Antidumping, Constructed Value, and Non-countervailable Subsidies: A Proposed Inclusion of Subsidies After Al Tech Specialty Steel Corp. v. United States

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Abstract

Part I discusses the antidumping law in the context of subsidy inclusion in constructed value calculations. Part II outlines the CIT’s exclusion of subsidies from the cost component of constructed value in light of the court’s policy rationales, and its interpretation of legislative, judicial, and administrative authority. Part III suggests that when a subsidy that benefits production is not countervailable, such as a subsidy that is generally available, the policy of remedying the unfair advantage created by the subsidy outweighs the CIT’s policy concern’s in Al Tech Specialty.
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AL TECH SPECIALTY STEEL CORP. v. UNITED STATES

INTRODUCTION

The antidumping¹ and countervailing duty² laws are remedies available to domestic industries³ injured by foreign producers who benefit from unfair trade practices, such as dumping⁴ or subsidization.⁵ The purpose of the United States antidumping law is to provide a remedy against unfair pricing practices⁶ by foreign importers.⁷ When foreign goods are sold in the United States at less than their fair value,⁸ the antidumping law imposes a duty, in addition to customs duties, equal to the difference between the foreign market value⁹ and the U.S. price¹⁰ of the imported goods.¹¹ If there is no adequate foreign market value or if the foreign producer dumps in its home market,

⁶. See Epstein, The Illusory Conflict Between Antidumping and Antitrust, 18 ANTITRUST BULL. 1, 5 (1973). An exporter engaging in predatory pricing sets his export price at whatever level is necessary to eliminate competition. Id.
⁷. See Epstein, supra note 6, at 5 (1973). When one or more firms achieves a price advantage through discrimination rather than through efficiency, the expected mechanisms of competitive markets may be distorted. Id. Dumping, a form of international price discrimination, can impair competition if it results in less efficient firms driving more efficient firms out of the market. Id. at 7. The result of such an event would be resource misallocation. See also Anthony, The American Response to Dumping From Capitalist and Socialist Economies—Substantive Premises, and Restructured Procedures After the 1967 GATT Code, 54 CORNELL L. REV. 159, 163-77 (1969).
¹¹. 19 U.S.C. § 1673 (1982 & Supp. III 1985). If the ITA finds that the sales are being made or are likely to be made at less than fair value and the International Trade Commission finds that a U.S. industry is materially injured, threatened with such injury, or that the establishment of an industry in the United States is materially retarded, then an antidumping duty is imposed "equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise." Id.
then constructed value may be used as a surrogate for foreign market value. The United States Court of International Trade ("CIT") recently decided in Al Tech Specialty Steel Corp. v. United States that subsidies could not be added to constructed value in a case where the subsidy at issue could be remedied under the countervailing duty law.

This Comment concurs with the Al Tech Specialty decision, but argues that its holding should not apply where the subsidies in question benefit production and are not countervailable. Part I discusses the antidumping law in the context of subsidy inclusion in constructed value calculations. Part II outlines the CIT's exclusion of subsidies from the cost component of constructed value in light of the court's policy rationales, and its interpretation of legislative, judicial, and administrative authority. Part III suggests that when a subsidy that benefits production is not countervailable, such as a subsidy that is generally available, the policy of remedying the unfair advantage created by the subsidy outweighs the CIT's policy concern's in Al Tech Specialty.

I. CONSTRUCTED VALUE IN ANTIDUMPING LAW

Protection against unfair trade practices is based on the need to protect vulnerable domestic industries, because such practices may result in market disruption and the reduction of competition. The countervailing duty law counteracts the ef-

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13. Kaplan, Kamarck & Parker, supra note 4, at 33.
15. Id. at 1429-30. According to the Al Tech Specialty court, "The antidumping remedy protects domestic industry from imported merchandise sold at less than fair value, which imports either have caused or threaten to cause material injury. . . . Countervailing duty law, in contrast, was enacted specifically to address the market distortions caused by subsidization." Id.
16. Ehrenhaft, Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties, 58 COLUM. L. REV. 44 (1958). Dumping has existed as long as the mercantile system, but it has been of major international significance since the late nineteenth century. Id. at 51. The cartels of Europe and the United States often dumped products in less-developed markets. Id. However, dumping legislation arose in many nations as an attempt to protect "war baby" industries following World War I. Id.
17. See Epstein, supra note 6, at 2-7. Epstein divides price discrimination between national markets into four categories: Introducing New Products, Meeting Competition, Maximizing Current Revenue, and Predatory Pricing. The most deleterious type of dumping from an economic standpoint is intermittent dumping. Id.
fect of foreign government subsidies on products exported to the United States.\textsuperscript{18} It generally provides for a duty on imports equal to the foreign government subsidy received by the foreign producer.\textsuperscript{19}

The antidumping law complements the countervailing duty remedy by counteracting the unfair pricing behavior of foreign producers.\textsuperscript{20} The antidumping law, as embodied in Title VII of the Tariff Act of 1930,\textsuperscript{21} may be defined as a surtax, in addition to normal duties, imposed on imports whose price is less than the "fair value"\textsuperscript{22} for such goods. Fair value is not specifically defined but it is generally considered synonymous with foreign market value.\textsuperscript{23} The additional antidumping duty is intended to restore the price of goods to their fair value, and thus prevent injury to U.S. producers of similar merchandise.\textsuperscript{24}

Under U.S. antidumping law, dumping margins are measured by calculating the amount that foreign market value ("FMV") exceeds the United States price ("USP") of the imported merchandise.\textsuperscript{25} The International Trade Administra-
tion ("ITA")\(^{26}\) of the Commerce Department calculates the FMV by resort to home market prices.\(^{27}\) If home market sales are below market value for an extended period, or if the product is made solely for export, then the ITA may use constructed value to represent the FMV for the purpose of calculating an accurate dumping duty.\(^{28}\)

Constructed value consists of four factors: 1) general production costs; 2) costs incidental to placing the merchandise in condition for exportation to the United States; 3) general expenses reflected by sales of comparable merchandise in the home market; and 4) profits reflected by sales of comparable merchandise in the home market.\(^{29}\) The constructed value formula in 19 U.S.C. § 1677b(e) ambiguously defines general production costs as costs "which would ordinarily permit the

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\(^{26}\) United States price, 19 U.S.C. § 1677a (1982), means the purchase price, or the exporter's sales price, whichever is the first arm's length transaction; that is, the first sale to a non-related entity. See E. McGovern, International Trade Regulation, at 360-62 (1986); E. Rossides, supra note 19, at 198-99.


\(^{29}\) According to Department of Commerce estimates, about fifty percent of current antidumping cases involve cost of production or constructed value analyses. Kaplan, Kamarck & Parker, supra note 4, at 33. The increasing importance of constructed value analysis stems, in part, from growing world-wide over-capacity in several sectors, including the steel and semiconductor industries. Id. at 146. It is also a result of growth in the number of export-oriented industries targeted towards the United States market. Id.
production of that particular merchandise in the ordinary course of business. The statute does not specify which costs may be considered. In the case of a government subsidy that benefits production, the cost could be that expended solely by the manufacturer, or the manufacturer’s costs plus government subsidies, which are, in effect, contributions to the cost of production.

The primary statutory issue before the CIT in Al Tech Specialty Steel Corp. v. United States was whether the cost of production and constructed value sections of the antidumping law require the ITA to include subsidies that benefit production as a component of cost in its constructed value of West German tool steel. The ITA excluded these subsidies from constructed value, and the CIT affirmed.

II. THE AL TECH SPECIALTY DECISION

In Al Tech Specialty, the West German federal and state governments heavily subsidized Arbed Saarstahl GmbH, a West German producer of tool steel imported into the United States. The domestic plaintiff contended that these subsidies

30. Id. The constructed value section does not clearly specify whether the production costs it lists should be the actual cost of production, including subsidies which benefit production, or the cost expended solely by the manufacturer. In Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421 (Ct. Int’l Trade 1986), the CIT recently chose the latter construction in a case involving countervailable subsidies. See 651 F. Supp. at 1430.
32. Id. The Al Tech Specialty plaintiffs argued before the ITA that all manufacturing costs should be considered, regardless of who bears the cost, since the subsidies merely shift costs from the producer to the government. 50 Fed. Reg. 23,170 (Int’l Trade Admin. 1985). The statute makes no reference to the production or material costs incurred by an individual producer. Id.
33. 651 F. Supp. 1421.
34. 19 U.S.C. § 1677b(b).
35. 19 U.S.C. § 1677b(e).
36. 651 F. Supp. at 1423.
38. See Memorandum in Support of Plaintiff’s Renewed Motion for Judgment upon an Agency Record at 3-5, Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421 (Ct. Int’l Trade 1986) (84-08-01192); see also Saarstahl Will Need More Aid, Metal Bulletin, July 1, 1983, at 21; More Aid For Saarstahl, Metal Bulletin, Sept. 13, 1983 (since 1978, Saarstahl has received DM 3.065 billion in state guarantees, bonuses and debt absorption. Saarstahl requested an additional grant of DM 86 million for 1983, and as of September 1983 had received DM 30 million of this grant).
should be considered as a component of the manufacturer's cost.\footnote{50 Fed. Reg. 23,170 (Int'l Trade Admin. 1985)} However, the ITA rejected this argument and based its cost calculation on only those expenses actually recorded in the foreign producer's books and records.\footnote{51 Fed. Reg. 10,071, 10,072 (Int'l Trade Admin. 1986)}

The \textit{Al Tech Specialty} court determined that traditional sources of statutory construction—legislative history, judicial precedent, and administrative practice—failed to demonstrate that the ITA's interpretation of cost of production and constructed value was unreasonable.\footnote{651 F. Supp. at 1429.} Consequently, the CIT deferred to the ITA's interpretation of cost, adopting both its exclusion of subsidies and its sole reliance on costs as documented in the producer's books and records.\footnote{See supra note 37.}


\footnotetext[41]{The scope of judicial review of final antidumping administrative determinations is defined to be whether the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(3)(b)(I) (1982 & Supp. III 1985). The United States Supreme Court has determined that as long as an agency does not act in express violation of statutory intent, courts should give substantial weight to the agency's interpretation of the statute it administers. Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978). The Court explained that administrative practice has special weight when it involves the "construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Id. at 450 (quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933)). Nevertheless, the Supreme Court has qualified the rule of deference to agency determinations, warning: "Expert discretion is the life-blood of the administrative process, but 'unless we make the requirements for admin-
The court's primary rationale for its decision was that the subsidies in question could be more properly counteracted by the countervailing duty law. The court also reasoned that consideration of subsidies exceeded the scope and purpose of the antidumping law. The court further reasoned that if the subsidies were included in constructed value, the ITA would be required to consider subsidies without undertaking a countervailing duty investigation. Thus, the court suggested that defendants might be deprived of due process safeguards unique to the countervailing duty law, particularly those concerning whether a countervailable subsidy exists. Finally, the CIT held that subsidy inclusion would create substantial uncertainty among exporters because benefits which were not previously countervailable could be attacked.

A. Authority for Subsidy Consideration in Constructed Value

Neither the cost of production section nor the constructed value section of the antidumping law expressly addresses whether domestic subsidies may be considered in constructed value calculations. Furthermore, legislative history, judicial precedent, and administrative practice establish little controlling authority for the CIT's exclusion of subsidies from constructed value calculations. These sources of statutory interpretation provide even less authority for the refusal to consider non-countervailable subsidies that benefit or supplement production costs in the constructed value calculation.

43. 651 F. Supp. at 1430.
44. Id. at 1429.
45. Id. at 1430.
46. Id.
47. Id.
50. 651 F. Supp. at 1425-29.
1. Legislative History and Subsidy Inclusion in Constructed Value

The Trade Act of 1974,\(^{51}\) broadened the use of constructed value by adding the cost of production section, under which the ITA must use constructed value instead of home market price in cases of home market dumping.\(^{52}\) "Home market dumping" is defined as sales in the home market that fall below the cost of production and that do not allow the manufacturer to cover costs within a reasonable time in the normal course of trade.\(^{53}\) The House Report accompanying the 1974 Act comments on the determination of home market dumping, but is inconclusive on the propriety of subsidy inclusion in the cost of production section.\(^{54}\) It specifies that the generally accepted accounting principles of the country of origin will be used to determine whether home market dumping exists, as long as such principles reasonably reflect the variable and fixed costs of production.\(^{55}\) See generally Campbell, The Foreign Trade Aspects of the Trade Act of 1974 (pt. 2), 33 WASH. & LEE L. REV. 639, 658-63 (1976).

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52. See H.R. REP. No. 571, 93d Cong., 1st Sess. 71 (1973). This House Report accompanied the Trade Act of 1974, which added the cost of production section—19 U.S.C. § 1677b(b)—and explained that the accounting principles generally accepted in the country of export should be used in determining whether merchandise has been sold at less than cost "if [the ITA] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." Id. It is ambiguous whether these variable and fixed costs include all costs incurred in the production of the merchandise (costs assumed by manufacturer and subsidizer), or only the costs incurred by the manufacturer. Since a cost of production section finding of home market sales less than value is often followed by a constructed value determination, the cost components of both have similar purposes: to accurately approximate the value of imported goods for the eventual purpose of imposing a dumping duty that reflects the extent of discriminatory pricing. Therefore, the suggested limitation of Al Tech Specialty is consistent with the fair price comparison required under the antidumping law. The antidumping law should be applied so that the comparison between foreign market value and United States price is an "apples to apples" comparison that accurately measures the dumping margin. See Smith-Corona v. United States, 713 F.2d 1568 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984).


54. See H. REP. No. 571, supra note 52, at 71. Due to the similarity of the cost components in the cost of production and constructed value sections, authority to include certain subsidies within the cost of production in order to accurately "reflect the variable and fixed costs of producing the merchandise" would suggest inclusion in constructed value.
costs of producing the merchandise.\textsuperscript{55} Even though the generally accepted accounting principles of the country of export may not expressly require subsidy consideration in cost of production, the consideration of such subsidies may be necessary to reasonably reflect the producer's variable and fixed costs.\textsuperscript{56} Indeed, the primary purpose of the cost of production section was to ensure a more accurate dumping margin.\textsuperscript{57} The issue remains, however, whether the ITA may consider a subsidy that benefits production in calculating cost of production or constructed value to more accurately reflect the variable and fixed costs of production.

The Trade and Tariff Act of 1984\textsuperscript{58} did not incorporate an input dumping proviso\textsuperscript{59} that, in effect, would have permitted the ITA to construct the value of the materials or components used in producing a dumped product if those materials were dumped in the exporter's home market.\textsuperscript{60} Access to a dumped production component would constitute a benefit to production as much as any government subsidy. By counteracting such a government-provided dumped-production input under this proviso, the ITA would have been capable of counteracting a production-benefitting subsidy with the antidumping law.\textsuperscript{61}

2. Judicial Precedent and Subsidy Inclusion in Constructed Value

Prior to \textit{Al Tech Specialty}, no conclusive judicial precedent existed interpreting whether subsidies may be considered, to the extent they benefit production, in calculating the cost component of constructed value.\textsuperscript{62} Furthermore, no court has resolved this issue in the context of non-countervailable subsi-

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{59} See Bello, \textit{supra} note 58, at 319-20. The Trade and Tariff Act did add an upstream subsidies section, 19 U.S.C.A. § 1677-1 (West Supp. 1987), which allows the ITA to counteract countervailable subsidies made on production components.
\textsuperscript{60} Bello, \textit{supra} note 58, at 319-20.
\textsuperscript{61} Id.
\textsuperscript{62} \textit{Al Tech Specialty}, 651 F. Supp. at 1426-28.
dies that benefit production.\textsuperscript{63} The first judicial consideration of whether foreign government subsidies may be included within constructed value, \textit{J.H. Cottman v. United States},\textsuperscript{64} favored subsidy inclusion. The \textit{Cottman} holding probably is distinguishable from the current subsidy issue. If \textit{Cottman} were decided today, the market distortion created by government subsidization would be addressed by the antidumping law's state-controlled economy section, which was enacted in 1974.\textsuperscript{65} Under this section of the antidumping law, the ITA employs the home market price or constructed value of such or similar merchandise from a comparable market economy country.\textsuperscript{66} If \textit{Cottman} were decided under this section, the foreign market value would not be distorted by the foreign government's subsidy as long as the ITA could find a comparable market economy surrogate that produced similar unsubsidized merchandise. Thus, a court would not be compelled to factor this government input subsidy in constructed value.

The persuasiveness of \textit{Cottman} is also limited by \textit{European Trading Co. v. United States},\textsuperscript{67} which was decided eight years later. In \textit{European Trading}, the Court of Customs and Patents

\textsuperscript{63} \textit{Id.} Thus, the inclusion of countervailable subsidies in constructed value was a novel issue for the CIT. None of the cases involving subsidies not countervailable under the generally available rule, see infra notes 102-108, have considered this issue. See, e.g. Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986); Agrexco Agricultural Export Co. v. United States, 604 F. Supp. 1238 (Ct. Int'l Trade 1985); Bethlehem Steel Corp. v. United States, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984); Carlisle Tire & Rubber Co. v. United States, 5 Ct. Int'l Trade 229, 564 F. Supp. 834 (1983).

\textsuperscript{64} \textit{J.H. Cottman & Co. v. United States}, 20 C.C.P.A. 344, cert. denied 289 U.S. 750 (1932). In \textit{Cottman} the Court of Customs and Patent Appeals ("CCPA") found that the government had a monopoly on the production and sale of phosphate in Morocco, and that no usable home market or third country sales existed. \textit{Id.} at 352. In a constructed value calculation, the court held that even though production costs were covered by the government, they could not be discounted to zero. \textit{Id.} at 358-59. By holding that production costs must be greater than zero, the court in effect held that production benefitting subsidies had to be given some value and included in the constructed value calculation. \textit{Id.} at 358-60.

\textsuperscript{65} 19 U.S.C. § 1677b(c) (1982).

\textsuperscript{66} 651 F. Supp. at 1427. The \textit{Al Tech Specialty} court suggested that the state-controlled economy section would probably apply if \textit{Cottman} were decided today. \textit{See id.}

\textsuperscript{67} \textit{United States v. European Trading Co.}, 27 C.C.P.A. 289 (1940). In \textit{European Trading}, a German producer of wire fish netting received an export rebate from its wire rod supplier, which the Customs appraiser categorized as a subsidy, adding it to "cost of production." \textit{Id.} at 296.
Appeals ("CCPA") held that an export subsidy should not be added to constructed value.\textsuperscript{68} Instead, the CCPA unanimously held that the customs appraiser should use the producer's actual cost in constructed value.\textsuperscript{69} The European Trading court rejected the use of subsidies in antidumping actions and warned against the unnecessary commingling of antidumping and countervailing duty law.\textsuperscript{70} Nevertheless, European Trading is distinguishable from the limited inclusion of non-counterviable subsidies because the export subsidy in that case was counterviable, and, therefore, could be fully counteracted.\textsuperscript{71}

Customs valuation\textsuperscript{72} cases have held that subsidies may be included in constructed value,\textsuperscript{73} but such decisions are persuasive only to the extent that the valuation policies in customs law for subsidy inclusion are consistent with the policies of the antidumping law.\textsuperscript{74} The 1958 antidumping amendments abandoned the term "cost of production"\textsuperscript{75} and adopted the term

\textsuperscript{68} Id. at 296.
\textsuperscript{69} Id. at 296-97.
\textsuperscript{70} Id. The European Trading court rejected consideration of counterviable export subsidies in antidumping actions and the cross-fertilization of antidumping and countervailing duty concepts. Id. at 297. As in Al Tech Specialty, the European Trading court contemplated the countervailing duty law as a more appropriate remedy. Id.
\textsuperscript{71} 27 C.C.P.A. at 297. The European Trading court explained:

[T]he antidumping act contains no express provision covering rebates, gratuities or grants, such as was provided in the countervailing duty provision to the Tariff Act of 1930. Incidentally, it may be said also that at the time of the passage of the antidumping act in 1921, the 1913 Tariff Act, which contained a countervailing duty provision . . . was in force and continued in force for sometime thereafter.

Id.

\textsuperscript{72} See generally R. Sturm, Customs Law and Administration § 43.2 (1986).
\textsuperscript{73} Ford Motor Co. v. United States, 29 Cust. Ct. 553 (1952). The court held that pattern equipment made by a U.S. importer is properly added into the cost of production of rough iron castings manufactured in and exported from Canada. Id. at 557. It also said that the purpose of the cost of production statute in customs valuation law is "to derive, not the manufacturer's actual cost, but the actual cost of manufacture." Id. at 557; see also Ravenna Mosaics Inc. v. United States, 49 Treas. Dec. 699 (1926). In Ravenna Mosaics, the court held that the cost of preparing design sketches, which was paid by the U.S. importer, was properly added as a production cost of mosaics exported to the United States. 49 Treas. Dec. 699.

\textsuperscript{74} Al Tech Specialty, 651 F. Supp. at 1427-28; see also Television Receiving Sets, Monochrome and Color, From Japan; Final Results of Administrative Review of Antidumping Finding, 46 Fed. Reg. 30,163 (Int'l Trade Admin. 1981) (stating that judicial decisions interpreting the phrase "freely offered" in the context of customs laws are irrelevant to interpreting the antidumping law).

"constructed value,"76 which was the term derived from the Customs Simplification Act of 195677 and used in customs valuation.78 Notwithstanding the use of identical terms, customs valuation cases are at most suggestive of the possibility of considering subsidies within a constructed value context.79

3. Administrative Practice and Subsidy Inclusion in Constructed Value

In the past the ITA has deducted government subsidies from reported costs in calculating constructed value.80 However, it no longer subtracts subsidies81 and recently has refused to add such subsidies to reported costs.82 The ITA currently relies on the producer's costs as reflected in properly maintained books and records.83 Thus, there is no long-stand-

76. Id.
77. The Customs Simplification Act of 1956, ch. 887, 70 Stat. 943, 944 (1956), applied to all merchandise except a few specific items left on a "final list" for valuation under the retained 1930 Act. E. Rosiddles, supra note 19, at 132-38. Under the 1956 Act constructed value was used if export value and United States value could not be found. Similar to the constructed value of the antidumping law, the constructed value of the 1956 Act was the sum of the following costs: materials, fabrication and processing, plus the cost of containers, coverings, and packing for shipment. E. Rossides, supra note 19, at 110-34.
78. E. Rosiddles, supra note 19, at 110-34.
80. See Preliminary Determinations of Sales at Not Less Than Fair Value: Certain Steel Products from the Netherlands, 47 Fed. Reg. 35,664 (Int'l Trade Admin. 1982) [hereinafter Steel Products From the Netherlands] (production costs absorbed by government grants that were subtracted to calculate cost of production to avoid possible double counting of subsidies in concurrent antidumping and countervailing duty investigations).
82. See Steel Products from the Netherlands, supra note 80; see also Certain Steel I-Beams from Belgium, Antidumping Determination of Sales at not Less than Fair Value, 44 Fed. Reg. 54,579 (Int'l Trade Admin. 1979).
83. The current Commerce policy is articulated in Import Administration Policy Paper #13 as follows:

Where a producer receives an outright grant or other bounty from its gov-
ing administrative practice on which litigants would have relied. Because no long-standing administrative practice exists to support either adding subsidies or reliance on costs as documented in the producer's books and records, prior administrative practice in antidumping actions provides no controlling authority for either approach.  

B. Policy Rationales for the Refusal to Consider Subsidies that Benefit Production when Constructing Foreign Market Value

In *Al Tech Specialty*, the CIT emphasized that the subsidies in question were countervailable. Subsidy inclusion was unnecessary because the subsidy could be counteracted through the countervailing duty law. Indeed, the countervailing duty law is the proper remedy for such subsidies. However, the court's other reasons for excluding subsidies that benefit production from constructed value are less persuasive, particularly in the context of non-countervailable subsidies that benefit production.

1. The Concern About Commingling Countervailing and Antidumping Laws

In *Al Tech Specialty*, the CIT stated that the ITA should rely on the costs as documented in the producer's books and records, and that it would be improper to include subsidies in the cost component of constructed value. The CIT added
that the calculation of subsidies is not within the scope of the antidumping law, and further distinguished the purpose of the antidumping law from that of the countervailing duty law.\textsuperscript{88} The court explained that the antidumping law counteracts the comparative advantage of foreign manufacturers who employ inconsistent pricing policies in the international market.\textsuperscript{89} In contrast, it reasoned that countervailing duty law protects domestic industries from the market distortions caused by foreign subsidization.\textsuperscript{90} Thus, both laws protect domestic competitors from unfairly low import prices. The court, however, contended that the amount of foreign subsidies received does not directly correlate to a firm’s disparate pricing practices.\textsuperscript{91} Prices can be raised or lowered independent of the effects of subsidization. The focus of each law generally differs, and, therefore, the countervailing duty and antidumping remedies should not be commingled if the subsidy can be countervailed.\textsuperscript{92}

\textsuperscript{88} Id. at 1429.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 1430; see also Ehrenhaft, supra note 16, at 58-59.
\textsuperscript{91} 651 F. Supp. at 1430.
\textsuperscript{92} E. Rossides, supra note 19, at 253-54. The simple, traditional difference between antidumping law and countervailing duty law is best illustrated as follows:

Example 1: A German Sewing machine manufacturer, Singer, sells its product in Germany for $100. It sells the same machine in the United States for $75 (after adjustments for shipping, etc.). Singer receives no financial assistance 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. \textit{Id.} at 253.

Example 2: LaCarona, 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. \textit{Id.} at 253.

Example 3: The Netherlands pays exporters of processed cheese an export subsidy of 2 cents per pound. Prochesse, a Dutch company, sells processed cheese 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. The added duty would, on the facts given, be the same under either law. \textit{Id.} at 254.
2. The Concern that Subsidy Inclusion Denies Exporters a Full Hearing on Whether the Benefit is a Subsidy

The CIT also rationalized that subsidy inclusion in constructed value would allow the ITA to counteract subsidization without undertaking any of the procedural protections contained in the countervailing duty statute.95 The CIT explained that exporters should not be deprived of the opportunity to have a full hearing at the agency level concerning whether the benefits are subsidies as defined in Title VII of the Tariff Act of 1930.94 This apprehension is overstated because, as demonstrated in Al Tech Specialty, exporters may demonstrate to the ITA that the subsidy does not benefit production, and thus should not be included in constructed value.95

3. Uncertainty Among Exporters

The CIT also based subsidy exclusion on its concern for certainty in the administration of the United States trade laws.96 The CIT explained that subsidy inclusion in constructed value would result in substantial uncertainty among exporters because benefits not previously countervailable

94. The Trade Agreements Act of 1979 ("TAA"), which added a new Title VII to the Tariff Act of 1930, defines "subsidy" as a "bounty or grant" as that term is used in section 303 of this Act [19 U.S.C. § 1303], and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the [GATT] . . . .
(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 of merchandise:
   (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
   (ii) The provision of goods or services at preferential rates.
   (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
   (iv) The assumption of any costs or expenses of manufacture, production, or distribution.
95. 49 Fed. Reg. 2995, 2996 (Int'l Trade Admin. 1984). During the dumping proceeding, the defendant in Al Tech Specialty argued that the government subsidies it did receive were used to restructure facilities from which its tool steel operations did not benefit. Id.
could be attacked. While the uncertainty argument has some merit in a case involving countervailable subsidies, it is much less convincing when non-countervailable subsidies benefit production since the existence of such subsidies in a constructed value case would be rare indeed.

III. A PROPOSED ADDITION OF NON-COUNTERVAILABLE SUBSIDIES TO CONSTRUCTED VALUE

Non-countervailable subsidies that benefit production should be added to constructed value to accurately measure the dumping margin. One example of a subsidy that is not countervailable is one that is generally available.

A. The Generally Available Rule

The generally available rule resulted from the ITA’s interpretation that the countervailing duty law, which defines a subsidy as a bounty or grant, requires that the purported subsidy provide a benefit to a specific enterprise or industry, or

97. Id.
98. See infra note 129 and accompanying text.
99. See infra notes 109-134 and accompanying text. The example of “assists” in customs valuation may lend some support to the argument for subsidy inclusion in constructed value. In customs valuation, assists are added to constructed value. See Lionel Trading Co. v. United States, 24 C.C.P.A. 432 (1937); Troy Textiles v. United States, 64 Cust. Ct. 654 (1970); Ford Motor Co. v. United States, 29 Cust. Ct. 553 (1952); Ravenna Mosaics Inc. v. United States, 49 Treas. Dec. 699 (1926). There is no definition of “assists” in the statutes or regulations, but they generally constitute anything of value furnished to a manufacturer, free of charge or at less than full value, which is necessary for the production of the particular imported good. R. Sturm, supra note 72, § 43.2, at 12.

The use of “assists” as an example of how constructed value could be interpreted in antidumping law is persuasive only to the extent that the policies for subsidy inclusion in customs valuation are consistent with the policies of the antidumping law. See Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421 (Ct. Int’l Trade 1986). The ITA often has refused to follow customs valuation precedents where to do so would impede the specific policies of the antidumping law. See Television Receiving Sets, Monochrome and Color, From Japan: Final Results of Administrative Review of Antidumping Finding, 46 Fed. Reg. 30,163 (Int’l Trade Admin. 1981) (ITA stated that judicial precedent interpreting the phrase “freely offered” in the customs valuation context is irrelevant to interpreting the antidumping law).

100. See Bello, supra note 58, at 312-14; Powell & Concannon, Stare Decisis in the Court of International Trade: One Court or Many?, in U.S. TRADE LAW AND POLICY 375-85 (1987).
group of enterprises or industries. Under this requirement, a nation-wide domestic subsidy, such as a two-hundred-percent tax deduction for employee training, would not be subject to countervailing duties. More recently, the ITA has refused to countervail several subsidies because their benefits were not limited to a specific group of enterprises or industries. Such non-countervailable benefits include: a government funded fisheries management program, the results of which were published and generally accessible; government grants and loan insurance that were not limited to a specific industry or enterprise; programs that cover half the cost of attending important

102. See E. McGovern, supra note 25, § 12.113. The statute's reference to "specific" enterprises or industries has been taken by the ITA to mean that generally available assistance is excluded from the scope of the countervailing duty law. Id. at 351. The ITA has held to this view even when the number of domestic firms which could make use of the particular advantage was very small. Id.; see S. REP. No. 249, 96th Cong., 1st Sess. 84, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 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 and the Tariff Act of 1930, unless that practice or interpretation is inconsistent with the bill. Id.


103. See Bethlehem Steel Corp. v. United States, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984). According to this court, "[t]ax laws become bounties or grants to the taxpayer only if the elimination, or reduction of the tax is selective." Id. at 349.

trade shows in cases where the firm can demonstrate that it will be in a position to pursue business orders received at such shows; and a program offering up to a $50,000 grant for manufacturers to develop new market opportunities and new products in Newfoundland, Canada.  

While the generally available rule first emerged as a broad limitation on countervailing subsidies, it has been a point of contention between the CIT and the ITA. In apparently contradictory opinions, the CIT first severely limited, and then later broadened the scope of the generally available rule. Nonetheless, this rule remains an exception to countervailable subsidies.

B. An Argument for the Inclusion of Non-countervailable Subsidies That Benefit Production in Constructed Value

In the case of non-countervailable subsidies which benefit

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106. For example in Carlisle Tire & Rubber Co. v. United States, 5 Ct. Int'l Trade 229, 564 F. Supp. 834 (1983), the court found two accelerated depreciation programs generally available, thus not countervailable. Id. at 836. Both programs allowed corporations to take an additional twenty percent depreciation beyond that normally taken. The requirements for taking advantage of one of these benefits was that the factory or machinery in question was in operation at least twelve hours daily. Id. The second benefit applied to all corporations with a history of keeping accurate records, including tax returns. In Bethlehem Steel Corp., 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984), the CIT limited the generally available rule to tax laws and criticized the broader rule it established in Carlisle Tire & Rubber, 7 Ct. Int'l Trade at 349-50, 590 F. Supp. at 1246. See Powell & Concannon, supra note 100, at 375-85. Nonetheless, the ITA in Refrigeration Compressors from the Republic of Singapore, supra note 104, at 30,494 wrote: "We do not consider generally available programs to be countervailable. The petitioner's reliance on Bethlehem Steel is misplaced since the court in that case upheld our determination that a generally available tax benefit is not countervailable. The court's further comments in Bethlehem Steel on general availability are dicta." Id.


production the inclusion of subsidies would not conflict with precedent. Moreover, the original purpose of constructed value—the accurate measurement of foreign market value—is furthered by the addition of subsidies that are not countervailable, but that still benefit production.\textsuperscript{109}

Since the enactment of the Trade Agreements Act of 1979 ("TAA"),\textsuperscript{110} countervailing duty and antidumping laws have been administered by the same agencies under similar procedures.\textsuperscript{111} Dumping margin and subsidy determinations are both made by the ITA, and the injury determinations under both statutes are made by the International Trade Commission ("ITC").\textsuperscript{112} Therefore, the administrative details of providing adequate process for subsidized defendants in an antidumping proceeding should not be as onerous as the CIT suggests.\textsuperscript{113}


> The purpose of the amendment is to prevent foreign sales below cost of production being used as the basis for determining whether sales of such merchandise to the United States are at less than the foreign market value. Otherwise, sales below cost to purchasers in the United States could be exempted from the provisions of the Act if sales prices in the home market or to third countries are also below cost by an equal or greater amount.


According to the Report of the Senate Finance Committee, "[t]he Committee is concerned that, in the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity." S. REP. No. 1298, 93d Cong., 2d Sess. 173, reprinted in 1974 U.S. Code Cong. & Admin. News 7186, 7310.


\textsuperscript{112} H. Kaye, P. Plaia & M. Hertzberg, supra note 26, § 18.03.

Furthermore, concurrent consideration of subsidy and dumping issues might expedite proceedings where the foreign producer arguably has benefitted from subsidies that may be found generally available. Although concurrent consideration of subsidy and dumping data would complicate the ITA's administrative responsibilities, a plaintiff may clearly petition the ITA under both the antidumping and countervailing duty laws where dumping and subsidization exist. The administrative burden of considering alleged subsidies in the context of the antidumping law could be minimized if limited to actions where the petitioner makes a prima facie showing that a subsidy exists. If the ITA then determines that a subsidy that benefits production exists but is generally available, it should be free to include the subsidy in constructed value to the extent it benefits production.

The *Al Tech Specialty* court based its holding on the fact that the subsidies in question would be better counteracted with the countervailing duty law. In the case of a generally available subsidy that cannot be countervailed, the *Al Tech Specialty* court's most compelling rationale—that the subsidy may be countervailed—would not exist. Furthermore, the CIT's other policy concerns fail to compel the *Al Tech Specialty* holding in the context of non-countervailable subsidies.

1. Subsidy Inclusion in Constructed Value and the Proper Scope of U.S. Antidumping Law

The CIT's first policy consideration, the scope of the antidumping law, militated against blurring the distinction between antidumping and countervailing duty law. However, the purpose of both laws is to eliminate the advantage of an importer that can unfairly underprice domestic competition.
While each law counteracts a different unfair activity—\textit{i.e.}, price discrimination and subsidization—both exist to protect domestic producers from the unfairly low pricing practices of foreign exporters.\textsuperscript{115} 

If a non-countervailable subsidy benefits production and the foreign market value is constructed, then the subsidy should be added to constructed value in order to accurately reflect the producer’s variable and fixed production costs.\textsuperscript{116} If the subsidy in question is not countervailable, there is no blurring or commingling of the laws, as the countervailing duty law does not come into play. Subsidy inclusion is essential for the accuracy of the constructed value calculation. Such inclusion results in a more accurate foreign market value, as measured by constructed value, and ensures that the dumping duty will more accurately approximate the true degree of disparate pricing.\textsuperscript{117} Moreover, if the subsidy benefits production, but is not countervailable, its inclusion in constructed value is consistent with the purpose of accurately measuring discriminatory pricing between national markets.\textsuperscript{118}

2. Subsidy Inclusion in Constructed Value and the Defendant’s Right to Process

The \textit{Al Tech Specialty} court’s concern that subsidy inclusion would allow the ITA to counteract subsidization without a determination of whether a subsidy exists, as defined in Title VII,\textsuperscript{119} also would not apply to non-countervailable subsidies.\textsuperscript{120} In a determination of whether certain subsidies should be considered within constructed value, the relevant issue is the extent to which these subsidies diminished the foreign manufacturer’s production costs, \textit{i.e.}, the extent to which they benefitted production.\textsuperscript{121} Furthermore, whether the subsidy

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 1429-30.
\item \textsuperscript{116} G. Bryan, \textit{supra} note 18, at 15-16.
\item \textsuperscript{117} See \textit{supra} note 109 and accompanying text.
\item \textsuperscript{118} See \textit{supra} note 109 and accompanying text.
\item \textsuperscript{119} 19 U.S.C. § 1677(5) (1982).
\item \textsuperscript{120} See \textit{supra} notes 93-95 and accompanying text.
\item \textsuperscript{121} See 50 Fed. Reg. 23,170 (Int’l Trade Admin. 1982). The \textit{Al Tech Specialty} plaintiffs argued before the ITA that all manufacturing costs should be considered regardless of who bears the cost, since the subsidies merely shift costs from the producer to the government. \textit{Id.} This interpretation of cost is consistent with the purpose of the constructed value and cost of production sections, which was to more
falls within the definition of bounty or grant is relevant only to determining whether it is countervailable, not whether it benefits production.\textsuperscript{122} Generally available subsidies clearly are not countervailable,\textsuperscript{123} thus, whether such a subsidy falls within the statutory definition of subsidy is irrelevant. Accordingly, generally available subsidies are not subsidies under the Title VII definition.\textsuperscript{124} Additionally, the non-countervailable subsidy situation suggests only a narrow application of subsidies to constructed value.\textsuperscript{125}

In the context of non-countervailable subsidies that benefit production, the concern that subsidy inclusion would deny exporters a full hearing on whether a countervailable subsidy exists is not germane. The appropriate issue in such a constructed value calculation is whether the generally available subsidy benefits production, and, if so, the extent of such benefit.\textsuperscript{126} As demonstrated by the \textit{Al Tech Specialty} defendant, defendants in dumping actions have the opportunity to contend that any alleged subsidies they may have received did not benefit production, and, therefore, could not be considered in a constructed value calculation.\textsuperscript{127}

\begin{footnotes}
\item[122] See supra note 109 and accompanying text. According to the Senate Report that accompanied the Antidumping Act of 1921, the purpose of the old cost of production section, which is now the constructed value section, was to create a constructive foreign market value based on the cost of material and labor at a time preceding the date of shipment of the imported merchandise which would ordinarily permit the manufacture or production of such merchandise in the usual course of business. It is not limited to the actual cost of the imported merchandise. \textit{S. Rep. No. 16, 67th Cong., 1st Sess. 13} (1921) (emphasis added).\textsuperscript{123} See supra notes 101-02 and accompanying text.\textsuperscript{124} See supra notes 100-08 and accompanying text.\textsuperscript{125} \textit{Id.}\textsuperscript{126} See infra note 129 and accompanying text.\textsuperscript{127} See supra note 121 and accompanying text.\textsuperscript{128} 49 Fed. Reg. 2995, 2996 (Int'l Trade Admin. 1984). In \textit{Al Tech Specialty}, the defendant West German producer argued before the ITA that the benefits received did not accrue to the production of the tool steel under investigation. \textit{Id.} In reference to non-countervailable subsidies under consideration in an antidumping investigation, the relevant defense is that the subsidies in question did not benefit the production of the merchandise in question. \textit{Id.} Since the \textit{Al Tech Specialty} defendant made this argument to the ITA, this case demonstrates that the defendant has the opportunity to assert the most relevant defense to subsidy inclusion in constructed value. \textit{Id.} In an antidumping proceeding, the defendant has adequate process to argue that the non-countervailable subsidies at issue did not benefit the production of the goods under investigation.
\end{footnotes}
3. Subsidy Inclusion and Uncertainty Among Exporters

The CIT's final policy concern was that subsidy inclusion would create uncertainty among exporters because benefits not previously countervailable could be counteracted. This concern overstates the reality of including generally available subsidies in constructed value because this suggested inclusion would be rare. Indeed, the inclusion of subsidies is suggested only when the following four conditions concurrently exist: 1) the subsidy in question is not countervailable; 2) the subsidy significantly benefits production; 3) the ITA employs constructed value to represent foreign market value; and 4) the dumping in question is deleterious enough to materially injure or tend to materially injure domestic industry. By focusing on uncertainty among exporters, the CIT has not considered the importance of accurately measuring foreign market value. If non-countervailable benefits subsidize production, then failure to consider them in constructed value represents a systematic flaw in the comparison of foreign market value and United States price.

In an earlier CIT case, Connors Steel Co. v. United States, the court decided that the existence of, or suspicion that, a subsidy benefits production should not affect the determination of whether the ITA investigates the prospect of home market dumping. Therefore, the ITA will not employ a constructed value as a result of home market dumping unless sufficient additional evidence, other than the presence of a subsidy,

129. This Comment has not discussed the material injury requirement in detail, as this is not germane to the issue of statutory construction and the occasional inclusion of some subsidies in constructed value. Nonetheless, dumping is not actionable unless it either materially retards the establishment of an industry in the United States, or has materially injured or threatened material injury to an established domestic industry. 19 U.S.C. § 1671(a)(2) (1982 & III Supp. 1985).
130. See supra note 109 and accompanying text.
132. 2 Ct. Int'l Trade at 250, 527 F. Supp. at 358. If foreign market value is constructed because actual sales were disregarded pursuant to the cost of production section, see 19 U.S.C. § 1677b(b) (1982), evidence other than the subsidy of home market dumping should exist. Therefore, in constructed value determinations which result from a finding of sales at less than cost of production, there must exist additional evidence of below-cost home market sales apart from subsidies. Connors Steel, 2 Ct. Int'l Trade at 249-50, 527 F. Supp. at 358.
warrants an investigation of whether the home market price is
less than fair market value.¹³³

The suggested inclusion of subsidies in constructed value
is so narrow as to provide uncertainty among but a few foreign
exporters, many of whom have benefitted from foreign subsi-
dies and then dumped their products in the United States.
Furthermore, the decision to investigate the existence of home
market dumping is independent of subsidies.¹³⁴ Thus, if the
ITA constructs foreign market value as a result of home market
dumping, evidence of dumping must exist apart from the exist-
ence of subsidization. In the few cases embraced by this sug-
gested inclusion of subsidies, the policy of accurately measur-
ing the extent of dumping and remedying its unfair advantage
outweighs any concern for uncertainty among a few exporters.

CONCLUSION

The Court of International Trade in Al Tech Specialty re-
cently established a rule of excluding subsidies from con-
structed value, but it has yet to consider this issue in the con-
text of non-countervailable subsidies. The determinative fac-
tors for subsidy exclusion were policy concerns, not judicial
precedent, legislative history, or long-standing administrative
practice. Where subsidies are generally available, however,
economic policy and the need to accurately measure the dump-
ing margin suggest that subsidies should be added to con-
structed value to the extent they benefit production. Thus, the
CIT’s refusal to add subsidies to constructed value should be
limited to countervailable subsidies. The inclusion of non-
countervailable subsidies to the extent they benefit production
would not be inconsistent with precedent and legislative his-
tory, and would promote fair trade through the effective en-
forcement of U.S. antidumping law.

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¹³³ Connors Steel, 2 Ct. Int’l Trade at 250, 527 F. Supp. at 358.
¹³⁴ Id.
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