

RECENT DEVELOPMENTS

COUNTERVAILING DUTIES: COURT OF INTERNATIONAL TRADE DETERMINES THAT COUNTERVAILING DUTY LAW IS APPLICABLE TO COUNTRIES HAVING NONMARKET ECONOMIES. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

Plaintiffs, United States producers of carbon steel wire rod¹ and potassium chloride,² petitioned the Commerce Department³ to impose countervailing duties⁴ on competing import-

¹ The plaintiffs petitioning on behalf of the steel wire rod industry were Atlantic Steel Co., Continental Steel Corp., Georgetown Steel Corp., and Raritan River Steel Co. Carbon Steel Wire Rod from Czechoslovakia; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (1984) [hereinafter cited as Czechoslovakia Determination]; Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (1984) [hereinafter cited as Poland Determination]. For the purpose of the Commerce Department's investigation, the term carbon 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 Schedule of the United States*

Id. at 19,375. The one known Polish producer and one known Polish exporter of carbon steel wire rod products to the United States are Huta Cedlera and Stalexport, respectively. *Id.* at 19,375.

² The plaintiffs petitioning on behalf of the United States potassium chloride industry were AMAX Chemical, Inc. and Kerr-McGee Chemical Corp. Potassium Chloride from the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 Fed. Reg. 23,428 (1984) [hereinafter cited as USSR Rescission]; Potassium Chloride from the German Democratic Republic; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 Fed. Reg. 23,428 (1984) [hereinafter cited as GDR Rescission].

³ Petitions under the countervailing duty statutes must be filed simultaneously with the United States International Trade Commission (USITC) and the Commerce Department. The Commerce Department also can self-initiate countervailing duty investigations. HOUSE SUBCOMM. ON TRADE OF THE COMM. ON WAYS AND MEANS, 98TH CONG., 2D SESS., OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW 51 (Comm. Print 1984) [hereinafter cited as HOUSE REPORT]. Prior to 1979, the Department of Treasury administered the countervailing duty statutes, but that responsibility was transferred to the Commerce Department under President Carter's Reorganization Plan No. 3. See Exec. Order No. 12,188, 44 Fed. Reg. 69,273 (1980). See also HOUSE REPORT, *supra*, at 51.

⁴ The United States imposes countervailing duties on subsidized imports to offset the effect the subsidies have on domestic products. The United States does not use countervailing duties to punish foreign countries or to raise revenues; rather, the

ers.⁵ Plaintiffs alleged that manufacturers, exporters, and producers of carbon steel wire rod in Czechoslovakia and Poland receive subsidies⁶ within the meaning of 19 U.S.C. § 1303, the applicable countervailing duty statute.⁷

After investigating plaintiffs' claims, the Commerce Department concluded that bounties or grants under section 1303 cannot be found as a matter of law in countries with nonmarket economies.⁸ Based

purpose is to maintain the price setting forces of the free market economy. While countervailing duties do not prevent imports from underselling domestic products, the duties do insure that United States goods will not be undersold because a competing product was subsidized. 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, 364-65 (1980).

⁵ Czechoslovakia Determination, *supra* note 1, at 19,370; Poland Determination, *supra* note 1, at 19,374.

⁶ Congress has stated that the term "subsidy" has the same meaning as the terms "bounty" or "grant" in 19 U.S.C. § 1303. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985). Some of the subsidies alleged by plaintiffs were: a beneficial rate of currency exchange granted to exporters, allowing exporting companies to keep a certain portion of the hard currency earned from their exports, tax exemptions, and income tax rebates based on export performance. Czechoslovakia Determination, *supra* note 1, at 19,370; Poland Determination, *supra* note 1, at 19,375.

⁷ 19 U.S.C. § 1303 states in relevant part:

(a)(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, barter, 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.

19 U.S.C. § 1303 (1982). Filing procedures under the countervailing duty law are found in Title One of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified as amended in scattered sections of 19 U.S.C. (1982)) and in the Department of Commerce's Implementing Regulations, 19 C.F.R. § 355 (1985). For a discussion of these procedures in applying the countervailing duty law, see Horlick, *Summary of Procedures Under the United States Anti-Dumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 838 (1984).

⁸ See *Continental Steel Corp.*, 614 F. Supp. at 548. The Commerce Department defined a nonmarket economy as one in which the market value of a product does not normally reflect its price. *Id.* at 549. In these actions the Commerce Department

upon that determination, the Commerce Department rescinded its investigations into similar claims concerning imports of potassium chloride from the Soviet Union and German Democratic Republic.⁹ In a consolidated action on appeal to the Court of International Trade, *held*, reversed. Bounties and grants within the meaning of section 1303 can be found in countries with nonmarket economies. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985).

The first countervailing duty law, enacted in 1890, applied only to sugar imports.¹⁰ Congress gradually expanded the countervailing duty law to apply generally to foreign imports.¹¹ The most important revisions occurred in 1930,¹² and much of the resulting act survives in the countervailing duty statutes now in force.¹³

The current countervailing duty provisions are found in 19 U.S.C. §§ 1303, 1671 (1982). The two sections differ primarily in that section 1671 requires the United States International Trade Commission (USITC), after a determination by the Commerce Department that an import has been subsidized, to find that the import causes or threatens to cause a material injury to a United States industry.¹⁴ Unless the USITC makes such a determination, the Commerce Department cannot impose countervailing duties on the imported product. Section 1671 applies only to those countries which have signed the Subsidies and Countervailing Duty Code negotiated during the Tokyo Round of Multilateral Trade Negotiations (MTN),¹⁵ have ac-

found a nonmarket economy to be evidenced by centrally administered prices, by centrally controlled allocation of resources and, in the potassium chloride cases, by extremely limited convertibility of the national currency. *Id.*

⁹ USSR Rescission, *supra* note 2, at 23,428; GDR Rescission, *supra* note 2, at 23,428.

¹⁰ See Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890). See also Czechoslovakia Determination, *supra* note 1, at 19,373.

¹¹ Czechoslovakia Determination, *supra* note 1, at 19,373.

¹² See Tariff Act of 1930, Pub. L. No. 361, 46 Stat. 590 (1930). An 1897 law authorized the imposition of countervailing duties to offset any bounty or grant on the exportation of foreign products. Congress expanded that provision in 1922 to cover bounties or grants on the manufacture or production of goods. HOUSE REPORT, *supra* note 3, at 47.

¹³ Zarin, *Countertrade and the Law*, 18 GEO. WASH. J. INT'L L. & ECON. 235, 257 (1984).

¹⁴ 19 U.S.C. § 1671 (1982).

¹⁵ *Id.* at § 1671(b)(1). The relevant section of the MTN can be found in the Annex to GATT Subsidies Code Agreement on Interpretation and Application of Articles VI, XVI, and XII of the General Agreement on Tariffs and Trade, *opened for signature*, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619.

cepted equivalent obligations,¹⁶ or are countries to whom the United States extends Most Favored Nation (MFN) treatment under other trade agreements.¹⁷

Section 1303, conversely, applies to those countries not under section 1671 and more substantively reflects the countervailing duty statute passed by Congress in the Tariff Act of 1930.¹⁸ Section 1303 only requires the Commerce Department to find the existence of a subsidy on a dutiable good before Commerce can place a countervailing duty on that import.¹⁹

The change in United States countervailing duty law since the 1930 statute, as embodied primarily in section 1671, reflects attempts by the United States to conform its law with the General Agreement on Tariffs and Trade (GATT)²⁰ and with the MTN.²¹ Article VI of the GATT enunciated the principle that before a country could impose

¹⁶ 19 U.S.C. § 1671(b)(2) (1982). Currently, Taiwan is the only country which comes within this provision. S. REP. NO. 249, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381; *see also* Zarin, *supra* note 13, at 257.

¹⁷ 19 U.S.C. § 1671 (1982). Countries meeting this requirement are Venezuela, Nepal, North Yemen, El Salvador, Paraguay, and Liberia. Zarin, *supra* note 13, at 258. *See also* Presidential Determinations Regarding the Acceptance and Applicability of Certain International Trade Agreements, 49 Fed. Reg. 74,781 (1979). Most Favored Nation treatment refers to nondiscriminatory treatment of trading partners. "MFN has its origin in international commercial agreements whereby the signatories extend to each other treatment in trade matters which is no less favorable than that accorded to a nation which is the most favored in this respect In the context of U.S. tariff legislation, MFN treatment means that the products of a country given such treatment are subject to lower rates of duty." HOUSE REPORT, *supra* note 3, at 124. Prior to 1934, the United States granted MFN treatment only under commercial agreements which contained an MFN clause. Section 350 of the Tariff Act of 1930, *supra* note 12, required MFN treatment for all countries having bilateral agreements containing tariff and trade concessions. When the United States became a signatory of GATT in 1948, however, it became obligated under GATT article one to grant MFN status to all other GATT signatories. HOUSE REPORT, *supra* note 3, at 124.

¹⁸ *See* Zarin, *supra* note 13, at 236.

¹⁹ 19 U.S.C. § 1303 (1982).

²⁰ *Opened for signature*, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The GATT's efforts to reduce trade barriers is based on the theory that in terms of wealth, all nations will benefit in the long term from specialization and trade; however, nations are not willing to pay heavy short-term costs in areas such as "unemployment, increased welfare payments, under-utilized resources, relocation expenses and the intangible individual burdens of sudden uprootment." Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Toyko Round*, 13 CORNELL INT'L L. J. 257, 259 (1980). One way governments may intervene to prevent such short-term costs is by increasing trade barriers to protect the domestic industries. *Id.*

²¹ Madden, *The Threat of Material Injury Standard in Countervailing Duty Enforcement*, 16 L. & POL'Y IN INT'L BUS. 373, 377-78 (1984).

countervailing duties on subsidized imports, a corresponding domestic industry must experience a material injury or the threat of a material injury.²² Due to a grandfather clause in the GATT, however, the United States was not bound by the material injury requirement because the United States law predated the GATT.²³ Congress adopted an injury test in the Trade Act of 1974²⁴ but did not qualify the standard with adjectives such as "material" or "serious."²⁵

In 1979 the United States participated in the Tokyo Round trade negotiations with other members of the GATT.²⁶ In signing the resulting agreement, the United States bound itself to accept an interpretation of injury consistent with Article VI of the Tokyo Round agreements.²⁷ Congress passed the Trade Agreements Act of 1979²⁸ to implement a "material injury" standard required under the Tokyo Round.²⁹

Section 1303, which has no material injury requirement, applies to most countries with nonmarket economies.³⁰ The United States suspended the MFN status of most nonmarket economy countries in the

²² *Id.* at 378.

²³ The United States was exempted through the GATT Protocol of Provisional Application, art. 1, par. 2(b), 61 Stat. A-12 (1947), T.I.A.S. No. 1700. *See* Madden, *supra* note 21, at 377.

²⁴ Pub. L. No. 93-618, tit. III § 331, 88 Stat. 1978, 2049-53 (1975). The Trade Act of 1974, in addition to providing for an injury test, extended the countervailing duty law to apply to duty-free imports for the first time. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS, U.S. LAWS AND REGULATIONS APPLICABLE TO IMPORTS FROM NONMARKET ECONOMIES COULD BE IMPROVED 28 (1981) [hereinafter cited as GAO REPORT]. The Act also made changes in many procedural aspects of the countervailing duty law, limiting, in effect, the executive branch's discretion in administering the law. HOUSE REPORT, *supra* note 3, at 48.

²⁵ Madden, *supra* note 21, at 378. Congress was concerned that the term "material" would connote a measurably higher standard of injury under United States law than was understood by United States trading partners of GATT signatories; therefore, Congress intended that the term "injury" remain unmodified. *Id.*

²⁶ *See id.*

²⁷ *Id.* at 380. In passing the Subsidies Code, the signatories intended to strengthen international discipline on the use of subsidies. HOUSE REPORT, *supra* note 3, at 27. Article 15 of the Subsidies Code suggests a means of estimating subsidies when direct measurement is not possible due to the nature of the exporter's economy. *Id.* at 28.

²⁸ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

²⁹ HOUSE REPORT, *supra* note 3.

³⁰ *See* UNITED STATES INTERNATIONAL TRADE COMMISSION, PUB. NO. 1645, CHINA'S ECONOMIC DEVELOPMENT STRATEGIES AND THEIR EFFECTS ON U.S. TRADE (1985) [hereinafter cited as CHINA STRATEGIES]. Poland's Most Favored Nation Status was restored in 1960, but President Reagan suspended that status indefinitely in 1982. *Id.*

early 1950's in accordance with section five of the Trade Agreements Extension Act of 1951.³¹ That Act established the policy of denying the benefits of trade agreements to communist countries.³² Congress reiterated the policy of denying MFN status to imports from non-market economy countries in the Trade Act of 1974, which authorized restoration of MFN status only to countries whose emigration policies embody certain criteria not typically followed in nonmarket economies.³³

The Commerce Department has addressed the applicability of section 1303 to nonmarket economy countries only once previously. In 1984 domestic textile producers petitioned³⁴ Commerce to evaluate whether textiles, apparel, and related products from the People's Republic of China were being subsidized by China's dual exchange rate system.³⁵ The question was never resolved, however, as Commerce Department Secretary Malcolm Baldrige persuaded the domestic producers to withdraw their countervailing duty petition in favor of a presidential initiative³⁶ to resolve their concerns. Baldrige's request came after strong warnings and protests by the People's Republic of China.³⁷

³¹ Act of June 16, 1951, ch. 141, 65 Stat. 72 (1951).

³² G.A.O. REPORT, *supra* note 24, at 125. This action was taken in response to the Korean War because of the support that countries under international communism gave to North Korea and China. The directive applied to all communist countries in 1951 except for Yugoslavia. In 1960 President Kennedy suspended Cuba's MFN status. HOUSE REPORT, *supra* note 3, at 125.

³³ See CHINA STRATEGIES, *supra* note 30.

³⁴ The petition was filed on behalf of the American Textile Workers Institute, the Amalgamated Clothing and Textile Workers Union, and the International Ladies' Garment Workers Union. Recent Development, *Countervailing Duties and Non-Market Economies: The Case of the People's Republic of China*, 10 SYRACUSE J. INT'L L. & COM. 405 (1983).

³⁵ The petitioners alleged that the People's Republic of China's dual exchange rate system, whereby producers of non-export goods were given one conversion rate and producers of goods for export were offered a more generous rate, constituted a subsidy within the meaning of the countervailing duty law. *Id.* at 405-06.

³⁶ *Id.* at 407. "[On] December 16, 1983, President Reagan announced new, more lenient criteria for triggering the 'call' mechanism whereby imports from communist countries are restricted under the Trade Act of 1974." *Id.*

³⁷ *Industry, Commerce Agree to Delay Decision on Chinese Textiles CVD Case*, 9 U.S. IMPORT WEEKLY (BNA) No. 10, at 373 (Dec. 7, 1983). An affirmative determination by the USITC could have resulted in an additional 40.4% duty on Chinese textiles. The determination also could have set a precedent for applying countervailing duties to all imports from China. The Chinese refused to cooperate in the USITC's investigation and ceased their purchase of United States grain. CHINA STRATEGIES, *supra* note 30.

When Congress passed the first countervailing duty laws, nonmarket economies did not exist.³⁸ Only in the last decade, as trade with countries having nonmarket economies has increased in importance,³⁹ has the question of the countervailing duty law's applicability to imports from those countries received more attention.

The apparent consensus among academic authorities has been that subsidies within the meaning of the countervailing duty law do not exist in nonmarket economies.⁴⁰ This was the position taken by the Commerce Department in its investigation into the carbon steel wire rod and potassium chloride petitions.⁴¹ The Commerce Department concluded that a subsidy cannot exist in a nonmarket economy because Commerce defined subsidy as an act which distorts the operation of a market.⁴² The Commerce Department found that Congress must necessarily have intended this reading of the countervailing duty law. The Department found such intent in Congressional silence on the applicability of the countervailing duty law to nonmarket economy countries when Congress enacted legislation on the application of antidumping laws to nonmarket economies.⁴³

In reversing the Commerce Department's determination, the Court of International Trade correctly refocused the discussion on the plain

³⁸ Czechoslovakia Determination, *supra* note 1, at 19,373.

³⁹ *See id.*

⁴⁰ *Id.* at 19,374. This argument is one the Commerce Department used in concluding that the current United States countervailing duty law should not apply to imports from nonmarket countries. The Court of International Trade, in its decision to the contrary, easily dismissed this argument as unpersuasive. *See Continental Steel Corp.*, 614 F. Supp. at 554-55.

⁴¹ *See* Czechoslovakia Determination, *supra* note 1, at 19,370; Poland Determination, *supra* note 1, at 19,374.

⁴² The Commerce Department stated:

We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth. In NME's [nonmarket economies] resources are not allocated by a market Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort to [sic] subvert.

Czechoslovakia Determination, *supra* note 1, at 19,371.

⁴³ *See id.* at 19,373. The Commerce Department specifically noted that § 773(3) of the Trade Act of 1974 amended § 205 of the Antidumping Act of 1921 and set rules concerning the unfair competition of products from nonmarket countries. The Senate Finance Committee recognized, in explaining the amendment, that the unique characteristics of nonmarket economies warranted a special legislative response. *Id.* at 19,373.

language and underlying purpose of the countervailing duty statute.⁴⁴ The court noted that the Commerce Department had, in effect, created a *per se* exemption from the statute despite the Department's statement to the contrary.⁴⁵ Section 1303 specifically applies to "any country," but the Commerce Department's reasoning created an exception to the language of section 1303.

The Commerce Department, in its discussion, focused on the fact that incentives, such as bounties or grants to industries, have little effect on the production or price of goods in nonmarket economies.⁴⁶ The Court of International Trade noted that Congress did not intend the countervailing duty law as a tool to influence how foreign governments allocate their resources or organize production.⁴⁷ Instead, the countervailing duty law has a practical domestic purpose of offsetting the effects on United States goods resulting from any subsidization given to imports.⁴⁸

Imports from nonmarket countries should be subject to some form of trade remedy. To hold nonmarket countries beyond the countervailing duty law would place those countries in a position more favorable than those countries to whom the United States owes fa-

⁴⁴ *Continental Steel Corp.*, 614 F. Supp. at 550-51. The court noted that Congress used words "of the broadest possible significance" in § 1303, which demonstrate Congress' "intent to cover as many beneficial acts as possible." *Id.* at 551. The Commerce Department in its preliminary determination also had focused on the language of § 1303 in finding that nonmarket countries should not be exempted from § 1303. The Commerce Department later decided that it had read the statute too narrowly and found that it needed to ask an additional "jurisdictional question; *i.e.*, whether government activities in an NME confer a 'bounty or grant' within the meaning of § 1303." *Czechoslovakia Determination*, *supra* note 1, at 19,371.

⁴⁵ *Continental Steel Corp.*, 614 F. Supp. at 550. The court stated that although Commerce had termed the question as one of jurisdiction, the question of whether an import from a nonmarket economy had been subsidized was actually the ultimate question on the petitions' merits. *Id.*

⁴⁶ See *Czechoslovakia Determination*, *supra* note 1; *Poland Determination*, *supra* note 1.

⁴⁷ *Continental Steel Corp.*, 614 F. Supp. at 553. The court noted that Commerce's definition of subsidy seemed to view the countervailing duty law as a means of "influencing the way the wealth of the world is developed or the way other countries choose to allocate resources." *Id.* at 553.

⁴⁸ *Id.* Congress has stated that the purpose of the countervailing duty law is to balance the need for assuring effective protection of domestic interests from foreign subsidies, on one hand, with the need to afford some flexibility in the application of the United States law which is essential for achieving a negotiated international agreement to the problems arising from the use of subsidies and imposition of countervailing duties.

S. REP. No. 1298, 93d Cong., 2d Sess. 183 (1974).

vored treatment. Section 1671, with its material injury test, provides a tougher standard for the imposition of countervailing duties.⁴⁹ The United States can justify this preferential treatment because countries under the provisions of section 1671 have agreed to certain reciprocal obligations toward the United States.⁵⁰

As shown in the Commerce Department's initial determination, however, legitimate difficulties exist in applying section 1303 to imports from countries with nonmarket economies.⁵¹ As the Court of International Trade noted in its decision, the main difficulty in applying countervailing duties to nonmarket economy countries lies in measuring the amount of any subsidy.⁵² Since section 1303 has no material injury test,⁵³ the proper determination of the existence and measurement of a subsidy becomes crucial in allowing the Commerce Department to apply the law fairly. To analyze properly the existence and amount of a subsidy, the Commerce Department must have "access to information setting forth the subsidy amounts and the existence of a suitable exchange rate for converting subsidy amounts stated in foreign currency into U.S. dollars."⁵⁴ This task is nearly impossible to accomplish in analyzing products from most nonmarket countries.⁵⁵ Therefore, a fair assessment of countervailing duties under section 1303 seems likewise impossible.

As the issue of subsidized goods from countries with nonmarket economies grows in importance,⁵⁶ the solution lies with Congress.

⁴⁹ See *supra* note 14 and accompanying text.

⁵⁰ See *supra* notes 15-17 and accompanying text.

⁵¹ See *infra* notes 54-55 and accompanying text. The Court of International Trade opined, however, that the "Commerce Department has the authority and ability to detect patterns of regularity and investigate beneficial deviations from those patterns — and it must do so regardless of the forms of the economy." *Continental Steel Corp.*, 614 F. Supp. at 554.

⁵² *Id.* This is especially true since many of the countries refuse to cooperate in any Commerce Department investigations. See *Czechoslovakia Determination*, *supra* note 1, at 19,371.

⁵³ See *supra* notes 18-19 and accompanying text.

⁵⁴ GAO REPORT, *supra* note 24, at 32. Subsidies on imports from a few nonmarket economy countries have the potential for measurement. Certain journals and other sources occasionally contain data on financial transactions. "Also, a few nonmarket economy countries are moving towards a single, market-type exchange rate which would enable amounts stated on one currency to be valued in such currencies as the dollar." *Id.*

⁵⁵ *Id.*

⁵⁶ The high demand for import relief reflects the economic setting of the past few years. The most important factor in the increase in imports has been the strength of the United States dollar since 1980, rendering the United States economy vulnerable

Reaction to the Court of International Trade ruling in the carbon steel wire rod and potassium chloride case should prompt Congress to reexamine the existing law. Countervailing duties, along with antidumping relief, have been the most frequently invoked trade remedies in recent years.⁵⁷ Logically, the Court of International Trade ruling will result in United States industries filing for relief under the countervailing duty statute rather than under the antidumping provisions since section 1303 does not have a material injury test.⁵⁸ The court's ruling may therefore result in a reduction in trade with nonmarket economy countries, a result which the United States may not desire.⁵⁹

Apart from the difficulty of measuring the amount of an import's subsidization, the application of section 1303 to imports from non-market countries may have unfair results. One reason the signatories adopted a material injury standard under the GATT was to encourage other countries to sign the Subsidies Code.⁶⁰ Nonmarket countries arguably cannot meet the Subsidies Code requirements;⁶¹ therefore, instead of serving as an incentive, the lack of a material injury standard serves as a penalty.⁶² The imposition of countervailing duties on imports which do not materially injure or threaten to materially injure a domestic industry is not fair to United States consumers.⁶³

to imports. The recession which lasted from 1979 to 1982 helped to produce high interest rates and the strong dollar. Stern, *New Directions for the Trade Laws*, 18 GEO. WASH. J. INT'L L. & ECON. 709, 711 (1985). As a result of the recession, the "normal cyclical pattern of import penetration" was broken. *Id.* at 710.

⁵⁷ Bello & Homer, *The Trade & Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 INT'L LAW. 639 (1985).

⁵⁸ See GAO REPORT, *supra* note 24, at 30. Additionally, commentators have charged that the antidumping law, which has a special provision for calculating fair market value for imports from state-controlled economies, is unpredictable and difficult to administer. Stern, *supra* note 56, at 717.

⁵⁹ See GAO REPORT, *supra* note 24, at 31. The author argues that if countervailing duties are applied without an injury test, "the potential for price competition will be limited by the threat of countervailing duties." *Id.* The Court of International Trade decision enhances the likelihood that countervailing petitions against nonmarket countries will be successful which may result in an increased workload for the Commerce Department. See *id.*

⁶⁰ *Id.* at 29. The State Department has stated, however, that "[the] selective extension of any injury test does not appear to have been a useful inducement to countries to sign the Subsidies Code or to assume equivalent obligations." *Id.* at 27.

⁶¹ *Id.* at 30.

⁶² *Id.*

⁶³ Stern, *supra* note 56, at 713. The author, who is the Chairwoman of the United

Consumers should not be required to pay higher prices for goods on which a countervailing duty has been placed unless such a duty is justified because of injury to domestic producers.

The Court of International Trade decision correctly found that section 1303 does not exempt nonmarket countries. Nevertheless, section 1303 provides no clear standards for the identification and measurement of subsidies from countries with nonmarket economies. Further application of section 1303 may be inherently unfair to those countries and to United States consumers who are asked to forego lower priced imports for the benefit of domestic industries. Trade with nonmarket countries is still viewed primarily as a political rather than an economic question.⁶⁴ The Court of International Trade decision reemphasizes the need for a revamping of the United States countervailing duty law with particular focus on imports from nonmarket countries. In response to the decision, Congress must reexamine the current countervailing duty law's application to nonmarket economy countries and revise that law to reflect clear and fair standards or, in the alternative, legislate an alternative trade remedy for nonmarket imports.

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States International Trade Commission, has noted that the remedies for imports from nonmarket economy countries may be the one exception to the premise that United States trade laws do not require "a major overhaul." *Id.* at 717.

⁶⁴ Barcello, *supra* note 20.

