

Fordham International Law Journal

Volume 9, Issue 3

1985

Article 4

The Applicability of the United States Countervailing Duty Law to Imports from Nonmarket Economy Countries

Karen A. O'Brien*

*

Copyright ©1985 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Applicability of the United States Countervailing Duty Law to Imports from Nonmarket Economy Countries

Karen A. O'Brien

Abstract

This Note will examine the applicability of the countervailing duty law to nonmarket economies. Part I will review the legislative history of the countervailing duty statute and its judicial and administrative interpretations. Part II will discuss the Commerce Department rulings, the Court of International Trade's reversal of these rulings in *Continental Steel Corp. v. United States* and the Federal Circuit's reversal of the CIT. Finally, Part III will analyze both approaches to the issue. This Note will conclude that the countervailing duty law should apply to goods from nonmarket economies.

THE APPLICABILITY OF THE UNITED STATES
COUNTERVAILING DUTY LAW TO IMPORTS
FROM NONMARKET ECONOMY
COUNTRIES

INTRODUCTION

The countervailing duty law¹ is one of the principal nontariff barriers² used by the United States to combat unfair

1. United States countervailing duty law is embodied in the Tariff Act of 1930, ch. 497, tit. III, § 303, 46 Stat. 687 (codified as amended at 19 U.S.C. § 1303 (1982)). The Tariff Act provides as follows:

(a) Levy of countervailing duties

(1) Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

(2) In the case of any imported article or merchandise which is free of duty, duties may be imposed under this section only if there are affirmative determinations by the Commission under subtitle IX of this chapter; except that such a determination shall not be required unless a determination of injury is required by the international obligations of the United States.

Id.

2. Nontariff barriers are obstructions to international trade other than customs duties or taxes on importation. *See* 2 R. STURM, *CUSTOMS LAWS & ADMINISTRATION* § 61.2(c) (1985); S. METZGER, *LOWERING NONTARIFF BARRIERS* 7 (1974); *see also infra* note 3 (discussion of use of nontariff barriers). The President of the United States has authority to enter into trade agreements to reduce or eliminate nontariff barriers. *See* 19 U.S.C. § 2112(b) (1982). The term nontariff barrier "cover[s] a variety of devices which distort trade, including quotas, variable levies, border taxes, discriminatory procurement and internal taxation practices, rules of origin requirements, subsidies and other direct and indirect means that nations use to discourage imports or artificially stimulate or restrict exports." S. REP. NO. 1298, 93d Cong., 2d Sess. 74, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7224 (Senate bill granting President authority to enter into trade agreements regarding nontariff barriers). *See generally* Note, *Guide to Import Relief and Unfair Trade Actions Available Under United States International Trade Law*, 15 INT'L LAW. 240 (1981) (discussion of various nontariff barriers).

competition from imported goods.³ The countervailing duty

3. See generally S. METZGER, *supra* note 2 (discussion of significant nontariff barriers, including countervailing duty law). There are other United States nontariff barriers, besides the countervailing duty law, which help combat unfair import competition.

The antidumping law prohibits sales of foreign goods in United States markets at less than fair value that threaten or cause material injury to a United States industry. Tariff Act of 1930, 19 U.S.C. § 1673 (1982). Antidumping duties are imposed in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise. See *id.* Antidumping actions, unlike countervailing duty petitions, are brought against the action of companies or industries, not countries. The following examples illustrate the distinction between the antidumping and countervailing duty provisions:

Example 1: Singerfabrik, a German company, manufactures sewing machines. The price in Germany is \$100. It sells the same machine in the United States for \$75 (after adjustment for shipping, etc.). Singer gets no financial help from the German government in connection with the production or export of the machines. Only the antidumping law would apply since there is no element of subsidy.

Example 2: LaCorona, an Italian manufacturer, receives a government subsidy payment equivalent to \$5 for each typewriter it exports. This enables it to sell its typewriters for \$92.50 or the equivalent in both Italy and the United States. Were it not for the subsidy, the price would be \$95 in both places. In this case, only the countervailing duty law would apply, because although there is subsidy, there is no price discrimination.

Example 3: The Netherlands pays exporters of processed cheese an export subsidy of 2 cents per pound. Prochesse, a Dutch company, sells processed cheeses for 37 cents a pound in the Netherlands and 35 cents (after adjustments) to the United States. A complaint could be filed with the [Commerce Department] asking for relief under either [or both] of these laws, because elements of both price discrimination and subsidy exist in this case, and the added duty would, on the facts given, be the same under either law.

E. ROSSIDES, U.S. CUSTOMS, TARIFFS AND TRADE 462-63 (1977). See generally J. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS (1984); Cuneo & Manuel, *Roadblock to Trade: The State-Controlled Economy Issue in Antidumping Law Administration*, 5 FORDHAM INT'L L.J. 277 (1982) (application of antidumping law to nonmarket economy countries).

Section 406 of the Trade Act of 1974 provides temporary relief against imports when a domestic industry is materially injured by increasing imports from communist countries. Under this provision, the plaintiff does not need to show unfairness. 19 U.S.C. § 2436 (1982); see S. REP. NO. 1298, 93d Cong., 2nd Sess. 210, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7186, 7342.

[Congress enacted section 406 because it] recognize[d] that a communist country, through control of the distribution process and the price at which articles are sold, could disrupt the domestic markets of its trading partners and thereby injure producers in those countries. In particular exports from communist countries could be directed so as to flood domestic markets within a shorter time period than could occur under free market condition[s].

Id. Congress stated that traditional unfair trade remedies have proved ineffective, because they are difficult to apply to products from nonmarket economies. See *infra*

law levies a duty equal to the amount of any subsidy granted by the government of an exporting country with respect to goods imported into this country.⁴ United States industries have re-

note 5 (definition of nonmarket economies). United States legislators were also motivated to support the law because they were concerned that the United States could become dependent upon communist countries for vital raw materials. *Id.*; see Erlick, *Relief from Communist Countries: The Trials and Tribulations of Section 406*, 13 *LAW & POL'Y INT'L BUS.* 617 (1981).

Section 337 of the Tariff Act of 1930 prohibits unfair methods of competition and unfair acts in the importation of goods. 19 U.S.C. § 1337 (1982). In practice, almost all of the cases brought under this section of the law involve alleged patent infringement or antitrust violations. See R. STURM, *supra* note 2, at § 65.3; Kaye & Plaia, *The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 *INT'L TRADE L.J.* 3 (1977).

The President has authority to retaliate against unfair practices of foreign governments under section 301 of the Trade Act of 1974. 19 U.S.C. § 2411 (1982). Section 301 is not a substitute for other United States statutes that address specific unfair trade practices. See Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why & How*, 6 *N.C.J. INT'L L. & COM. REG.* 381 (1981). Section 301 gives the Executive the power to use economic and diplomatic pressure to benefit United States Commerce. *Id.* at 382.

The President has additional power under section 201 of the Tariff Act of 1974 (the "escape clause") to take remedial action to prevent severe economic injury to domestic industries caused by a rapid or disruptive increase in imports. 19 U.S.C. § 2253 (1982); see S. REP. NO. 1298, 93d Cong., 2d Sess. 119, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7263.

For many years, the Congress has required that an "escape clause" be included in each trade agreement. The rationale for the "escape clause" has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.

Id.; see also, AMERICAN BAR ASSOCIATION, *CURRENT LEGAL ASPECTS OF INTERNATIONAL TRADE LAW* 37 (1982) (discussion of the escape clause).

4. See Tariff Act of 1930, 19 U.S.C. § 1303 (1982). "Subsidy" is defined by the Trade Agreements Act of 1979, 19 U.S.C. § 1677(5) (1982), 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 [GATT] 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.

cently filed countervailing duty petitions seeking relief from low-priced imports that originate in nonmarket economy countries.⁵ Problems have arisen, however, in applying the coun-

-
- (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.

Id.

The Trade and Tariff Act of 1984, 19 U.S.C.A. § 1677-1 (West Supp. 1985) added the following definition of upstream subsidies to the Trade Agreements Act of 1979:

- (a) Definition. The term "upstream subsidy" means any subsidy described in section 1677(5)(B)(i), (ii), or (iii) of this title by the government of a country that—
 - 1) is paid or bestowed by that government with respect to a product (hereafter referred to as an "input product") that is used in the manufacture or production in that country of merchandise which is the subject of a countervailing duty proceeding;
 - 2) in the judgment of the administering authority bestows a competitive benefit on the merchandise; and
 - 3) has a significant effect on the cost of manufacturing or producing the merchandise.

Trade and Tariff Act of 1984, 19 U.S.C. § 1677-1. The terms "bounty" or "grant" are used interchangeably with the term "subsidy" throughout this text. *See* 19 U.S.C. § 1677(5) (1982).

5. The first countervailing duty petition brought against a nonmarket economy country was brought by members of the United States textile industry. *See* Textiles, Apparel, and Related Products from the People's Republic of China, 48 Fed. Reg. 46,600 (Int'l Trade Admin. 1983) (initiation of countervailing duty investigations). Although the petitioners ultimately withdrew their petition in this case, *see infra* notes 82-88 and accompanying text, several other petitions have resulted in decisions from the United States Commerce Department. *E.g.*, Carbon Steel Wire Rod From Czechoslovakia, 48 Fed. Reg. 56,419 (Int'l Trade Admin. 1984) (initiation of countervailing duty investigation); Carbon Steel Wire Rod from Poland, 48 Fed. Reg. 56,419 (Int'l Trade Admin. 1984) (initiation of countervailing duty investigation); *see also infra* notes 89-128 and accompanying text (Commerce Department discussion of these cases).

The International Trade Administration (ITA), *see infra* note 33 and accompanying text, listed several factors to be considered in determining whether an economy was nonmarket, including: i) state control of capital financing through controls on internally generated funds and state control of banks; ii) state control of international currency transactions with "hard currency" countries and officially maintained dual exchange rate; and iii) government appointment of management, control of sectoral development plans and capital investment. Truck Trailer Axle-and-Brake Assemblies from Hungary, 46 Fed. Reg. 46,152 (1981); *see infra* note 105 (Commerce Department definition of nonmarket economy).

Typically, the governments of nonmarket economy countries are communist. The United States recognizes the following countries as nonmarket economy countries: Albania, Bulgaria, Cuba, Czechoslovakia, Estonia, German Democratic Republic, Hungary, Indochina, Korea, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Polish People's Republic, Southern Sakhalin, Tanna Tuva, and the Union of Soviet

tervailing duty law to goods from nonmarket economy countries because it is difficult to identify and quantify subsidies on such goods.⁶

The issue of whether the countervailing duty law can be applied to goods from nonmarket economy countries was first addressed by the Court of International Trade in *Continental Steel Corp. v. United States*.⁷ The Court of International Trade (CIT), reversing two rulings of the United States Department of Commerce (Commerce Department), held that the Commerce Department erred in assuming that a subsidy can exist only in a market economy.⁸ According to the CIT, the coun-

Socialist Republics. See headnote 3(f) of the Tariff Schedule of the United States (TSUS), 19 U.S.C. § 1202 (1982). The People's Republic of China, Romania, and Yugoslavia, although not listed in the headnote, are considered nonmarket economies. See COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED 1 (GAO Pub. No. ID-81-35, 1981) [hereinafter cited as COMPTROLLER GENERAL'S REPORT]. Yugoslavia's inclusion remains debatable. Although it is a communist country, it is nonetheless regarded by many as a market economy. *Id.*

Nonmarket economies are characterized by resources allocated by the government, administratively set domestic prices, and nonconvertible currency. *Id.* at 2.

The United States has differentiated among the nonmarket economies in establishing and maintaining trade and economic relations. For example, the United States now extends most-favored-nation tariff treatment to products imported from Poland, Hungary, Yugoslavia, Romania, and the People's Republic of China, but not to products from other nonmarket countries, such as the Soviet Union. *Id.* at 3. Most-favored-nation treatment is a commitment by one country that it will extend to another country the lowest tariff rates it applies to imports from any third country. The Soviet Union's invasion of Afghanistan resulted in a partial United States embargo of goods from that country. *Id.* at 3; see Metzger, *Most-Favored Nation Treatment of Imports to the U.S. from the U.S.S.R.*, 1 INT'L TRADE L.J. 79 (1975).

6. See *infra* notes 101-15 and accompanying text (discussion of Commerce Department's explanation of difficulty of applying countervailing duty law); *infra* note 143 and accompanying text (discussion of Court of International Trade's explanation of difficulty of applying the countervailing duty law).

7. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985), *appeal docketed*, No. 85-2805 (Fed. Cir. Sept. 24, 1985). Three actions were consolidated in this case: Georgetown Steel and Continental Steel sought review in the CIT of the Commerce Department's negative countervailing duty determination in the cases involving carbon steel wire rod from Czechoslovakia, 49 Fed. Reg. 19,370, and Poland, 49 Fed. Reg. 19,374. Amax Chemical and Kerr-McGee sought to review the dismissal of their petitions in the cases of potash imported from the Soviet Union and the German Democratic Republic, 49 Fed. Reg. 23,428. See *infra* notes 129-148 and accompanying text (discussion of court's reversal of Commerce Department). The Court of International Trade has exclusive jurisdiction in any action brought under 19 U.S.C. § 1516(a) (1982), which includes actions appealing a ruling by the Commerce Department. 28 U.S.C. § 1581(c) (1982).

8. *Continental Steel*, 614 F. Supp. at 550.

tervailing duty law was intended to apply to all countries, regardless of their economic systems.⁹ The Court of Appeals for the Federal Circuit has recently reversed the CIT and upheld the Commerce Department's determination that the countervailing duty law does not apply to imports from nonmarket economy countries.¹⁰

This Note will examine the applicability of the countervailing duty law to nonmarket economies. Part I will review the legislative history of the countervailing duty statute and its judicial and administrative interpretations.¹¹ Part II will discuss the Commerce Department rulings, the Court of International Trade's reversal of these rulings in *Continental Steel Corp. v. United States* and the Federal Circuit's reversal of the CIT.¹² Finally, Part III will analyze both approaches to the issue.¹³ This Note will conclude that the countervailing duty law should apply to goods from nonmarket economies.¹⁴

I. HISTORY OF THE COUNTERVAILING DUTY LAW

The encouragement of exports through government subsidies has long been recognized as a threat to the natural and efficient allocation of resources in international trade.¹⁵ The United States has dealt with this problem through the use of a

9. *Id.* at 551.

10. *Georgetown Steel Corp. v. United States*, No. 85-2805 (Fed. Cir. Sept. 18, 1986). *Continental Steel* does not appear as a party in this court. For purposes of this note, however, both cases will be referred to as *Continental Steel*. The Federal Circuit vacated the order of the CIT in the Polish and Czechoslovakian wire rod case and the case was remanded to the CIT to dismiss the complaint for lack of jurisdiction because the complaint was not timely filed. The Federal Circuit reversed the CIT insofar as it set aside the Commerce Department's final actions in the Soviet Union and German Democratic Republic potash cases.

11. See *infra* notes 15-81 and accompanying text.

12. See *infra* notes 82-152 and accompanying text.

13. See *infra* notes 153-200 and accompanying text.

14. See *infra* notes 201-24 and accompanying text.

15. S. METZGER, *supra* note 2, at 101. As early as 1776, commentators condemned the use of bounties as an artificial stimulation of exports. 1 A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 506 (R. Campbell & C. Skinner eds. 1976). "The effect of bounties, like that of all the other expedients of the mercantile system, can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord." *Id.* (footnote omitted). Subsidies are seen as distortions of international trade because the exporter receiving assistance is more competitive in the world market as a result of its product's subsidization, not because of its more efficient production. See Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International*

countervailing duty law since 1890.¹⁶

A. *Relevant Legislative History*

The United States adopted its first general countervailing duty law as part of the Tariff Act of 1897.¹⁷ That Act authorized the United States Treasury Department to apply countervailing duties on any imported, dutiable¹⁸ product that had received a bounty or grant from the government of the exporting state.¹⁹ The Tariff Act of 1922 (1922 Act)²⁰ substantially enlarged the scope of the countervailing duty law to cover bounties or grants bestowed upon the manufacture or production of goods, as well as on their exportation.²¹ The 1922 Act also broadened the law to include subsidies paid by nongovernmental sources.²² The present countervailing duty law is

Trade, 9 VA. J. INT'L L. 82, 83 (1969); Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 840 (1972).

16. See McKinley Tariff Act, ch. 1244, § 1, para. 237, 26 Stat. 567, 584 (1890). Congress enacted the world's first countervailing duty law in 1890, after extensive debate concerning protection of the United States sugar industry from highly subsidized European competitors. See H. KAYE, P. PLAIA & M. HERTZBERG, *INTERNATIONAL TRADE PRACTICE* § 13.04 (1981). Congress has the primary and ultimate power to "lay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with foreign nations." U.S. CONST. art. I, § 8, cl. 1,3.

17. Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897).

18. Importers must pay countervailing duties in addition to any other duties imposed on the imported merchandise. 19 U.S.C. § 1671(a) (1982). The original countervailing duty law did not apply to duty-free merchandise. The Trade Act of 1974 amended the law to include duty-free merchandise. Pub. L. No. 93-618, 88 Stat. 1978, 2049 (1974).

19. Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897).

20. Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935-36 (1922).

21. *Id.* Export subsidies are defined as those grants paid by the foreign government upon export. See Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 261 (1980) [hereinafter cited as Barcelo I]; Barcelo, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 780-81 (1977) [hereinafter cited as Barcelo II]. Manufacture or production bounties are domestic subsidies paid by the foreign government without respect to the ultimate destination of the end product. See Barcelo I, *supra*, at 261; Barcelo II, *supra*, at 780.

22. Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935-36 (1922). A nongovernmental source includes a "person, partnership, association, cartel, or corporation." *Id.* To date, however, all of the Commerce Department's countervailing duty determinations have arisen from the actions of a foreign government, rather than from the actions of a private foreign organization. See *Countervailing Duties [Reference File]*, U.S. IMPORT WEEKLY (BNA), 40:0103 (1985) [hereinafter cited as *Countervailing Duties*].

found in section 303 of the Tariff Act of 1930.²³

The Trade Act of 1974²⁴ provided for United States participation in the Tokyo Round of Multilateral Trade Negotiations (Tokyo Round),²⁵ which had as its main goal the reduc-

23. Tariff Act of 1930, ch. 497, tit. III, § 303, 46 Stat. 590, 687 (codified at 19 U.S.C. § 1303 (1983)).

24. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974). Two provisions of the 1974 Act address the issue of unfair imports from nonmarket economies. Section 406 of the 1974 Act allows the President of the United States to invoke import relief whenever imports from a communist country cause "market disruption." *Id.* tit. 4, § 406, 88 Stat. 1978, 2062 (codified at 19 U.S.C. § 2436 (1982)); *see supra* note 3. Congress also amended the antidumping law in the 1974 Act to make it easier to apply to nonmarket economy countries. The antidumping law will apply when the exporting nation is selling goods abroad at a price lower than in its home market, thereby materially injuring a United States industry. *Id.* Before the 1974 Act revisions, the law was hard to apply because it was difficult to determine the home market price in a nonmarket economy. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. 174, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7311.

The Committee is concerned that the technical rules contained in the Act are insufficient to counteract dumping from State-controlled-economy countries where the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison purposes.

Id. The 1974 Act attempts to solve the problem by adopting a standard for price comparison. Trade Act of 1974, Pub. L. No. 93-618, tit. 3, § 204(c), 88 Stat. 1978, 2047 (codified at 19 U.S.C. § 1677b (1982)):

(c) State-controlled economies

If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled economy country or countries is sold either—

(A) for consumption in the home market of that country or countries, or

(B) to other countries, including the United States; or

(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e) of this section.

19 U.S.C. § 1677b(c). The 1974 Act also authorizes the President, subject to congressional approval, to negotiate tariff modifications and reductions in nontariff barriers, including countervailing duties. Trade Act of 1974, Pub. L. No. 93-618, § 203, 88 Stat. 1978, 2015 (codified at 19 U.S.C. § 2253 (1985)); *see supra* note 3.

25. The Tokyo Round of Multilateral Trade Negotiations [hereinafter cited as the Tokyo Round] was the seventh round of negotiations held by signatories to the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, T.I.A.S.

tion or elimination of tariff and nontariff barriers to trade.²⁶ At the Tokyo Round, the participants drafted a Subsidies Code²⁷ that provides detailed rules for the application of antisubsidy principles and sanctions underlying the General Agreement on Trade and Tariffs (GATT).²⁸

The Trade Agreements Act of 1979 (1979 Act) revised the countervailing duty law to comply with the United States obligations under the Subsidies Code.²⁹ One of the major revisions of the law was the addition of a requirement that domestic industries prove that they are being materially injured by imports from countries that have signed the Subsidies Code or assumed equivalent obligations.³⁰ Because no nonmarket economy country has assumed the obligations of the Subsidies Code, imports from these countries do not receive the benefit of the material injury test.³¹ In addition, the Congress defined

No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. GATT is an international document that was negotiated in 1947 by 23 trading nations for the purpose of establishing "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, 55 U.N.T.S. 194, 196. Conducted in Geneva, Switzerland, between 1973 and 1979, the Tokyo Round's goal was to continue the liberalization of world trade that began with GATT. The Tokyo Round's most important accomplishment was a series of international agreements limiting the use and growth of nontariff measures. See H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 16, at § 13.02 n.3; R. STURM, *supra* note 2, at § 62; Note, *Technical Analysis of the Subsidies and Countervailing Measures Agreement*, 11 LAW & POL'Y INT'L BUS. 1497 (1979).

26. See O. LONG, THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS—REPORT BY THE DIRECTOR GENERAL OF GATT I (1979). "The negotiations on a wide range of non-tariff measures were what most distinguished the Tokyo Round from earlier GATT multilateral negotiations." *Id.* at 49.

27. General Agreement on Tariffs and Trade: Interpretation and Application of Articles VI, XVI, XXIII, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter cited as Subsidies Code]. See generally Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 LAW & POL'Y INT'L BUS. 1447 (1979) (discussion of deliberations leading to enactment of Subsidies Code).

28. See Subsidies Code, *supra* note 27.

29. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. 1, §§ 701-707, 93 Stat. 144, 151-62 (codified at 19 U.S.C. § 1671b (1982 & Supp. I 1983)). Congress adopted the Trade Agreements Act of 1979 to "make necessary and appropriate changes in United States law to implement the results of the Tokyo Round of Multilateral Trade Negotiations (MTN)." S. REP. No. 249, 96th Cong., 1st Sess. 1, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381.

30. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. 1, § 701, 93 Stat. 144, 151 (codified at 19 U.S.C. § 1671b (1982 & Supp. I 1983)).

31. *Id.* Office of the United States Trade Representative, International Agree-

subsidies for the first time in the 1979 Act, incorporating part of the Subsidies Code definition.³²

B. *The Administrative Review Procedure and the
Commerce Department's Interpretation of the
Countervailing Duty Law*

1. Overview

The Secretary of Commerce administers the countervailing duty law under the supervision of the administering agency, the International Trade Administration.³³ The Secretary of Commerce may initiate a countervailing duty investigation,³⁴ but such investigations are most commonly initiated by a petition from an interested party³⁵ who has reason to believe

ments and Arrangements Concluded During Tokyo Round, Status of Acceptances (Oct. 1, 1985) (memorandum providing the current status of acceptances of the nontariff measure codes and international arrangements negotiated during the Tokyo Round of Multilateral Trade Negotiations) (available at the *Fordham International Law Journal*). The following countries have signed and ratified the Subsidies Code: Austria, Brazil, Canada, Chile, Egypt, European Economic Community (for Member States), Finland, Hong Kong, India, Indonesia, Israel, Japan, Korea, New Zealand, Norway, Pakistan, Philippines, Spain, Sweden, Switzerland, Turkey, United States, and Uruguay. *See id.*

The People's Republic of China is reportedly seeking GATT status again, after a 36 year absence, which indicates that it may be considering signing the Subsidies Code. *China Seeking GATT Status*, N.Y. Times, Jan. 13, 1986, at D6, col. 3.

32. *See supra* note 4; *see also* S. REP. NO. 249, 96th Cong., 1st Sess., 84-85, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 470-71 (legislative purpose in defining subsidy).

33. 19 U.S.C. § 1303(b) (1982). This section provides that the countervailing duty "shall be imposed, under regulations prescribed by the administering authority" as defined in 19 U.S.C. § 1677(1). *Id.* "The term 'administering authority' means the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law." 19 U.S.C. § 1677(1).

Authority to administer the countervailing duty law was transferred from the Secretary of the Treasury to the Secretary of Commerce, effective January 2, 1980. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,274 (1979). The exercise of that authority is under the general supervision of the Under Secretary for International Trade and the immediate supervision of the Assistant Secretary for Trade Administration who, through the Deputy Assistant Secretary for Import Administration, supervises the administering agency, the International Trade Administration (I.T.A.). *See Countervailing Duties, supra* note 22, at 40:0102. For information on how to file a countervailing duty petition, *see id.* at 40:0107-0120. *See generally* deKieffer, *When, Why and How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective*, 6 N.C.J. INT'L L. & COM. REG. 363 (1980-81).

34. 19 C.F.R. § 355.25 (1985).

35. *See infra* note 64 (definition of interested party); 19 U.S.C. § 1677(9)(a).

that a subsidy is being provided with respect to merchandise imported into the United States.³⁶

The petition must contain specified information, to the extent that it is reasonably available.³⁷ The requirements include a detailed description of the imported merchandise,³⁸ its country of exportation,³⁹ the identities of the benefiting foreign enterprises,⁴⁰ the foreign statutory or other authority under which the subsidy is provided,⁴¹ the manner in which the subsidy is paid, and the value of such subsidy when received and used by producers or sellers of the merchandise.⁴² The petition should also contain information respecting sales prices by foreign manufacturers, producers, or exporters to the United States during the period to be investigated.⁴³ In addition, the petition should give the quantity and value of the goods imported into the United States in the most recent two-year period.⁴⁴

Within twenty days after a petition is filed, the Secretary of Commerce must rule on the sufficiency of the petition.⁴⁵ If the petition properly alleges a basis upon which a countervailing duty may be imposed, a notice of "Initiation of Countervailing Duty Investigation" will be published in the *Federal Register*.⁴⁶ The Secretary of Commerce will make a preliminary determination within eighty-five days of the filing of a petition, and will base the decision on the best information available at the time.⁴⁷ Within seventy-five days of the date of a preliminary determination, the Secretary of Commerce will make a final determination.⁴⁸

If the Secretary finds that a subsidy has been provided, he will publish a countervailing duty order.⁴⁹ The countervailing

36. 19 C.F.R. § 355.26 (1985).

37. *Id.*

38. *Id.* § 355.26(4).

39. *Id.* § 355.26(5).

40. *Id.* § 355.26(6).

41. *Id.* § 355.26(7).

42. *Id.*

43. *Id.* § 355.26(8).

44. *Id.* § 355.26(9).

45. *Id.* § 355.27.

46. *Id.* § 355.27(b).

47. *Id.* § 355.28.

48. *Id.* § 355.33.

49. *Id.* § 355.36.

duty order directs customs officers to assess a countervailing duty on the merchandise found to be benefiting from the subsidy.⁵⁰ At least once a year, the International Trade Administration assesses the amount of the net subsidy.⁵¹

2. Administrative Analysis: Identifying and Quantifying Subsidies

The Commerce Department has a twofold task in a countervailing duty investigation. First, it must determine whether a subsidy exists,⁵² and, second, estimate the amount of the net subsidy.⁵³ The Commerce Department can refer to the illustrative list of subsidies set forth in the Tariff Act of 1979 for guidance in identifying subsidies.⁵⁴ In evaluating what constitutes a bounty or grant, it also reviews past policies and decisions and the wide variety of foreign governmental actions that it has identified as bounties or grants.⁵⁵ These governmental actions have included a package of payments and benefits made to a company as an inducement to build plants, including accelerated depreciation under the income tax laws, low-interest loans, and property tax concessions,⁵⁶ cash payments to fishermen for financing vessel, wharf, and storage area construction,⁵⁷ and a favorable interest rate program for plant modernization, freight rate subsidies assistance, and milk price support payments.⁵⁸

Once a subsidy is identified, its amount often proves difficult to determine.⁵⁹ The commercial and competitive advan-

50. *Id.* § 355.36(a).

51. *Id.* § 355.41.

52. 19 U.S.C. § 1303 (1982).

53. *Id.*

54. Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. I, § 771(5), 93 Stat. 176 (codified at 19 U.S.C. § 1677(5) (1982)); *see supra* note 4 (illustrative list of subsidies).

55. *See* S. REP. NO. 249, 96th Cong., 1st Sess. 84, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 470. "The definition of 'subsidy' is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term 'bounty or grant' under section 303 of the Tariff Act of 1930, unless that practice or interpretation is inconsistent with the bill." *Id.*

56. X-Radial Steel Belted Tires from Canada, T.D. 73-10, 7 Cust. B. & Dec. 24 (1973).

57. Certain Fish from Canada, T.D. 78-181, 12 Cust. B. & Dec. 386 (1978).

58. Cheese from Finland, T.D. 76-173, 10 Cust. B. & Dec. 305 (1976).

59. *See* J. PATTISON, *supra* note 3, at 6-20 (1984). The amount of countervailing duty levied by the Commerce Department is limited to the amount of net subsidy

tage received by the foreign firm is the basic standard used in calculating the amount of the subsidy.⁶⁰ For example, if the alleged subsidy is the extension of a preferential loan rate by a government, the Commerce Department will find a subsidy in the amount of the benefit conferred by the lower rate, discounted to present value if necessary.⁶¹ However, in certain circumstances, the calculation of a subsidy is not so straightforward. Quantification problems have arisen, for example, when a subsidy applies to several products only one of which is under investigation.⁶²

C. *Judicial Interpretation of the Statutory Language*

The Court of International Trade has exclusive jurisdiction over actions brought to contest final countervailing duty determinations by the Commerce Department.⁶³ Such an action may be brought by an "interested party" who was a party to the administrative proceeding.⁶⁴ Judicial review is based on the record made before the administrative agency.⁶⁵ Upon re-

given by the foreign government to the exporter or producer. 19 U.S.C. § 1671(a); see 19 U.S.C. § 1677(6) (definition of net subsidy). The Commerce Department declines import relief when an investigation reveals that the alleged subsidy is de minimis. J. PATTISON, *supra* note 3, at 6-23.

60. See S. REP. NO. 249, 96th Cong., 1st Sess. 85-86, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 471-72. The Commerce Department summarized the quantification process in its preliminary determination in Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 6,768, 6,769 (1984), as follows:

If an industry or industry group is treated preferentially, we need to quantify any benefit conferred. In our countervailing duty cases to date—which have all involved products from market economies—we have used prices or costs to calculate benefits. In market economies, government subsidies generally cause changes in prices facing a firm—the prices paid for goods or services purchased, or the prices received for the sale of a product. In our investigations, we usually seek the price the firm would have paid or received absent government intervention or preferentiality. Any difference between the "benchmark" price, based on operation of a market, and what the firm pays or receives as a result of the government intervention is a subsidy.

Id.

61. 19 U.S.C. § 1677(5)(B)(i) (1982); see, e.g., J. PATTISON, *supra* note 3, at 6-34 n.1; Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,307-308 (1982).

62. See J. PATTISON, *supra* note 3, at 6-24.

63. 28 U.S.C. § 1581(c) (1982).

64. 19 U.S.C. § 1677(9) (1982). "Interested part[ies]" may include foreign manufacturers, United States manufacturers, foreign governments, certain unions, certain trade associations, United States importers and foreign exporters. *Id.*

65. 19 U.S.C. § 1516a (1982); see S. REP. NO. 249, 96th Cong., 1st Sess. 251-52 (1979).

view, the CIT must determine whether the disputed determination is unsupported by substantial evidence or otherwise not in accordance with the law.⁶⁶

Through the years, United States courts have interpreted the phrase "bounty or grant," as used in section 303 of the Tariff Act of 1930, to include a number of governmental programs.⁶⁷ Generally, the courts have advocated a broad reading of the terms "bounty" or "grant" to accord with the congressional purpose of "assuring effective protection of domestic interests from foreign subsidies."⁶⁸ These courts have held the following to be countervailable bounties or grants: remissions of domestic taxes,⁶⁹ an allowance paid upon exportation,⁷⁰ a system of currency control designed so that exporters can meet foreign competition,⁷¹ preferential rail freight rates,⁷² and a program giving loans at a preferential interest rate, in which the first seven repayments are deferred and a special municipal tax arrangement is provided.⁷³

The Court of International Trade has also interpreted the "bounty or grant" language of section 303. In *Bethlehem Steel Corp. v. United States*⁷⁴ the CIT affirmed its broad reading of the law and rejected the International Trade Administration's view that, as a rule, domestic programs generally available to all industries are not subsidies.⁷⁵ According to the CIT, the extent to which subsidization is practiced in the country of production

66. 19 U.S.C. § 1516a(b).

67. See 2 R. STURM, *supra* note 2, at § 58.2 (1985).

68. See, e.g., *A.S.G. Industries, Inc. v. United States*, 610 F.2d 770, 776 (C.C.P.A. 1980) (citing S. REP. No. 1298, 93d Cong., 2d Sess. 183 (1974)); *Nicholas & Co. v. United States*, 249 U.S. 34, 39 (1919).

69. See *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973).

70. *Nicholas & Co. v. United States*, 249 U.S. 34 (1919).

71. *Robert E. Miller & Co. v. United States*, 34 C.C.P.A. 101, C.A.D. 349 (1946); *F.W. Woolworth Co. v. United States*, 115 F.2d 348 (C.C.P.A. 1940).

72. *Macalloy Corp. v. United States*, 1 Ct. Int'l Trade 199 (1981).

73. *Michelin Tire Corp. v. United States*, 2 Ct. Int'l Trade 143 (1981).

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

75. *Id.* at 1239. The court's opinion reads in part:

The practice at issue was one in which companies (whose employee training programs were certified by the South African Department of Manpower) were allowed to deduct 200 percent of the expenses of the training program from their taxable income. The I.T.A. found that this practice was not a bounty or grant because of 'the general availability of this tax benefit.'

Id.

is entirely immaterial.⁷⁶

In *Cabot Corp. v. United States*,⁷⁷ the Court of International Trade clarified its position on generally available benefits. The CIT noted that "generalized benefits" provided by a government, such as national defense or education benefits that accrue generally to all citizens as well as enterprises, are not countervailable bounties or grants.⁷⁸ However, "generally available" benefits, that may be obtained by any and all enterprises, when actually bestowed may constitute grants to individual enterprises.⁷⁹ Therefore, if the "generally available" benefit amounts to an additional benefit or competitive advantage, it is countervailable.⁸⁰ The Commerce Department, however, has rejected the Court of International Trade's broad approach and has continued to hold that generally available programs like those at issue in *Bethlehem Steel* and *Cabot* are not countervailable.⁸¹

II. CONTINENTAL STEEL CORP. v. UNITED STATES

A countervailing duty petition brought by the United States steel industry gave the Commerce Department, the Court of International Trade and the Court of Appeals for the Federal Circuit their first chance to decide whether the countervailing duty law applies to goods from nonmarket economies.

76. *Id.* at 1241. "A law created to deal with the advantageous effects of such benefits as are enjoyed by imports to be sold in the U.S. is hardly concerned with whether the challenged imports are the only beneficiaries or just one of many." *Id.* at 1242. The court's opinion forecast the *Continental Steel* decision, which held that goods from nonmarket economy countries are not exempt from the countervailing duty law. See *infra* notes 129-47 and accompanying text (discussion of *Continental Steel* decision).

77. 19 Cust. B. & Dec. 11 (Ct. Int'l Trade 1985).

78. *Id.* at 19.

79. *Id.* For example, although the government may make low interest rates on loans available to all industries building new plants, only those industries building new plants will benefit from the grant. Thus the implementation of the subsidy results in a special bestowal upon specific enterprises and is therefore countervailable.

80. *Id.* at 19.

81. See, e.g., Certain Refrigeration Compressors from Singapore, 50 Fed. Reg. 30,493, 30,494 (1985) ("[w]e do not consider generally available programs to be countervailable . . . [t]he court's . . . comments in *Bethlehem Steel* on general availability are dicta").

A. Commerce Department Rulings

In September 1983, the Commerce Department first formally addressed the issue of whether a subsidy can be found in a nonmarket economy when United States textile and apparel interests⁸² filed a countervailing duty petition against products from the People's Republic of China (PRC).⁸³ The subsidy alleged in the petition was the PRC's dual exchange rate system, in which a one yuan conversion rate is offered to producers of non-export goods, and another more generous rate is offered to producers of certain export goods.⁸⁴ The Commerce Department initiated "novel" issue hearings to consider the applicability of the United States countervailing duty law to nonmarket economy countries.⁸⁵ The issue became moot, however, when the Commerce Department convinced the textile and apparel coalition to withdraw its petition, pending potential changes in United States textile trade policy.⁸⁶ In De-

82. The countervailing duty petition was filed by the American Textile Manufacturer Institute, the Amalgamated Clothing and Textile Workers Union, and the International Ladies Garments Workers Union. It was later amended to include the American Apparel Manufacturers Association. See *Textiles, Apparel & Related Products from People's Republic of China*, 48 Fed. Reg. 46,600 (Int'l Trade Admin. 1983) (initiation of countervailing duty investigation).

83. See *id.*

84. See *Textile Coalition Charges Subsidization by Chinese of Textile, Apparel Goods*, 8 U.S. IMPORT WEEKLY (BNA) No. 23, at 878 (Sept. 14, 1983). Under the system an "internal settlement rate" allows Chinese exporters to exchange each dollar earned for 2.8 yuan, whereas the official rate is approximately 1.9 yuan to the dollar, according to the petition. *Id.*

85. 48 Fed. Reg. 46,092 (1983). The Commerce Department scheduled the special conference to discuss the "novel" issue: "Whether under the Tariff Act of 1930, as amended, bounties or grants may be found in a non-market economy country . . ." *Id.* The countervailing duty petition was the first ever filed against a nonmarket economy country. See *Applicability of Laws to Nonmarket Economies Discussed at Commerce Hearing*, 9 U.S. IMPORT WEEKLY (BNA) No. 6, at 226 (Nov. 9 1983) (statement by Deputy Assistant Secretary for Import Administration Alan F. Holmer). For a summary of the arguments that were presented to the Commerce Department at the hearing on the issue above, see Note, *Countervailing Duties and Non-Market Economies: The Case of the Peoples Republic of China*, 10 SYRACUSE J. INT'L L. & COM. 405 (1983).

86. See *Industry, Commerce Agree to Delay Decision on Chinese Textiles CVD Case*, 9 U.S. IMPORT WEEKLY (BNA) No. 10, at 373 (Dec. 7, 1983).

The termination of the investigation followed an announcement from Peking that the country would purchase an additional 2 million tons of U.S. grain to meet its obligations under an existing bilateral grain pact. China embargoed U.S. wheat and soybean imports from the United States in retaliation for not coming to an agreement on a new bilateral textile agreement.

Id.

cember 1983, the President announced a significant tightening of the United States system of restrictions on imports and textiles and apparel products.⁸⁷ The issue was, therefore, left unresolved.⁸⁸

The United States steel industry provided the Commerce Department its first opportunity to decide whether certain practices by a nonmarket economy country constitute the awarding of bounties or grants. In November 1983, four United States steel producers⁸⁹ filed a petition on behalf of the carbon steel wire rod industry⁹⁰ alleging that manufacturers, producers, or exporters in Czechoslovakia and Poland received direct or indirect benefits.⁹¹ In the following month, the Commerce Department initiated an investigation based on those allegations.⁹²

87. See *White House Announces Specific Criteria for Limiting Textile, Apparel Imports*, 9 U.S. IMPORT WEEKLY (BNA) No. 12, at 457 (Dec. 21, 1983). The President's plan provided additional criteria to be used to determine a "presumption of market disruption or threat thereof." *Id.*

88. The textile and apparel coalition did not reinstate its countervailing duty petition. *Textiles, Apparel & Related Products from People's Republic of China*, 48 Fed. Reg. 55,492 (Int'l Trade Admin. 1983) (termination of countervailing duty investigations).

89. The industry coalition consisted of Atlantic Steel Company, Continental Steel Company, Georgetown Steel Corporation, and Raritan River Steel Company. See *Carbon Steel Wire Rod from Poland*, 48 Fed. Reg. 56,419 (Int'l Trade Admin. 1983) (initiation of countervailing duty investigation); *Carbon Steel Wire Rod from Czechoslovakia*, 48 Fed. Reg. 56,419 (Int'l Trade Admin. 1983) (initiation of countervailing duty investigation). These two investigations proceeded simultaneously. The decisions in each stage were virtually identical and appear consecutively in the Federal Register. Hereinafter citation will only be made to *Carbon Steel Wire Rod from Poland* in referring to these two investigations.

90. *Carbon Steel Wire Rod from Poland*, *supra* note 89, at 56,419. The steel producers filed the petition on behalf of all United States carbon steel wire rod producers.

'[C]arbon steel wire rod' covers a coiled, semi-finished, hot-rolled carbon steel product of approximately round solid cross-section, not under 0.20 inch nor over 0.74 inch in diameter, not tempered, not treated, not partly manufactured; and valued over 4 cents per pound, as currently provided for in item 607.17 of the Tariff Schedules of the United States.

Id. at 56,420.

91. *Id.* In this instance, the court applied 19 U.S.C. § 1303, because neither Poland nor Czechoslovakia has signed the Subsidies Code. *Id.*; see *supra* note 31 (list of countries that have signed Subsidies Code).

92. See *Carbon Steel Wire Rod from Poland*, *supra* note 89, at 56,419.

1. The Commerce Department's Preliminary Carbon Steel Wire Rod Determination

In February 1984, the Commerce Department issued its preliminary determination that Congress did not exempt nonmarket economy countries from the countervailing duty law.⁹³ The Commerce Department focused on the language of the statute noting that, by its terms, section 303 applies to "any country, dependency, colony, province or other political subdivision of government."⁹⁴ However, it also found that the government actions in question did not constitute bounties or grants.⁹⁵ Specifically, the Commerce Department found that a multiple exchange rate system,⁹⁶ a currency retention program,⁹⁷ price equalization payments to foreign trade organizations,⁹⁸ adjustment and conversion coefficients that increase the effective exchange rate,⁹⁹ and a tax exemption for foreign trade earnings were not bounties or grants.¹⁰⁰

2. The Commerce Department's Final Determination

Several months later, the Commerce Department reversed its preliminary ruling and decided that bounties or grants cannot be identified in nonmarket economies.¹⁰¹ In reaching its

93. See Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 6,768 (Int'l Trade Admin. 1984) (preliminary negative countervailing duty determination) [hereinafter cited as Carbon Steel Wire Rod from Poland II].

94. *Id.* at 6,769; see 19 U.S.C. § 1303 (countervailing duty statute).

95. Carbon Steel Wire Rod from Poland II, *supra* note 93, at 6,770.

96. *Id.* at 6,768. Petitioners alleged that a multiple exchange rate system existed whereby "different rates are applied to 1) commercial transactions with capitalist countries, 2) commercial transactions with socialist countries, and 3) non-commercial transactions and tourism." *Id.*

97. *Id.* Petitioners specifically alleged a currency retention program that allowed exporting companies to keep a certain portion of their hard currency export earnings. *Id.*

98. *Id.* at 6,769. Petitioners alleged that foreign trade organizations and the industrial enterprises involved in foreign trade were compensated for losses incurred when the Foreign Trade Ministry sold goods for less than their domestic price. *Id.*

99. *Id.* Petitioners alleged adjustment coefficients existed. See *id.* at 6,773.

100. Carbon Steel Wire Rod from Czechoslovakia, 49 Fed. Reg. 6,773 (Int'l Trade Admin. 1984) (preliminary negative countervailing duty determination). Petitioners alleged that tax exemption of foreign trade earnings existed in Czechoslovakia. *Id.*

101. Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19,374 (Int'l Trade Admin. 1984) (final negative countervailing duty determination) [hereinafter cited as Carbon Steel Wire Rod from Poland III]. The Commerce Department reaffirmed this decision shortly thereafter when it refused to investigate allegations of subsidiza-

conclusion, the Commerce Department shifted its focus from the statutory wording that the countervailing duty law applies to "any country, dependency, colony, province or other political subdivision,"¹⁰² and its consideration of whether any political entity is exempted per se from the countervailing duty law, to consideration of whether government activities in a nonmarket economy confer a bounty or grant within the meaning of section 303.¹⁰³

The Commerce Department defined a subsidy as any action that distorts or subverts the market process and results in a misallocation of resources, inefficient production, and reduced world wealth.¹⁰⁴ It described a nonmarket economy as one in which allocation of resources is achieved by central planning, not supply and demand, and in which there is, therefore, no market process to distort or subvert.¹⁰⁵ Thus, under the Commerce Department's definition, incentives in a nonmarket economy are imposed upon a system that is not "economically rational" by market standards.¹⁰⁶ The Commerce Department reasoned that, because subsidies are measured by the difference between the market price a firm would receive absent government intervention and the price a firm receives with the preferential governmental treatment, identification of a bounty or grant in a nonmarket economy would be impossible.¹⁰⁷

The Commerce Department concluded that because a supply and demand economy is a necessary reference point for identifying and calculating the amount of subsidy, bounty, or grant, the countervailing duty law does not apply in a state-controlled economy.¹⁰⁸ The Commerce Department maintained that to impose the concept of a subsidy when it has no

tion of potash from several nonmarket economy countries. Potassium Chloride from the German Democratic Republic, 49 Fed. Reg. 23,428 (1984) (rescission of initiation of countervailing duty investigation and dismissal of petition); Potassium Chloride from the Soviet Union, 49 Fed. Reg. 23,428 (1984) (rescission of initiation of countervailing duty investigation and dismissal of petition).

102. 19 U.S.C. § 1303 (1982).

103. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,375.

104. *Id.*

105. *Id.*

106. *Id.* at 19,377.

107. *Id.* at 19,375.

108. *Id.* at 19,376. The Commerce Department defines demand as "the prices that consumers are willing to pay for the good." *Id.*

meaning would force it to identify every government action as a subsidy.¹⁰⁹

According to the Commerce Department, the grant of a relative advantage by a foreign government to one of its domestic industries determines whether that government has awarded a bounty or grant.¹¹⁰ The Commerce Department illustrated this point by example.¹¹¹ If a market economy producer were given a government payment on each of its sales, theoretically the producer would respond by increasing output.¹¹² However, according to the Commerce Department, if a nonmarket economy producer were given a similar benefit, for example, a government increase of the controlled price, the higher price would not necessarily increase the output of the nonmarket economy producer.¹¹³ This result is possible because the government may control the raw materials the producer needs to increase production.¹¹⁴ If the government denies the producer access to needed raw materials, the producer could not increase his production, even though the government allowed him to charge a higher price.¹¹⁵

To further support its determination that the countervailing duty law does not apply to goods from nonmarket economy countries, the Commerce Department noted that Congress has been silent on the issue.¹¹⁶ The Commerce Department observed that, in the 1974 Act, Congress specifically addressed the problem of unfair trade remedies with respect to imports from nonmarket economies, but chose vehicles other than the countervailing duty law to regulate the problem.¹¹⁷ First, Congress amended section 205 of the Antidumping Act of 1921¹¹⁸ by adopting a standard for price comparison.¹¹⁹

109. *Id.*

110. *Id.* "Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the economic result of the foreign government's action which controls . . ." *Id.* (citing *United States v. Zenith Radio Corp.*, 64 C.C.P.A. 130, 138-39, 562 F.2d 1209, 1216 (1977), *aff'd*, 437 U.S. 443 (1978)).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 19,378.

117. *Id.* at 19,377.

118. Trade Act of 1974, Pub. L. No. 93-618, § 204(c), 88 Stat. 1978, 2047 (codified at 19 U.S.C. § 167b(c) (1982)).

Second, Congress enacted section 406 of the 1974 Act to protect United States industries from trade disruption caused by imports from communist countries.¹²⁰ The Commerce Department also noted that, although the countervailing duty law was restructured in the 1979 Act, Congress did not enact a provision that referred to nonmarket economies.¹²¹

The Commerce Department also cited article 15 of the Subsidies Code¹²² as evidence of congressional intent to not apply the countervailing duty law to nonmarket economies.¹²³ Article 15 permits signatories to regulate unfairly priced imports from nonmarket economies under either antidumping or countervailing duty legislation.¹²⁴ The Commerce Department claimed that, by approving article 15, Congress reaffirmed its decision to regulate unfair competition from nonmarket economy countries under the antidumping law.¹²⁵ In contrast, the Commerce Department noted, Congress made no effort to amend the countervailing duty law.¹²⁶

In addition, the Commerce Department referred to recent government and academic literature that discussed the difficulty of applying the countervailing duty law to nonmarket economy countries.¹²⁷ Finally, the Commerce Department claimed for itself broad discretion in determining whether a bounty or grant exists.¹²⁸

B. *Decision of the Court of International Trade*

The Court of International Trade reversed the Commerce

119. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,377; *see infra* note 3 and accompanying text.

120. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,377; *see infra* note 3 and accompanying text.

121. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,377.

122. *Id.* at 19,378; *see* Subsidies Code, *supra* note 27, at art. 15.

123. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,378.

124. *See* Subsidies Code, *supra* note 27, at art. 15.

125. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,378.

126. *Id.*

127. *See id.* The following sources were cited by the Commerce Department: INTERFACE TWO, (D. Wallace Jr. & D.A. Flores, eds. 1982); INTERNATIONAL ORDER FOR PUBLIC SUBSIDIES (Trade Policy Research Centre 1977); Barcelo, *Subsidies and Countervailing Duties—Analysis and A Proposal*, 9 *LAW & POL'Y INT'L BUS.* 779, 850 (1977); REPORT TO THE CONGRESS OF THE UNITED STATES: U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED (1981).

128. Carbon Steel Wire Rod from Poland III, *supra* note 101, at 19,378.

Department's decision and held that countervailing duties may be applied to imports from nonmarket economies.¹²⁹ In reviewing the Commerce Department's decision, the CIT discussed the definition of a subsidy, the plain meaning and remedial purpose of the countervailing duty law, the problem of identification and quantification of subsidies, and the legislative history of the law.

The CIT declined to adopt the Commerce Department's definition of a subsidy.¹³⁰ The CIT stated that the countervailing duty law is not a tool of foreign policy; rather, its purpose is to protect domestic industry subsidized from goods imported into the United States.¹³¹ In order to effectuate this domestic purpose, Congress intended the law to apply without exception.¹³² According to the CIT, the Commerce Department's fundamental error was its premise that a subsidy can exist only in a market economy.¹³³ In contrast to the Commerce Department, the CIT defined subsidization as the encouragement of exportation through some form of special preference.¹³⁴ The CIT asserted that the Commerce Department's position suggested the "absurd" result that the more completely a government becomes involved in production, the less likely it is to be subsidizing.¹³⁵

The CIT also stated that the Commerce Department's position was at odds with the plain meaning and remedial purpose of the countervailing duty law and inconsistent with judicial interpretation and past administration of the law.¹³⁶ The CIT noted that the law was carefully drafted to apply to all countries, regardless of their economic structure.¹³⁷ In addition, the CIT argued, the Commerce Department's position

129. See *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

130. See *id.* at 553; *supra* text accompanying note 104 (Commerce Department's definition of subsidy).

131. *Continental Steel*, 614 F. Supp. at 553.

132. *Id.*

133. *Id.* at 550.

134. *Id.* at 553.

135. *Id.*

136. *Id.* at 550.

137. *Id.* at 551. The court wrote:

In the opinion of the Court the language of this law is perfectly indifferent to forms of economy. The language plainly shows the strongest possible

would diminish the remedial effect of the law.¹³⁸ The CIT noted that the history of the administration of the countervailing duty law did not show the development of any exceptions based on the degree of centralized control exercised by the government of the country of production.¹³⁹

The CIT also responded to the Commerce Department's claim that subsidies in a nonmarket economy would be impossible to identify and quantify because nearly every government action could be deemed a subsidy, and there would be no market value against which to determine its amount.¹⁴⁰ The CIT noted that the types of subsidies alleged to exist in these cases were not benefits peculiar to nonmarket economies and, therefore, could be easily identified as subsidies.¹⁴¹ Furthermore, even if the Commerce Department scrutinized novel domestic conduct of a nonmarket economy country, that agency has the ability to detect whether the foreign government is subsidizing the new conduct.¹⁴² The CIT acknowledged that the Commerce Department faces a problem in measuring these subsidies, but noted that this task is "precisely within the expertise

desire to prevent evasion either by means of technicalities of status, or by technicalities of form, or by technicalities of relationship.

We have a law which uses ten exhaustive alternatives to describe the possible conveyor of the subsidy.

Id.

138. *Id.* at 352.

139. *Id.* at 34; see Memorandum of Plaintiffs in Support of Motion for Judgment on the Agency Record at 25, 26, *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985) [hereinafter cited as Plaintiffs' Memo]. A major point in the plaintiffs' brief was that the countervailing duty law has been applied to goods from countries that were state-controlled to a degree that would meet the criteria the I.T.A. uses to classify nonmarket economies. *Id.* For example, a countervailing duty determination against sugar from Imperial (Czarist) Russia was upheld in *Downs v. United States*, 187 U.S. 496 (1903), even though the Russian government exercised complete control over the sugar industry through a comprehensive tax and quota-based system of controls on the processing and sale of sugar. In addition, countervailing duties were imposed extensively against imports from Germany during the 1930's, despite extensive governmental control. *Id.*

140. *Continental Steel*, 614 F. Supp. at 554; *Carbon Steel Wire Rod from Poland III*, *supra* note 101, at 19,376.

141. *Continental Steel*, 614 F. Supp. at 554; see Plaintiffs' Memo, *supra* note 139, at 45.

142. *Continental Steel*, 614 F. Supp. at 554. "All that will be needed in these cases is the ability to distinguish between the normal operation of central control and the exceptional or . . . unfair event. It would be wrong for the Court to be more specific at this time about the method of detecting subsidies within a nonmarket economy." *Id.*

of the agency."¹⁴³

The CIT rejected the Commerce Department's argument that legislative amendments to the antidumping provision demonstrated congressional intent to exclude application of the countervailing duty law to nonmarket economy goods.¹⁴⁴ In the CIT's opinion, the amendment of the antidumping law was irrelevant, because unlike the antidumping provisions, the countervailing duty law does not require fair market value as a reference point.¹⁴⁵ In addition, that Congress refrained from amending the law indicates that the law needed no clarification, and applied to all forms of economies.¹⁴⁶ Finally, the CIT refuted the Commerce Department's argument that Congress' enactment of section 406 of the Trade Act of 1974¹⁴⁷ was evidence that the countervailing duty law did not apply to goods from nonmarket economy countries. In the CIT's opinion, section 406 is merely an alternative method of dealing with the problem.¹⁴⁸

C. *Decision of the Court of Appeals for the Federal Circuit*

The Court of Appeals for the Federal Circuit reversed the CIT's decision and upheld the Commerce Department's determination that the countervailing duty law does not apply to imports from nonmarket economy countries. The Federal Cir-

143. *Id.* "If there are any difficulties here, they are not difficulties of meaning, but problems of measurement . . ." *Id.* The court did not expound further on the Commerce Department's presumed expertise. *But see* Plaintiffs' Memo, *supra* note 139.

Lastly, the ITA's decision seeks refuge in the premise that countervailing duties would be too difficult to calculate in [nonmarket economy] proceedings. Previous experience, however, suggests that the ITA is far too modest. Indeed, the ITA has proven itself ingenious at calculating duties in the face of immensely complicated factual situations. *See, e.g.,* Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 18,006 (1984) (developing present value method of calculating the subsidy element in preferential loans, grants, and equity infusions).

Id. at 39.

144. *Continental Steel*, 614 F. Supp. at 555.

145. *Id.*

146. *Id.*

147. Trade Act of 1974, Pub. L. No. 93-618, tit. 4, § 406, 88 Stat. 1978, 2062 (codified at 19 U.S.C. § 2436 (1983)); *see supra* note 3 and accompanying text.

148. *Continental Steel*, 614 F. Supp. at 555. "Section 406 is a separate remedy for separate circumstances. The potent specialized nature of the countervailing duty law is not affected by the existence of possible alternative remedies." *Id.*

cuit based its decision on the purpose of the countervailing duty law, the nature of nonmarket economies and the actions Congress has taken to revise statutes other than the countervailing duty statute to deal specially with the issue of imports from nonmarket economy countries.¹⁴⁹

The Federal Circuit stated that the purpose of Congress in enacting the countervailing duty law was to protect domestic industries against "unfair" competition resulting from subsidies that distort the market process and give foreign producers a competitive advantage. The Federal Circuit found, however, that this kind of "unfair" competition cannot exist in imports from nonmarket economy countries. Since in a nonmarket economy central planners decide what entities will sell what goods where and at what prices and terms, the nonmarket economy is already replete with distortions. Thus, concluded the Federal Circuit, governments in nonmarket economies do not provide the kind of "bounty" or "grant" for which Congress prescribed the imposition of countervailing duties.¹⁵⁰

The Federal Circuit found further support for its conclusion in the action of Congress in dealing with the problem of imports from nonmarket economy countries in other statutory provisions. Echoing the Commerce Department's argument, the Federal Circuit noted that Congress has amended the antidumping law in both the Trade Act of 1974 and the Trade Agreements Act of 1979 to make it more effective in dealing with imports from nonmarket economies, while it remained silent about the application of the countervailing duty law to such imports even though both statutes presented similar problems in application.¹⁵¹ The Federal Circuit found such inaction to be evidence of a congressional belief that the countervailing duty law did not apply to nonmarket economies.

Finally, the Federal Circuit addressed the *amici curiae* argument that the Commerce Department's construction of the countervailing duty statute subverts the statute's purpose because it excepts from the countervailing duty law countries that

149. *Georgetown Steel Corp. v. United States*, No. 85-2805, slip op. at III (Fed. Cir. Sept. 18, 1986).

150. *Georgetown Steel Corp. v. United States*, No. 85-2805, slip op. at III A (Fed. Cir. Sept. 18, 1986).

151. *Georgetown Steel Corp. v. United States*, No. 85-2805, slip op. at III B 1 & 2 (Fed. Cir. Sept. 18, 1986); *see supra* notes 117 and 121.

are the worst distorters of world markets. In reply the Federal Circuit stated that Congress has decided that the antidumping statute is the proper method for protecting the American market against goods sold by nonmarket economies at unreasonably low prices. If that remedy is inadequate, then it is up to Congress to provide the additional remedies it deems appropriate.¹⁵²

III. ANALYSIS OF THE ADMINISTRATIVE AND JUDICIAL DECISIONS

This section of the Note compares the approach of the Commerce Department to that of the Court of International Trade and outlines the ramifications of each. As noted, the Federal Circuit essentially adopted the Commerce Department's position. Finally, suggested approaches to the problem are offered.

A. Comparison and Analysis of Approaches

As the *Continental Steel*¹⁵³ case illustrates, the Commerce Department and the Court of International Trade differ fundamentally in their approach to resolving the issue of whether the countervailing duty law applies to imports from nonmarket economies. Each begins with a different definition of subsidy. The Commerce Department defines a subsidy as a distortion of the market process that results in a "misallocation of resources, encouraging inefficient production and lessening world wealth."¹⁵⁴ This contrasts sharply with the CIT's definition of subsidy as "the encouragement of exportation by means of some type of special preference."¹⁵⁵ Thus, the Commerce Department focused on the subsidy's effect on the world economy, while the CIT focused on the effect of subsidized imports on the United States economy.¹⁵⁶ It is in the definition of subsidy and the articulation of the broad purpose of the countervailing duty law that the Commerce Department's posi-

152. *Georgetown Steel Corp. v. United States*, No. 85-2805, slip op. at III C (Fed. Cir. Sept. 18, 1986).

153. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

154. *Carbon Steel Wire Rod from Poland III*, *supra* note 101, at 19,375.

155. *Continental Steel*, 614 F. Supp. at 553.

156. *Id.* at 553; *see supra* note 154.

tion seems weakest.¹⁵⁷ As the CIT pointed out, the countervailing duty law was enacted to assure effective protection of domestic interests from foreign subsidies, and since its inception the court has interpreted the law broadly to effectuate that purpose.¹⁵⁸ The countervailing duty law was meant to be concerned with the subsidy's effect not on world trade, but on failing United States industries.¹⁵⁹

The Commerce Department and the CIT also differed on the issue of whether a subsidy can even be found in a nonmarket economy. According to the Commerce Department, a subsidy is detected by its economic effect on the laws of supply and demand.¹⁶⁰ A subsidy is a market phenomenon, and therefore cannot exist in a nonmarket setting.¹⁶¹ The CIT, on the other hand, noted that a subsidy can be found in any economy in which the government or private sources favor the manufacture, production, or export of particular merchandise.¹⁶² The CIT was also more persuasive on this point. Congress, in enacting the countervailing duty law, was not concerned with the effect of the government benefit on the exporting country's economy, but rather, on the negative effect that subsidized imports would have on the United States econ-

157. See Reply Memorandum of Plaintiffs in Support of Motion for Judgment on the Agency Record at 21-23, *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985) [hereinafter cited as Plaintiffs' Reply Memo].

The ITA's restrictive construction contravenes Congressional intent that Section 303 be broadly applied and, therefore, is not entitled to deference. In *ASG Industries, Inc. v. United States*, 610 F.2d 770, 776 (C.C.P.A. 1979), the Court rejected a limiting administrative interpretation on Section 303, stating: "To permit the Secretary to place a narrow or restricted interpretation on 'bounty' or 'grant' as a basis for a negative countervailing duty determination would clearly frustrate the Congressional purpose of 'assuring effective protection of domestic interests from foreign subsidies.'" Furthermore, the unbroken pattern of legislative amendments over the past ninety years reflects a continuing effort to strengthen and render more effective the countervailing duty law.

Id. at 21.

158. *Continental Steel*, 614 F. Supp. at 553-54.

159. See Plaintiffs' Reply Memo, *supra* note 157, at 2. "As should be self-evident, the countervailing duty law is concerned—not with resource allocation in Poland and Czechoslovakia—but rather with the effect of subsidized imports on U.S. industry." *Id.*; see *supra* notes 17-32 and accompanying text (regarding legislative history).

160. *Carbon Steel Wire Rod from Poland III*, *supra* note 101, at 19,375.

161. *Id.*

162. *Continental Steel*, 614 F. Supp. at 554.

omy.¹⁶³

The crux of the Commerce Department's ruling, however, was the difficulty in applying the countervailing duty law to goods from nonmarket economies.¹⁶⁴ On this point, the Commerce Department's position that the identification and quantification of countervailing duties is virtually impossible in nonmarket economies may be valid.¹⁶⁵ The CIT was perhaps overconfident in the ability of the Commerce Department to identify every situation in which a countervailing duty could arise and to estimate the value of such duties.¹⁶⁶ The CIT's opinion gave the Commerce Department little guidance and stated merely that

[a]ll that will be needed in these cases is the ability to distinguish between the normal operation of central control and the exception or disproportionate or unfair event. It would be wrong for the Court to be more specific at this time about the method of detecting subsidies within a nonmarket economy.¹⁶⁷

The CIT's approach thus relied on standards that reflected the normal commercial situation encountered by business in that nonmarket economy country.¹⁶⁸

Depending on the type of subsidy involved, the Commerce Department would encounter varying degrees of difficulty in levying a countervailing duty. For example, the Commerce Department would have little trouble in identifying and quantifying "export" subsidies.¹⁶⁹ If a nonmarket economy country producer is receiving economic support for exports, but not for domestic sales, then an export subsidy would ex-

163. See *supra* note 16 and accompanying text; see also S. REP. NO. 1298, 93d Cong., 2d Sess. 183, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7318. The purpose of the countervailing duty law is to ensure effective protection of domestic interests from subsidized foreign imports. *Id.*

164. See *supra* text accompanying note 107. Defendant's Memorandum in Opposition to Plaintiff's Motions for Review at 5, *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985). "[I]f in adopting a particular interpretation of the law the ITA cannot thereafter administer it in a reasonable manner, then it has no choice but to reject that interpretation." *Id.*

165. See *supra* note 107 and accompanying text.

166. See *supra* note 143 and accompanying text.

167. *Continental Steel*, 614 F. Supp. at 554.

168. See *id.*

169. See Rosen & Benjamin, *Court Spurns Narrow Reading of Import Duty Law*, *Legal Times*, Sept. 30, 1985, at 11, col. 1.

ist.¹⁷⁰ The Commerce Department could establish the value of the subsidy by comparing the prices the firm receives for export goods with those received for nonexport goods.¹⁷¹ Under the facts of *Continental Steel*, the Commerce Department could easily identify and quantify the alleged subsidies, because the subsidies in that case were conventional export subsidies not peculiar to nonmarket economies.¹⁷²

In several areas, however, the Commerce Department could have great difficulty in applying the countervailing duty law to goods from nonmarket economy countries.¹⁷³ "Domestic" subsidies, for example, may be more difficult than "export" subsidies to identify and measure.¹⁷⁴ The Commerce Department would have to determine whether the government grant is selective, and whether it "distort[s] . . . a pattern of regularity."¹⁷⁵ In addition, when a foreign government invests directly in a foreign exporter, the government's participation is countervailable if it is on terms "inconsistent with commercial considerations."¹⁷⁶ However, in the absence of ordinary commercial indicators, it may be difficult to measure subsidies of this type.¹⁷⁷ Likewise, government labor assistance programs¹⁷⁸ and government loans¹⁷⁹ may obscure whether the

170. *Id.*

171. *See supra* note 60 (discussion of how Commerce Department quantifies subsidies).

172. *See Continental Steel*, 614 F. Supp. at 554. "The subsidies alleged to exist here are not acts which are peculiar to nonmarket economies." *Id.*; Plaintiffs' Memo *supra* note 139, at 45. "[T]he practices alleged are conventional export subsidies that are defined in the precedents interpreting section 303 and in the Illustrative List. Even the ITA admits that some of the incentives tied to exports which Plaintiff's alleged 'might be considered export subsidies.'" *Id.*

173. *See supra* note 4 (definition of domestic subsidy).

174. *Continental Steel*, 614 F. Supp. at 554.

175. *Id.*; *see Rosen & Benjamin, Court Spurns Narrow Reading of Import Duty Law*, *Legal Times*, Sept. 30, 1985, at 11, col. 2.

176. 19 U.S.C. § 1677(5)(B)(i) (1982).

177. *See Rosen & Benjamin, Court Spurns Narrow Reading of Import Duty Law*, *Legal Times*, Sept. 30, 1985, at 11, col. 2.

178. "To be countervailable, a benefit program for workers must give preferential benefits to workers in a particular industry or in a particular targeted region." *Certain Steel Products from Belgium*, 47 Fed. Reg. 39,304, 39,319-20 (1982). *See generally* J. PATTISON, *supra* note 3, at 6-57.

179. *See* J. PATTISON, *supra* note 3, at 6-34 n.1. "A loan guarantee by a government is generally considered a subsidy to the extent it assures more favorable terms than are otherwise available in the commercial market. 19 U.S.C. § 1677(5)(B)(i) (1982)." *Id.*

foreign government is providing a subsidy, and if so, to what extent.¹⁸⁰ Thus, the CIT might have glossed over the problem of identifying and quantifying subsidies in nonmarket economies which could have resulted in applying the law in an arbitrary and capricious manner.¹⁸¹

The Commerce Department and the Federal Circuit found that Congress' refinement of the antidumping law¹⁸² and adoption of section 406 of the Trade Act of 1974¹⁸³ indicated that the countervailing duty law does not apply to goods from nonmarket economy countries. This seems the most telling argument for concluding that the countervailing duty law does not apply to imports from nonmarket economy countries. The Commerce Department and the Federal Circuit might be led to the view that when Congress twice amended the antidumping law to make that law more effective in dealing with imports from nonmarket economy countries, and did not amend the countervailing duty law to correct similar problems, it believed that the countervailing duty law had no application to nonmarket economy countries. This conclusion, however, is unsupported by the legislative history of either law.¹⁸⁴

B. *Ramifications of the CIT's Approach to the Countervailing Duty Law*

The affirmance of the decision of the Court of International Trade would have been a victory for United States industries whose products compete with nonmarket economy imports. Filing of countervailing duty petitions against goods from nonmarket economy countries would have been possible, and especially attractive, because nonmarket economy countries are not entitled to an injury test before the International

180. See Rosen & Benjamin, *Court Spurns Narrow Reading of Import Duty Law*, *Legal Times*, Sept. 30, 1985 at 11, cols. 2-3.

181. See *Applicability of Laws to Nonmarket Economies Discussed at Commerce Hearing*, 9 U.S. IMPORT WEEKLY (BNA) No. 6, at 227 (Nov. 9, 1983). As Senator Strom Thurmond stated at the Commerce Department's "novel" issue hearing, see *supra* note 85 and accompanying text, "[t]he government must come to Congress to seek changes in the law, . . . not 'ignore or misapply' it." *Id.*

182. See *supra* notes 118-19 and accompanying text.

183. Trade Act of 1974, Pub. L. No. 93-618, tit. 4, § 406, 88 Stat. 1978, 2062 (codified at 19 U.S.C. § 2436 (1982)); see *supra* note 120 and accompanying text.

184. See *supra* notes 144-48 and accompanying text.

Trade Commission.¹⁸⁵

A victory for United States producers, however, would have been a defeat for both United States importers and consumers. Once the Commerce Department finds a subsidy, the statute mandates the levy of a countervailing duty.¹⁸⁶ The imposition of a countervailing duty always results in a higher price to consumers and importers.¹⁸⁷ Therefore, in cases in which United States industries are not injured, consumers are penalized without receiving any corresponding benefit to the domestic economy. The countervailing duty law could thus be viewed as a competitive weapon for United States industries, rather than a protective device against artificial export stimulants.¹⁸⁸

In addition, mandatory application of the law could affect sensitive political relations with nonmarket economy countries.¹⁸⁹ Countervailing duty investigations typically relate to actions of governments,¹⁹⁰ and are therefore infinitely more delicate than, for example, antidumping actions, which are directed at an individual firm's price discrimination.¹⁹¹ Many of the programs that the Commerce Department deems countervailable lie at the heart of a foreign government's domestic policy, and therefore touch upon the sovereign concerns of that government.¹⁹² A countervailing duty investiga-

185. See *supra* text accompanying note 31.

186. See *supra* note 1.

187. See S. METZGER, *supra* note 2, at 124.

188. See Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of the Countervailing Duty Law*, 1 *LAW & POL'Y INT'L BUS.* 17, 26 (1969) [hereinafter cited as *Mutiny Against the Bounty*]; Feller, *The Antidumping Act and the Future of East-West Trade*, 66 *MICH. L. REV.* 115, 133 (1967). "Countervailing duties could be imposed even if the export price were too high to be competitive in the United States market or if the volume were too small to injure or threaten to injure a domestic industry." *Id.*

189. Concern over political relations was the basis of the Commerce Department's negotiations with the domestic textile industry to withdraw its countervailing duty petition against imports from the People's Republic of China. See *supra* note 86 and accompanying text.

190. See *supra* note 22.

191. See UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY AND PUBLISHED IN CONJUNCTION WITH COMMISSION'S REPORT TO THE PRESIDENT 412 (July, 1971).

192. Note, *Protecting Steel: Time For A New Approach*, 96 *HARV. L. REV.* 866, 871 (1983). This commentator queries how United States citizens would react if the gov-

tion not only points out the clear economic and social differences between market and nonmarket economies, but also could be perceived as an attempt to ascribe capitalist values to socialist ideology.¹⁹³

The Court of International Trade's decision gave the Commerce Department little guidance as to how to identify and measure subsidies in nonmarket economies.¹⁹⁴ In addition, the Commerce Department faced the problem of acquiring essential information about alleged subsidies from often uncooperative nonmarket economy countries.¹⁹⁵ On a practical level, the Commerce Department would have had a very difficult task, and its decisions might have resulted in arbitrary and capricious determinations.¹⁹⁶

C. *Ramifications of the Commerce Department's Approach to the Countervailing Duty Law*

The Federal Circuit's affirmance of the Commerce Department's position that the countervailing duty law does not apply to imports from nonmarket economies leaves domestic industries with one less mechanism with which to combat the rising level of imports from nonmarket economies.¹⁹⁷ The remaining unfair import competition remedies, such as the antidumping law and section 406, are either more difficult to implement than the countervailing duty law or have proven to be ineffective.¹⁹⁸ By comparison, a remedy based on the countervailing

ernments of Western European countries announced that they were imposing countervailing duties on cars imported from the United States. *Id.* n.31.

193. See Note, *supra* note 85, at 419.

194. See *supra* note 167 and accompanying text.

195. See *supra* notes 37-44 and accompanying text (information necessary for filing a countervailing duty petition).

196. See *Carbon Steel Wire Rod from Poland III*, *supra* note 101, at 19,376.

197. In 1970 nonmarket economy country imports to the United States totalled \$217 million compared to \$3,183 million in 1983. UNITED NATIONS, INTERNATIONAL TRADE STATISTICS YEARBOOK 1180 (1985). However, "[f]rom an economic perspective, the nonmarket economies have the long-term potential to buy and sell much more in world markets than they do presently. These countries comprise about one-third of the world's population and about one-quarter of its land area. Their combined GNP is roughly equal to that of the United States." COMPTROLLER GENERAL'S REPORT, *supra* note 5, at 3.

198. In 1984, then Under Secretary of Commerce for International Trade, Lionel H. Olmer, noted that "[i]n applying the antidumping law to NME's [nonmarket economies] we have found the present statute and regulations to be enormously burdensome and excessively complicated, in comparison to the law as applied to market

duty law would be easier to obtain because the plaintiff does not need to prove a material injury.¹⁹⁹ In addition, the countervailing duty law is sometimes the only unfair import remedy available.²⁰⁰

D. *Suggested Approaches*

The issue of whether the countervailing duty law should apply to imports from nonmarket economy countries is ill-suited to resolution by the courts. Only Congress can undertake the necessary inquiry into the economic and political ramifications of such an application. If Congress believes that domestic industries are entitled to protection from subsidized imports from market economies, it is difficult to understand how Congress could conclude that domestic industries are not entitled to protection from subsidized imports from nonmarket economy countries. Highly theoretical and often strained arguments as to the meaning of subsidy and "unfair" competition fail to provide satisfactory answers. Congress would also have to consider, however, whether the political and administrative problems inherent in the application of the countervailing duty law to nonmarket economy countries would make such legislation unwise.²⁰¹ A number of legislative approaches have been suggested to alleviate these concerns. For example, commentators have suggested that the countervailing duty law be

economies. The results are often unpredictable" *Nonmarket Economy Imports Legislation: Hearing Before the Subcommittee on International Trade of the Committee on Finance, 98th Cong., 2d Sess. 3-4 (1984)* [hereinafter cited as *Nonmarket Economy Imports Legislation Hearing*]. But see *BNA Interview with Alan Holmer, Former Commerce Department Deputy Assistant Secretary for Import Administration*, 2 INT'L TRADE REP. (BNA) No. 32, at 1016 (Aug. 7, 1985). When questioned about what recourse United States industries will have if the Commerce Department's position of not applying the countervailing duty law to nonmarket economies stands, Holmer stated, "Petitioners continue to have the same remedy that they have in fact used often: they can bring an antidumping case. The size of the dumping margins found in cases involving non-market economies over the last year or two underscores the viability of this option, that is readily available to petitioners." *Id.* at 1017. However, situations in which subsidies are present do not always give rise to sales at less than fair market value, and therefore do not give rise to antidumping actions. See *supra* note 3. No United States petitioner has ever received relief under section 406. See Horlick & Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 827 (1984).

199. See *supra* note 1 and accompanying text.

200. See *supra* note 3.

201. See COMPTROLLER GENERAL'S REPORT, *supra* note 5, at 3, 27.

amended to permit its discretionary application, in order to preserve sensitive political relations.²⁰² It has also been reminded that nonmarket economy countries could be given the advantage of an injury test, if they sign the Subsidies Code or assume equivalent obligations.²⁰³ Proposals have also been made that would ease the administration of the countervailing duty law by establishing standards for the quantification of subsidies.²⁰⁴

1. Proposals for Discretionary Application of the Countervailing Duty Law and Inclusion of the Injury Test

Commentators have suggested that Congress amend the countervailing duty statute to permit the President to waive the imposition of countervailing duties when he determines that it would be in the interest of the United States not to countervail imports from a particular country.²⁰⁵ This proposal, however, is unlikely to win favor with the Executive Branch.²⁰⁶ In order to prevent Congress from passing additional protectionist legislation, the President must show that existing remedies, such as the countervailing duty law, provide United States industries adequate protection from unfair imports.²⁰⁷

It has also been suggested that the nonmarket economy countries themselves could help ensure that United States industries do not use the countervailing duty law offensively by signing the Subsidies Code or assuming equivalent obligations, thus acquiring the protection of the material injury

202. See *infra* notes 205-07 and accompanying text.

203. See *infra* notes 208-12 and accompanying text.

204. See *infra* notes 213-30 and accompanying text.

205. Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 146 (1968); Feller, *Mutiny Against the Bounty*, *supra* note 188, at 17, 64-65; Note, *supra* note 85, at 419.

The 1979 Tariff Act amendments to the countervailing duty law give the law's procedural requirements an "adjudicatory cast," which tends to reduce or prevent the opportunity the law should give decision makers to consider other facts, such as sensitive political relations with affected countries or national security. Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can.] [Will]/[Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1365, 1398 (1979).

206. See Butler, *supra* note 205, at 142. See generally Mervosh, *The New Trade Strategy*, *Business Week*, Oct. 7, 1985, at 90.

207. See Butler, *supra* note 205, at 142.

test.²⁰⁸ If nonmarket economy countries refrain from signing the Subsidies Code because they are unable to comply with all of the Code's provisions,²⁰⁹ they could seek protection by negotiating individualized bilateral agreements with the United States.²¹⁰ Under such agreements, the nonmarket economy countries would affirm their adherence to those Subsidies Code principles that they could uphold, and, in return, the United States would extend to them the benefit of the injury test.²¹¹ Although this proposal does improve the position of the nonmarket economy countries that import goods to the United States, it also gives those countries an unfair advantage over the United States traditional market economy trading partners by not requiring the same obligations.²¹²

2. Proposals to Facilitate the Application of the Countervailing Duty Law

Commentators have suggested that the problem of quantifying the amount of a subsidy received by an exporter in a nonmarket economy could be resolved by the use of a hypothetical constructed value in a surrogate country, as is currently done in antidumping investigations.²¹³ Under this ap-

208. See COMPTROLLER GENERAL'S REPORT, *supra* note 5, at 29. It reads in part: Limiting the need for an injury test, for the most part, to countries under the Agreement is intended to encourage countries to either sign the Subsidies Code or to assume substantially equivalent obligations. According to the State Department's comments on our draft report, however, "The selective extension of an injury test does not appear to have been a useful inducement to countries to sign the Subsidies Code or to assume equivalent obligations."

Id.

209. Some reasons given for nonmarket economy countries not being able to comply with all the provisions of the Subsidies Code are the need to disclose information on certain aspects of the operation of their economies and the impossibility of identifying and quantifying the net effect of domestic subsidies.

210. *Id.* at 32.

211. *Id.* at 32-33.

212. *Id.* at 33.

213. See, e.g., *Nonmarket Economy Imports Legislation Hearing*, *supra* note 198, at 35 (statement suggesting that greater effort to implement the surrogate country approach with simulated constructed value be made); *Applicability of Laws to Nonmarket Economies Discussed at Commerce Hearing*, 9 U.S. IMPORT WEEKLY (BNA) No. 6, at 226, 228 (Nov. 9, 1983); see also Horlick & Shuman, *supra* note 198, at 825 (discussion of theory and its problems). The use of a hypothetical constructed value in a surrogate country originated in the antidumping case *Electric Golf Cars from Poland*, in which United States manufacturers of electric golf cars alleged that golf cars from Poland

proach, the amount of subsidy would be determined by comparing the United States import price to what the cost of production would be in the nonmarket economy country.²¹⁴ This nonmarket economy production cost would be computed by quantifying the raw materials, energy, and labor actually employed in the production of the good in the nonmarket economy country and determining their value in a comparable market economy.²¹⁵ The benefit of the approach is that it relies largely on public information to determine the production cost in a market economy and is therefore easy to administer because it does not require any country but the nonmarket economy respondent to supply confidential data to the Commerce Department.²¹⁶ In addition, surrogate countries could be identified in advance so that when a particular case arose, the investigation could be completed within the normal time frame.²¹⁷ However, this approach presents a variety of problems, including the difficulty of selecting the "right" surrogate country and the possibility of administrative abuse of discretion in choosing that country.²¹⁸

Legislation has been proposed in the Congress that would attempt to solve the problem of quantification of subsidies in a

were being sold at less than fair value. *Electric Golf Cars from Poland*, 40 Fed. Reg. 25,497 (1975). Because Poland was deemed a nonmarket economy country Treasury Regulations provided that the constructed value of such or similar merchandise in a nonmarket economy country could be used. 19 C.F.R. § 353.6. The Treasury Department faced a problem, however, because no other nonmarket economy country produced electric golf cars. The hypothetical constructed value in a surrogate country was used as a standard. It has since been added to the hierarchy of Commerce Department regulations for calculating foreign market value. See 19 C.F.R. § 353(4)(a); Cuneo & Manuel, *supra* note 3, at 292; COMPTROLLER GENERAL'S REPORT, *supra* note 2, at 15 (drawbacks of simulating foreign market value). See generally Note, *Dumping from 'Controlled Economy' Countries: The Polish Golf Car Case*, 11 LAW & POL'Y INT'L BUS. 777 (1979).

214. See *supra* note 60 (Commerce Department describes how it quantifies subsidies).

215. 19 C.F.R. § 353.8(c).

216. See Horlick & Shuman, *supra* note 198, at 825. This hypothetical surrogate approach is, therefore, different from the surrogate country approach, in which the Commerce Department seeks confidential business data from a surrogate country that is often uncooperative. *Id.* at 821.

217. *Applicability of Laws to Nonmarket Economies Discussed at Commerce Hearing*, 9 U.S. IMPORT WEEKLY (BNA) No. 6, at 226, 229 (Nov. 9, 1983).

218. See Horlick & Shuman, *supra* note 198, at 825; see COMPTROLLER GENERAL'S REPORT, *supra* note 5, at 22-23 (advantages and disadvantages of simulated constructed value).

different manner.²¹⁹ Under this approach, in countervailing duty investigations in which the Commerce Department has not been provided with the necessary information from the nonmarket economy country to determine whether a subsidy exists, a different standard would be employed.²²⁰ The Commerce Department would not seek to measure value in the nonmarket economy country, but would look at the price of imports of foreign market producers in the United States market.²²¹ The reference price would be the lowest average price charged in the United States for a like product from a market economy country.²²² Problems with this approach could arise, however, when there is only one United States producer whose product competes with the nonmarket economy import.²²³ The bill's alleged benefit is that it would be simpler and more predictable than any other approach in applying the countervailing duty law when quantification of subsidies is difficult.²²⁴

219. This bill was first proposed as S. 1966 in 1979 and subsequently revised and resubmitted as S. 958 in 1981 and S. 1351 in 1983/84. The Heinz bill (named after Senator Heinz, its chief sponsor) has developed an alternative approach to handling nonmarket economy import problems under the unfair trade laws. See Horlick & Shuman, *supra* note 198, at 832. The bill was dropped in conference at the end of the 1984 Small Fee Congressional Session. *Id.*

220. See *Nonmarket Imports Legislation Hearing, supra* note 213, at 2 (opening statement of Senator John Heinz). See generally COMPTROLLER GENERAL'S REPORT, *supra* note 5, at 20-22 (discussion of methodology of United States market price approach).

221. See *Nonmarket Economy Imports Legislation Hearing, supra* note 213, at 2, 6.

222. *Id.*

223. See Horlick & Shuman, *supra* note 198, at 834; see Cuneo & Manuel, *supra* note 3, at 309-10 (problems with lowest free market price approach).

224. *Nonmarket Economy Imports Legislation Hearing, supra* note 198, at 4-6 (testimony of Lionel H. Olmer, Under Secretary of Commerce for International Trade; further criticism of the bill).

Based on Commerce's four-year experience administering the AD/CVD laws, we think they must be substantially improved as applied to NME's. We believe the artificial pricing investigation proposed in S. 1351 would be simpler and more predictable than current law, and therefore the best way to protect U.S. industry against unfairly traded NME imports. Domestic manufacturers could more effectively anticipate the likelihood of relief, and weigh the costs and benefits of seeking relief. NME producers could price more fairly in the first place. Importers would benefit from increased predictability by not buying imports likely to be found unfairly traded.

Id. at 6. *But see id.* at 35 (Peter Ehrenhaft's suggestion that greater effort to implement surrogate constructed value test be made).

The most recent version of this bill seeks to amend only the antidumping law and not the countervailing duty law. S.1868, 99th Cong., 1st Sess., 131 CONG. REC. 16,000, 16,002 (1985) (Heinz bill).

CONCLUSION

Having posited for itself the almost impossible task of determining "whether when Congress enacted the countervailing duty law in 1897 it would have applied the statute to nonmarket economies, if they then had existed," it seems that the Federal Circuit erred in deciding that the law should not apply to such economies. Legislative history and judicial and administrative interpretations of the countervailing duty law call for a broad reading of the law to effectuate its original purpose: protection of United States industries from unfair import competition.

Whether the decision of the Federal Circuit was right or wrong, the issue of the countervailing duty law's applicability to imports from nonmarket economy countries is ill-suited to resolution by the courts. Only Congress can undertake the necessary inquiry into the economic, political and administrative ramifications of such an application.

Karen A. O'Brien