commerce was able to verify that the loan was never made. Commerce also determined that CSAR reimbursed the government of Singapore for the salaries and benefits the government paid to employees assigned to CSAR.⁹⁹ Consequently, Commerce determined that no countervailable duty would be assessed against the merchandise and the investigation was terminated.

A negative determination may be challenged in the United States Court of International Trade by a petitioner who sought to have duties imposed on the imported merchandise. To have standing to raise a judicial challenge to a negative agency determination, the plaintiff must be an "interested party."¹⁰⁰ Among other possible plaintiffs, an interested party is defined to include "a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States."¹⁰¹ An action seeking judicial review of a final determination must be filed with the Court of International Trade within thirty days of the date the determination is published in the *Federal*

tant to state once again that because Singapore is not a signatory to the GATT Subsidies Code, no injury determination from the International Trade Commission was necessary. The potential effect of Commission proceedings must not be overlooked in future investigations involving software imported from a signatory nation.

98. *Id.* 12,250.

99. *Id.*

100. 19 U.S.C. § 1516a(a)(1) (1988).

101. *Id.* § 1677(9)(E). There is an ongoing controversy regarding whether a petitioner must affirmatively prove its petition has the express endorsement of a majority of the domestic industry. The Department of Commerce practice has been to assume that a petitioner has the support of a majority of the domestic industry unless it is affirmatively shown not to be the case. *NTN Bearing Corp. of Am. v. United States*, 15 C.I.T. —, —, 757 F. Supp. 1425, 1428 (1991). The Court of International Trade has upheld this practice. *See, e.g., Citrosuco Paulista, S.A. v. United States*, 12 C.I.T. 1196, 1205, 704 F. Supp. 1075, 1085 (1988) ("Neither the statute nor Commerce's regulations require a petitioner to establish affirmatively that it has the support of a majority of a particular industry"). Nevertheless, in *Suramericana*, the Court of International Trade held that in the absence of affirmative evidence that a majority of the industry evidence that a majority of the industry supports the petition, Commerce must reject the petition. *Suramericana*, 14 C.I.T. at —, 746 F. Supp. at 150. *Suramericana* is presently on appeal.

Register.¹⁰²

Commerce's determination has met with divided reaction in the software industry. Visible Systems, the petitioner, was disappointed in the negative determination. Nevertheless, the company was pleased with Commerce's ruling that software on a carrier medium is merchandise subject to the countervailing duty laws.¹⁰³ The Government of Japan expressed concern that the ruling could affect operating system software being developed in that country with the aid of governmental subsidies. The United States Trade Representative has already cited the Japanese project as a barrier to trade with the United States.¹⁰⁴ The Association of Data Processing Service Organizations opposed the investigation from the beginning on the grounds that other countries would retaliate against an affirmative determination by imposing duties on United States software.¹⁰⁵

IV. OBSERVATIONS

Despite the negative result, this determination may have a great impact on the United States software industry and on foreign software producers hoping to sell their merchandise in the United States. This is the first determination which conclusively stated that software on a carrier medium is merchandise for the purposes of the countervailing duty laws. That conclusion is likely to apply with equal force to an antidumping investigation.¹⁰⁶ Consequently, foreign software suppliers must be wary of their development and distribution practices or face the possibility of the imposition of countervailing or antidumping duties and the expensive litigation that may result.

Domestic companies must be increasingly aware of foreign trade laws which may be used against United States companies shipping software abroad. One particular area of concern is software developed with governmental aid. The United States Government subsidizes the development of software through many of its agencies including the Department of Defense.¹⁰⁷ Many of these programs have commercial

102. 19 U.S.C. § 1516a(A)(1) (1988). See *supra* notes 68-75 and accompanying text for general information regarding judicial review.

103. Ludlum, *Commerce Department Revokes Singapore Ruling*, *Computerworld*, Apr. 2, 1990, at 119.

104. Roberston, *BATTLE SHAPING UP IN TACTICAL CPU MARKET*, *ELECTRONIC NEWS*, Jan. 15, 1990, at 4 [hereinafter *ELECTRONIC NEWS*].

105. Ludlum, *Adapso Urges Dropping Singapore Subsidy Suit*, *Computerworld*, Mar. 26, 1990, at 8; see also Ludlum, *Software Case Could Boomerang*, *COMPUTERWORLD*, Jan. 15, 1990, at 10.

106. See *supra* note 4.

107. Roberston, *ELECTRONIC NEWS*, Jan. 15, 1990, at 4.

value. Consequently, companies distributing them abroad face the serious threat of retaliatory duties.

The most immediate result may be the administrative difficulties now facing the agencies charged with enforcing the countervailing duty and antidumping laws. Despite reaching the conclusion that software imported on a carrier medium is subject to the countervailing duty laws, the determination made no progress toward deciding the collateral issues it raised. For example, it remains unclear how duties will be assessed if software enters the United States on a single disk and copies are then produced for domestic distribution. Is the dutiable value limited to the recording area available on the master copy or should Customs make some allowance for the copies to be made and sold in the United States? Can duties be avoided entirely if the software is electronically transmitted over telephone lines rather than shipped in any tangible form?¹⁰⁸

Any authoritative answer to the questions this investigation raised may have to wait until Commerce reaches an affirmative determination in either a countervailing duty or dumping determination. Alternatively, the administrative agencies charged with enforcing the dumping and countervailing duty laws could promulgate guidelines or regulations after appropriate notice and public comment. While promulgation of final regulations would appear to be premature at this juncture, the agencies would benefit from public comment on the enforceability of countervailing and antidumping duty orders on computer software. The International Trade Administration of the Department of Commerce has had only the single experience of Singapore Software Subsidies to form its administrative expertise in the arena of computer software, and the International Trade Commission has not had any opportunity to address the issue in a subsidy or dumping context. There is a danger that the ease with which countervailing duty orders may be avoided (*e.g.*, by reproducing the imported software after it has been entered into the United States) may work to undermine the entire system of antidump-

108. Under General Note 4(b) of the Harmonized Tariff Schedule, telecommunications transmissions are specifically exempt from duties. See *supra* note 86 for general information on the Harmonized Tariff Schedule.

An argument was also raised that software is exempt from duty under General Note 4(c) which exempts "[r]ecords, diagrams and other data with regard to any business, engineering or exploration operation whether on paper, cards, photographs, blueprints, tapes, or other media . . ." (emphasis added). See *Preliminary Determination*, *supra* note 85, at 1598. Commerce flatly rejected this argument stating:

This provision applies solely to the business records or documents of a company. The subject merchandise is a commercial product imported for the purpose of duplication and entry into the commerce of the United States for distribution and sale.

Id.

ing and countervailing duty laws in the United States and in other countries with similar laws. Nevertheless, there are presently no outstanding countervailing or antidumping duty orders. There is, therefore, presently no circumvention of those orders.

As an alternative to an administrative interpretation, Congress could decide to address issues of countervailability in legislation. There is always a danger, however, in urging the Congress to enact preemptive legislation.

Related to this danger, and another factor mitigating against special treatment for computer software, is the fact that software is in many ways similar to other commodities subject to the countervailing duty and antidumping laws. Like software, books, films, and music can all be stored on various media including magnetic tapes and disks. Despite this fact, there have been no calls to reform the laws with respect to motion pictures stored on video tape or music on compact discs.

The same possibilities for fraud and circumvention exist in these industries as in the software industry. A single master tape could be imported and reproduced into compact discs for distribution in the United States, thus avoiding paying duties on each copy. If special regulations or statutory provisions are enacted to deal with the importation of software, there appears to be no reason to prevent a similar extension to books, music, and film. Nevertheless, experience in the those industries appears to indicate that reform is presently unnecessary.

The issues raised by this investigation of computer software from Singapore, may be best resolved through the offices of the United States Trade Representative working within the larger framework of GATT. GATT is at the same time a legal framework and a forum for negotiation.¹⁰⁹ International trade negotiations are often time consuming, for they require elaborate preparations and are often sidetracked by other pressing issues of domestic and international concern. As GATT provisions against software subsidies or dumping may be difficult to enforce, commercial diplomacy may achieve a solution on the substance of enforcement problems, or at least establish new procedures to facilitate settlement of future disputes.¹¹⁰ Furthermore, the very process of international negotiations may serve to educate and involve the computer software industries in these issues of subsidies in international trade.

The United States could also look for an appropriate case to adjudi-

109. See O. LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 21 (1987) [hereinafter LONG]; Greenwald, *International Trade Disputes: Adjudication of Disputes Under the General Agreement on Tariffs and Trade (GATT)*, in United States Court of International Trade, *Proceedings of the Seventh Annual Judicial Conference* (Oct. 15, 1990).

110. LONG, *supra* note 109 at 21.

cate before a GATT dispute resolution panel. GATT panels operate in the manner of arbitration panels. When two or more countries are involved in a dispute, the GATT dispute resolution procedures may be used to address recommendations to the parties.¹¹¹ The panel resolution process offers the prospect of having international trade disputes examined and assessed on the basis of conventional commitments and treaty obligations.¹¹² The United States would be unlikely to call for a GATT panel with regard to Singapore software, however, because the domestic administrative process has already determined that there was no countervailable subsidy. Nonetheless, the possibility of convening a GATT panel may be appropriate for future software cases involving other countries who are signatories to GATT.

The software issues thus will await resolution at an administrative, congressional, or international level. For the present, international trade lawyers and lawyers representing the software industry in the United States and abroad are on notice that the development and pricing of computer software throughout the world may be a future subject of international trade litigation.

111. *See id.* at 84.

112. *See id.*

