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Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries

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Vivian C. Jones
Specialist in International Trade and Finance
Foreign Affairs, Defense, and Trade Division

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Committees of Congress

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Summary

Concern regarding the mounting U.S. trade deficit with China, combined with China's alleged foreign exchange-rate manipulation and unfair trade practices, led some in the 109th Congress to introduce legislation proposing to make countervailing duty (CVD) laws applicable to nonmarket economy (NME) countries. Many expect that legislative interest in this area will continue in the 110th Congress.

CVD laws provide for assessment of duties on imports whose production and/or importation is found to be subsidized by a public entity in their country of origin and are injurious to a domestic producer of like merchandise. Antidumping (AD), another kind of trade remedy action, addresses products sold in the United States at less than their fair value (as defined by law) in a similar manner.

Although antidumping (AD) and countervailing duty (CVD) laws and procedure generally parallel each other, CVD laws contain no specific provisions for CVD investigations on imports from nonmarket economy (NME) countries.

Initial administrative attempts in 1983 to apply countervailing remedies to allegedly subsidized imports from several NME countries led to determinations by the International Trade Administration (ITA) of the Department of Commerce, the U.S. agency charged with determining whether such subsidization in fact exists (and its extent), that subsidization ("bounties" or "grants") within the meaning of the countervailing law, cannot be found in nonmarket economies.

These ITA determinations were challenged in the U.S. Court of International Trade (CIT), which held that they were "not in accordance with the law," reversed them, and remanded the cases to the ITA. On appeal, the U.S. Court of Appeals for the Federal Circuit reversed, and reinstated the ITA's original determinations — thus affirming that the ITA has the discretion not to apply the CVD law to NME countries. The ITA has not initiated any countervailing investigations of allegedly subsidized imports as such from NME countries since 1991.

Legislation to prevent further exemption of NME countries from countervailing action (aimed particularly at China) has been introduced in the 109th Congress making such action applicable to NME countries. H.R. 3283 (English, passed House on July 27, 2005), among other things, included such a provision. It is expected that similar legislation will be introduced in the 110th Congress.

On November 27, 2006, the ITA initiated a countervailing duty case against China for the first time since 1991, but made no determination at that time concerning the applicability of CVD law to NMEs.

This report replaces CRS Issue Brief IB10148, *Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries*, by Vivian C. Jones and Vladimir N. Pregelj. This report will be updated as events warrant.

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Most Recent Developments

Concerns in the 109th Congress regarding the mounting U.S. trade deficit with China, combined with China's alleged foreign exchange-rate manipulation and unfair trade practices, led to calls for making countervailing duty (CVD) laws applicable to nonmarket economy (NME) countries. Many expect that legislative interest in this area will continue in the 110th Congress.

On November 27, 2006, the International Trade Administration (ITA) of the Department of Commerce, the administrative agency tasked with determining whether or not subsidies exist, formally initiated a countervailing duty (CVD) case (on coated free sheet paper) against China.[1] The agency, which has not initiated a countervailing case against a nonmarket economy country since 1991, declined to make any determination at that time regarding the applicability of CVD law to NME countries, but said that it will once again consider that issue in the context of the investigation.[2]

In the same investigation, on December 15, 2006, the International Trade Commission (ITC) preliminarily determined "that there was a reasonable indication that a U.S. domestic industry is materially injured or threatened with material injury" by reason of allegedly subsidized coated paper from China — thus referring the case back to the ITA for a determination on subsidization.[3] If the ITC had determined in the negative, the case would have been terminated.

In the 109th Congress, H.R. 3283 (English, introduced July 14, 2005) which, among other things, requires application of CVD action to NME countries, was passed by the House on July 27, 2005. The bill was received in the Senate on July 28, 2005, and referred to the Committee on Finance. Other bills containing similar provisions include S. 593 (Collins, introduced March 10, 2005) and its companion bill H.R. 1216 (English), and H.R. 3306 (Rangel, introduced July 14, 2005). S. 1421

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[1] 71 F.R. 68546.

[2] Department of Commerce, "Commerce Initiates Countervailing Duty Investigation on Coated Free Sheet Paper from the People's Republic of China," Fact Sheet, November 21, 2006.

[3] U.S. International Trade Commission. "ITC Votes to Continue Cases on Coated Free Sheet Paper from China, Indonesia, and Korea," News Release 06-120, December 15, 2006. For an overview of CVD procedures, see CRS Report RL32371, *Trade Remedies: A Primer*.

(Collins, introduced July 19, 2005) is a companion bill to H.R. 3283. Section 3 of H.R. 1498 (Tim Ryan, introduced April 6, 2005), defines manipulation of foreign exchange rates as a countervailable subsidy.

Background and Analysis

Countervailing duty (CVD) laws provide relief to domestic industries that have been, or are threatened with, the adverse impact of imported goods sold in the U.S. market that have been subsidized by a foreign government or public entity. The relief provided is an additional import duty placed on the subsidized imports that is equal to the estimated amount of subsidization. In order for an industry to obtain relief, two things must be determined: (1) the International Trade Commission must find that the domestic industry is materially injured or threatened with material injury due to the imports, and (2) the International Trade Administration (ITA) of the Department of Commerce must find that the targeted imports have been subsidized.[4] CVD laws currently do not apply to nonmarket economy (NME) countries due to a determination by the ITA that there is no adequate way to measure market distortions caused by subsidies in an economy that is not based on market principles.

The ITA is also the agency responsible for designation of countries as nonmarket economies, defined by law as "any foreign country that the administering authority [ITA] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[5] NME designations are based on the extent to which (1) the country's currency is convertible; (2) its wage rates result from free bargaining between labor and management; (3) joint ventures or other foreign investment are permitted; (4) the government owns or controls the means of production; and (5) the government controls the allocation of resources and price and output decisions. The ITA may also consider other factors that it considers appropriate.[6]

The ITA made the determination not to apply CVD action to NME countries in 1983-84 in connection with countervailing investigations of two cases of alleged subsidization, one dealing with carbon steel wire rod imported from Czechoslovakia and Poland, and the other with imports of potassium chloride (potash) from the German Democratic Republic (East Germany) and the Soviet Union. All of them at the time were treated as nonmarket economy countries.

China's NME Status. The People's Republic of China, the United States's second largest import trading partner ($242.6 billion in 2005, imports for consumption) and our largest partner in terms of trade deficit ($203.8 billion in

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[4] 19 U.S.C. 1671 *et seq*.

[5] 19 U.S.C. 1677(18)(A). The following are ITA-designated NME countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan, and Vietnam.

[6] 19 U.S.C. 1677(18)(B).

2005)[7] is currently designated as a nonmarket economy. Concern over China's alleged subsidization of many of its exports, combined with its policy until July 2005 of pegging its currency to the U.S. dollar (and presently, to a basket of currencies that includes the dollar), have led to renewed congressional interest in applying countervailing action to imports from China.

The applicability of NME classification with regard to China was determined in *Preliminary Determination of Sales at Less than Fair Value, Greige Polyester Cotton Print Cloth from China*.[8] The ITA recently reaffirmed this determination on May 15, 2006 (and more comprehensively on August 30, 2006) in the context of an investigation on certain lined paper from China.[9] Any determination that a foreign country is a nonmarket economy country remains in effect until specifically revoked by the ITA.[10]

In China's case, however, China's World Trade Organization (WTO) accession package specified that the NME designation must effectively be revoked by the United States and other World Trade Organization (WTO) members within fifteen years after China's accession date (December 11, 2016), if it has not been previously revoked.[11] Therefore, in order to be in compliance with its WTO obligations, the United States must grant market economy status by that date.

Countervailing Duty Legislation

At the time the 1983-1984 investigations were initiated, the United States had in force two countervailing duty laws. Both provided for the imposition, on imports of already dutiable (but not duty-free) products that had been subsidized in their country of origin, of a countervailing duty in the amount of such subsidization. Both laws also required a determination of the existence and amount of subsidization to be countervailed, but one of the laws also required a finding that the subsidized imports have caused or threatened to cause injury to a U.S. domestic industry.

The earlier of the two laws (Section 303 of the Tariff Act of 1930, repealed) was a minimally modified version of the countervailing law of general applicability, initially enacted by the Tariff Act of 1897, and at the time of the two cases above applied only to products of countries *other than* countries "under the Agreement," meaning (1) any country to which the GATT Subsidies and Countervailing Code applied, or (2) had assumed Code-equivalent obligations with respect to the United

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[7] Trade balance equals exports (of domestic merchandise) minus imports (for consumption).

[8] 48 F.R. 9897.

[9] ITA. *The People's Republic of China (PRC) Status as a Non-Market Economy (NME)*. Memorandum, May 15, 2006. The ITA conducted a more comprehensive analysis of the issue in *Antidumping Investigation of Certain Lined Paper Products from the People's Republic of China ("China"). China's Status as a Non-Market Economy ("NME")*. Memorandum, August 30, 2006.

[10] 19 U.S.C.1677(18)(C)(I).

[11] World Trade Organization. *Accession of the People's Republic of China*. WTO Document WT/L/432, p. 9.

States, or (3) the President determined the existence of an agreement with the United States containing certain relevant provisions specifically spelled out in the statute. This statute — repealed effective January 1, 1995, by Section 261(a) of the Uruguay Round Agreements Act (URAA) (P.L. 103-465) — provided for the levying of a countervailing duty (CVD) equal to the net amount of public or private subsidization (defined as "*any* bounty or grant, however the same be paid or bestowed") without any need for injury determination.

Countervailing legislation with much broader country applicability (i.e., to countries "under the Agreement") consisted of comprehensive provisions (including detailed procedural provisions) added by the Trade Agreements Act of 1979 (P.L. 96-39) as Subtitle A of Title VII to the Tariff Act of 1930.[12] That law implemented for the United States the provisions of the international Subsidies and Countervailing Code agreed to in multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) in Geneva in April 1979. Under this legislation, most of which is still in force in a somewhat amended language, the assessment of a countervailing duty required — in addition to a determination that a "country under the Agreement" or a private entity in such country was providing "directly or indirectly, a subsidy with respect to the manufacture, production, or exportation" of merchandise imported into the United States — a determination that such imports have caused, or threatened with, injury to an industry in the United States, or that the establishment of an industry in the United States is thereby materially retarded.

The URAA, in addition to repealing section 303 and omitting subsidies from a private source as being countervailable, also amended the countervailing duty law of the 1979 Act by incorporating into it provisions comparable to those of section 303, which do not require injury determination in countervailing investigations of subsidized imports from countries other than "Subsidies Agreement countries." The latter have been defined in the same way — with appropriate updating technical changes — as the countries under the Agreement under the Trade Agreements Act of 1979. This version is still in effect.[13]

Countervailing Duty Investigations of Imports from Nonmarket Economy Countries (1983-1984; 1991)

1983-1984. Parallel countervailing duty investigations of imports of carbon steel wire rod imports from Czechoslovakia and Poland[14] were initiated on December 13, 1983, pursuant to petitions filed with the International Trade Administration on November 23, 1983, by four U.S. steel manufacturers. The petitions alleged that manufacturers, producers, or exporters of the product in question in either country received public benefits within the meaning of the countervailing law. Specifically, the petitions for countervailing action alleged that "bounties or grants" were provided

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[12] 19 U.S.C. 1671-1671h.

[13] 19 U.S.C. 1671(b).

[14] *Carbon steel wire rod from Czechoslovakia* (48 F.R. 56419) and *Carbon steel wire rod from Poland* (48 F.R. 56419).

in both countries in the form of a multiple exchange rate system, and a partial hard-currency retention program for exporting firms. In addition, Czechoslovakia allegedly had in effect a system of industry-specific trade conversion coefficients for the official exchange rate, and tax exemption for foreign trade earnings, while Poland provided price equalization payments for losses incurred due to foreign sales below domestic prices.

Both cases proceeded in parallel, and the determinations on issues they had in common were identical except for a few minor, country-specific differences. Therefore, page references to the *Federal Register* included in this report will be only those dealing with the Czechoslovak case, unless an issue specific to one country is discussed.

In its notices of initiation of investigation, the International Trade Administration (ITA) found both countries to be "countries not under the Agreement," and conducted the countervailing procedure according to provisions of Section 303, hence, without the need for determining injury. In addition, the ITA considered both of them nonmarket economy (NME) countries, but specifically pointed out that it had not yet resolved the question "whether the countervailing duty law [either Section 303 or the countervailing duty provision of Title VII] applies to nonmarket economy countries [as such]."

Although this issue had arisen almost a year earlier in connection with a CVD investigation of textile imports from China,[15] it was not resolved then because the CVD petition was withdrawn by the petitioners, meaning that the investigation terminated.[16] The issue, however, was subsequently addressed in the preliminary determinations in the two carbon steel wire rod cases.[17] In both cases, the ITA found that "nonmarket economy countries are not exempted *per se* from the countervailing duty law," since Section 303, by its statutory terms as well as based on its legislative history, applied to "*any* country..."

Weighing its own tentative initial literal interpretation of the country applicability of the provision and the arguments introduced earlier in the consideration of the China textiles case — focusing on the difference in the effects of government intervention in a market and nonmarket economy — the ITA, however, was "dispose[d] to not exclude nonmarket ... economies from its application without further review in each particular case." The ITA, consequently, had its "first opportunity to determine preliminarily whether practices by a government of a so-called nonmarket economy country confer countervailable benefits."

Focusing on prices as the key elements of subsidization, the ITA, in the ensuing detailed analysis of the situation in both countries, pointed out that

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[15] 48 F.R. 46600.

[16] 48 F.R. 55492.

[17] Czechoslovakia: 49 F.R. 6773; Poland: 49 F.R.6768.

> [i]n nonmarket economies, central planners typically set the prices without any regard to their economic value. As such, these prices do not reflect scarcity or abundance. For example, when a product is scarce in a market economy, its price will increase. In a nonmarket economy, however, the price of a scarce good will not go up unless the central planners mandate a new, higher price. Even if we can identify an internally set price, that price does not have the same meaning as a price in a market economy (49 F.R. 6770).

The ITA then analyzed in detail the alleged subsidization programs by determining first whether they would confer a subsidy in a market economy, and then whether the conclusion would be different for an NME country. The ITA concluded preliminarily that multiple exchange rates, currency retention schemes, trade conversion coefficients, and price equalization payments do not confer a bounty or grant either in market or in nonmarket economies; that the Polish adjustment coefficient program did not constitute a bounty or grant within the meaning of the law; and that the agency had not received sufficient timely information on the Czechoslovak tax exemption program to make a determination. On the basis of these findings, the ITA preliminarily determined that, while Congress did not exempt NME countries as such from the CVD law, the alleged Czechoslovak and Polish practices were not providing bounties or grants within the meaning of the CVD law. As the CVD law required, the ITA continued both investigations into their final phase.

In the final phase of these two investigations, the ITA focused on the unresolved issue of the application of the CVD law to nonmarket economy countries. In its detailed and comprehensive final determinations in the two carbon steel wire rod cases,[18] the ITA first concluded "that Congress never has confronted directly the question of whether the countervailing duty law applies to NME countries." It pointed out that Congress did not even debate, much less legislate on this issue, either in 1974 (when the concept of nonmarket economy countries was introduced into trade legislation and remedies were provided specifically with respect to imports from them, and Congress also amended the CVD law) or in 1979 (when the CVD law was thoroughly restructured, and the application of unfair-pricing remedial legislation was dealt with in detail, but only with respect to dumping by NME countries).

The ITA found it significant that, in the Trade Act of 1974, Congress enacted remedial provisions dealing specifically with injurious imports from "State-controlled-economy" or "Communist" countries — both terms functionally equivalent to that of "nonmarket economy" countries used in another part of the same Act — in the context of antidumping and "market disruption" (NME-specific import-relief action) but not with respect to countervailing action. In this, pointed out the ITA, citing the Senate report on the 1974 Act (S.Rept. 93-1298), Congress recognized the need for special remedial legislation applicable to State-controlled-economy countries because traditional fair- or unfair-trade remedies were insufficient or have proven inappropriate or ineffective because in "State-controlled-economy countries ... supply and demand forces do not operate to produce prices" and "because of the difficulty of [the] application [of such remedies] to products from State-controlled economies" (cited at 49 F.R. 19373).

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[18] Czechoslovakia: 49 F.R. 19370; Poland: 49 F.R. 19374.

Likewise, in the legislative history of the thorough restructuring of the CVD law by the Trade Agreements Act of 1979, there was nothing regarding any aspect of the application of the CVD law to NME countries, although the Subsidies and Countervailing Code of the General Agreement on Tariffs and Trade, implemented for the United States by that act, in Article 15 "explicitly permits [GATT] signatories to regulate unfairly priced imports from NME countries under either antidumping or countervailing duty legislation" (49 F.R. 19373).

The ITA also consulted with other U.S. government and academic sources, which, briefly, concluded that "it is ... only 'remotely possible' to identify and quantify subsidies in NMEs;" "most of the analysis used thus far for ... subsidies, is entirely inapplicable. ... Theoretically, any given sale may be subsidized or not, but since there is no market reference point, it is idle to speak in such terms." To one author, the countervailing duty law appears to require identification and measurement of a resource transfer from the state to the producer, but "this is simply not a measurable event in the typical nonmarket economy;" and "The extent to which a nonmarket system ... can be said to be subsidising will always be unclear" (all cited at 49 F.R. 19374).

Claiming broad discretion in this matter earlier recognized by the judiciary the ITA concluded that a "bounty or grant," within the meaning of the countervailing duty law, cannot be found in an NME.[19] The ITA also determined that Czechoslovakia and Poland were NMEs, since they operated "on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise ... do not reflect the value of the merchandise." Accordingly, the ITA determined that manufacturers, producers, or exporters in Czechoslovakia and Poland did not receive bounties or grants, and issued, effective May 7, 1984, final negative countervailing duty determinations.[20]

Shortly before the completion of the countervailing duty investigations of carbon steel wire rod, two U.S. chemical manufacturers filed (on March 30, 1984) petitions alleging subsidization of potassium chloride (potash) imported from the German Democratic Republic and the Soviet Union, whereupon the respective investigations were initiated as of April 26, 1984.[21] Because of the subsequent determination in the carbon steel wire rod cases that bounties or grants within the meaning of the countervailing duty law cannot be found in a NME (and both countries were determined to be NMEs), the ITA on June 6,1984, rescinded the two potassium chloride (potash) investigations and dismissed the relevant petitions.[22]

1991. Since the conclusion of the wire rod and potash countervailing duty cases (see next section) the ITA has not initiated any countervailing investigations of allegedly subsidized imports from NME countries, with one specialized exception.

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[19] 49 F.R. 19374.

[20] 49 F.R. 19374 and 19378.

[21] *Potassium chloride from the German Democratic Republic* (49 F.R. 18000) and *Potassium chloride from the Soviet Union* (49 F.R. 18002).

[22] 49 F.R. 23428.

Based on a petition filed on October 1, 1991, the ITA, on November 13, 1991, initiated a countervailing duty investigation of *Ceiling and Oscillating Fans Imported from China*.[23] The petitioner claimed that, while China was an NME country, "the PRC fans sector operates substantially pursuant to market principles and that the CVD law should apply."

The petition was apparently based on the fact that ITA had, meanwhile, procedurally introduced into antidumping investigations of imports from NME countries the concept of market-oriented industry (MOI) as a means of determining whether an industry in an NME country is sufficiently market-oriented (i.e., free from state control) to enable the ITA to use the economic data provided by the industry itself (rather than those of a surrogate market-economy country) in determining fair market value of the imported product subject to the investigation.

The petitioners in the Chinese fan CVD case claimed that the Chinese fan industry was an MOI with dependable self-provided data (including those relating to subsidization) and, hence, could objectively be subjected to a countervailing investigation. In its preliminary investigation,[24] the ITA concluded that the prices of several inputs are not market-determined and, hence, the industry cannot be considered an MOI, but believed that the information used as the basis for the determination should be verified and did not rescind the investigation. In its final, more comprehensive phase of the investigation, the ITA concluded that "the prices of several significant inputs are not market-determined" and therefore "the PC fans industry is not an MOI."... "As a result ... the CVD law cannot be applied to the PRC fan industry" and the ITA issued final negative determination in the case.[25]

Court Decisions Regarding Applicability of Countervailing to NME Countries

This report presents the relevant courts' views in a highly summarized form, and strives not to omit any of their salient points. However, it is also far from being a legal analysis of such views. If the detail or a legal analysis of the judicial opinions is required, their actual texts, identified in this report by page references to, respectively, ***614 Federal Supplement****, or* ***801 Federal Reporter 2d****, should be consulted. Requests for legal analysis should be addressed to the American Law Division of the Congressional Research Service.*

U.S. Court of International Trade (614 F. Supp. 548-557). Following the ITA's negative determinations in the carbon steel wire rod cases and the dismissal of the potassium chloride cases, the petitioners challenged those actions in the U.S. Court of International Trade (CIT). The court consolidated both suits and, on July 30, 1985, held that "countervailing duty law covers countries with nonmarket economies in light of fact that governmental subsidies that are target of law may be found in nonmarket economies as well as in market economies" (p. 548). The CIT reversed the carbon steel wire rod cases and remanded them to the ITA for

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[23] 56 F.R. 57616.

[24] 57 F.R. 10011.

[25] 57 F.R. 24018.

determinations consistent with the court's opinion, and set aside the rescissions of the potash cases and ordered that their investigations be resumed (p. 557).

The CIT, in its detailed opinion, addressed each of the four grounds on which the ITA had based its determination of nonapplicability of countervailing procedure to NME countries: (1) the view that a subsidy cannot be conferred in an nonmarket economy "because a subsidy, *by definition*, means an act which distorts the operation of a [free] *market*" (both italics in the original); (2) congressional "silence" on the issue and the apparent preference for other trade remedial procedures; (3) consensus of academic opinion as to nonapplicability of CVD law to NME countries; and (4) the ITA's asserted broad discretion to determine the existence or nonexistence of subsidies.

The CIT held that the ITA had made a basic error in interpreting and administering the CVD law by concluding that, in its opinion, subsidies cannot be found in nonmarket economies. The court emphasized that, absent clear legislative intent to the contrary, the plain language of the CVD law must ordinarily be regarded as conclusive (p. 551). Hence, it applies to *any country* and, therefore, does not allow for any *per se* exemptions of any political entity, a fact that the ITA itself appears to have recognized in its determinations.

The ITA, in the court's view, "institute[d], by administrative fiat, a major exemption for countries with nonmarket economies" by redefining the term "subsidy" as "a distortion of the operation [solely] of a market economy," thereby attempting to amend the CVD law (p. 552). Although the ITA had recognized that the CVD law did not allow for *per se* exemptions (see p. 3), it claimed that *countries* with nonmarket economies (i.e., political entities of a certain *type*) were exempt because of their NME status, illogically contradicting the meaning of the CVD statute. The difficulties of the CVD law, said the CIT, are not those of its *meaning*, but rather problems of *measurement*, which are precisely within the expertise of the agency." The ITA "has the authority and ability to detect patterns of regularity and investigate beneficial deviations from those pattern — and it must do so regardless of the form of the economy" (p. 554).

As to the ITA's argument that Congress' "silence" on the applicability of the CVD law to NME countries and its apparent preference for other remedial measures — among them antidumping law, which does contain specific provisions dealing with NME countries — the CIT pointed out that those measures have been established for remedying specific trade problems other than subsidization. Moreover, said the court, Article 15 of the GATT Subsidies and Countervailing Code, implemented for the United States by the Trade Agreements Act of 1979, "clearly gives a country the choice of using subsidy law or antidumping law for imports from a country with a state-controlled economy" (p. 556).

The court summarily dismissed the ITA's recourse to the views of "economic academia" "that the government of a country with a nonmarket economy cannot show what amounts to favoritism towards the manufacture, production, or export of particular merchandise. The idea violates common sense and conflicts with a rational construction of the law" (p. 554-555).

ITA's alleged assertion of its "broad discretion to determine the existence or nonexistence of subsidies" (p. 550) was not specifically addressed by the court; it was, however, implicitly challenged in the lengthy critique of administrative actions that, in the court's view, were contrary to law and, in effect, were attempts "to amend the countervailing law ... by administrative fiat." (p. 552).

U.S. Court of Appeals for the Federal Circuit (801 F. 2d 1308-1318). The U.S. government appealed the CIT decision to the U.S. Court of Appeals for the Federal Circuit, which — focusing on the potash cases — reviewed in detail the legislative history and development of relevant trade remedy laws and concluded that the CVD statute under which these investigations were conducted (Section 303 of the Tariff Act of 1930) had remained "substantially unchanged from the first general countervailing duty statute the Congress enacted [in 1897] ...."

Since Congress had not "defined the terms 'bounty' and 'grant' as used in section 303," the appellate court concluded it could not "answer the question whether that section applies to nonmarket economies by reference to the language of the statute" nor could it, on the other hand, answer it by concluding that, on the basis of the statutory language, "Congress has not attempted to exclude nonmarket economies from what the court believed to be the sweeping reach of the section." Since "at the time of the original enactment there were no nonmarket economies; Congress ... had no occasion to address the issue ..." Hence, it remained for the court to "determine, as best [it could], whether when Congress enacted the countervailing duty law in 1897 it would have applied the statute to nonmarket economies, if they then had existed" (p. 1314).

Based on the relevant aspects of the potash case, the appellate court concluded that the economic incentives and benefits provided by the Soviet Union and East Germany to their exports of potash to the United States did not constitute bounties or grants under the applicable CVD law (p. 1314). The court also said it followed a precedent which "recognized that the agency administering the countervailing duty law [i.e., the ITA] has broad discretion in determining the existence of a 'bounty' or 'grant' under that law" and, further, that it could not "say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the exports of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with the law or an abuse of discretion" (p. 1318).

In conclusion, the Court of Appeals on September 18, 1986, vacated the CIT order insofar as it reversed the ITA's final CVD determinations in the two wire rod cases, and remanded them to the CIT with instructions to dismiss the complaint for lack of jurisdictions (because the complaint was not timely filed). It also reversed the CIT order insofar as it set aside the ITA's final actions in the potash cases (p. 1318).

Action in Congress

The decision of the U.S. Court of Appeals for the Federal Circuit in the wire rod and potash cases triggered immediate reaction in Congress. H.R. 3 of the 100th Congress (*Trade and International Economic Policy Reform Act of 1987*; introduced on January 6, 1987), as passed by the House, provided for the application of the

countervailing duty law to nonmarket economy countries to the extent that a subsidy can reasonably be identified and measured by the administering authority (the ITA, see section 157). The proposed statute also contained detailed procedural provisions, including a requirement of injury determination by the U.S. International Trade Commission, whenever international obligations of the United States required it (H.Rept. 100-40, Part 1, p. 389). A comparable provision, however, was not included in the Senate version, and the House-passed language was dropped in conference (H.Rept. 100-576, p. 628; April 20, 1988).

As H.R. 3 was being considered, companion bills S. 770 and H.R. 1687 were introduced on March 18 and 24, 1987, respectively, to apply CVD provisions to imports from a state-controlled economy country, but were not further considered.

The application of CVD law to NME countries was addressed again in the 103rd and 104th Congresses. In the 103rd Congress, Section 105 of S. 90 (T*rade Enforcement Act of 1993*, introduced on January 21, 1993) expanded the definition of "countervailable subsidy" in the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (P.L. 103-465), by applying it to NME countries and prescribing the determination of its amount by using a surrogate market-economy country method (as used in antidumping investigations). An identical provision was included in the 104th Congress as Section 103 in S. 1148 (*Economic Revitalization Act*), introduced on August 10, 1995. Both bills died in committee.

In the 106th through 108th Congresses, identical bills (H.R. 3198 in the 106th Congress; H.R. 784 in the 107th Congress; and H.R. 3716 in the 108th Congress) were introduced, applying the CVD duty law to NME countries and applicable to investigations of *subsidies provided* on or after the date of the enactment of the respective act. Virtually identical bills, but applicable to CVD investigations pursuant to *petitions filed* on or after the date of the enactment of the respective act, were introduced in the 108th Congress (H.R. 3716 and S. 2212). All of these bills died in committee.

109th Congress. Two free-standing bills with identical operative provisions were introduced in the 109th Congress on March 10, 2005: S. 593 (Collins, *Stopping the Overseas Subsidies Act of 2005*) and H.R. 1216 (English), providing for application of CV duties to subsidized imports from NME countries, based on all petitions filed on or after the date of the enactment of the legislation. These bills are pending in the respective committees of jurisdiction.

In order to assure the consideration of S. 593 in the Senate, Senator Evan Bayh, one of its original sponsors, on April 12, 2005, placed a hold on the confirmation of then-Representative Rob Portman as the U.S. Trade Representative until Senate leadership would allow a vote on S. 593; on April 27, 2005, Senator Bayh proposed amendment S.Amdt. 568, identical with S. 593, to H.R. 3, but on April 28, 2005, withdrew the amendment and released the hold.

Provisions requiring application of CV action to imports from NME countries were subsequently included as Section 3 in broader trade-remedial legislation (*United States Trade Rights Enforcement Act*), introduced on July 14, 2005 (H.R. 3283, English) and July 19, 2005 (S. 1421, Collins). In addition to amending Title VII of

the Tariff Act of 1930 by subjecting NME countries to CV action, the legislation provides operational definitions of countervailable subsidy with respect to China (thus attempting to surmount the obstacle to determinations of subsidy, which the International Trade Administration claims cannot be made with respect to NME countries; see p. 4). The section also prohibits double-counting of countervailable subsidies in any antidumping order on the same product imported from the same country. The countervailing provisions would apply to a CVD petition filed on or after 30 days after the enactment date of the act, while the AD double-counting provision would apply to any subsequently made AD preliminary, final, or administrative-review determination.

After failing to pass in the House on July 26, 2005, under suspension of the rules (240-186), H.R. 3283 was considered the following day under the provisions of H.Res. 387 (an original closed rule, reported on July 26, 2005, in H.Rept. 109-187 and agreed to 228-200 on July 27, 2005) and passed on July 27, 2005 (255-168). The measure was received in the Senate on July 28, 2005, and referred to the Committee on Finance.

In somewhat simpler language, H.R. 3306 (*Fair Trade with China Act of 2005*), focuses its findings exclusively on problems in trade with China, but in Section 3 subjects all (including China) NME countries to countervailing action, effective with respect to CVD petitions filed on or after the enactment date of the bill. The provision also specifies that the application of CV action to nonmarket economy countries in no way affects the NME status of a country under antidumping provisions of the Tariff Act of l930 (several of which deal specifically with AD action against NME countries).

Triggered by alleged foreign exchange-rate manipulation by China, Section 3 of H.R. 1498 (*Chinese Currency Act of 2005*) introduced April 6, 2005, and referred to House committees on Ways and Means, and Armed Forces, defines any such manipulation as a countervailable subsidy.

Appendix: Summary of Legislation in the 109th Congress

S. 593 (Collins); H.R. 1216 (English)

Require application of countervailing procedure to imports from nonmarket economy countries. Introduced March 10, 2005; referred respectively to Committees on Finance, and Ways and Means.

H.R. 1498 (Tim Ryan, Chinese Currency Act of 2005)

Section 3 defines manipulation of foreign-exchange rate as countervailable subsidy. Introduced April 6, 2005; referred to Committees on Ways and Means, and Armed Forces.

H.R. 3283 (English); S. 1421 (Collins)

United States Trade Rights Enforcement Act. Section 3 requires application of countervailing procedure to imports from nonmarket economy countries; defines "countervailable subsidy" with respect to China; and prohibits double-counting of countervailable subsidy in antidumping cases; to enter into effect with respect to CVD provisions on 30th day after enactment and with respect to AD provisions as of the date of any subsequent AD determination. Introduced, respectively, on July 14 and 19, 2005, and referred, respectively, to Committees on Ways and Means, and on Finance. Having failed to pass the House on July 26, 2005, under suspension of the rules, H.R. 3283 was considered under a closed rule (H.Res. 387; H.Rept. 109-187, agreed to 228-200 on July 27), and passed (255-168) on July 27, 2005.

H.R. 3306 (Rangel)

Section 3 requires application of countervailing procedure to imports from nonmarket economy countries; applicable to CVD investigations for which petitions have been filed on or after the day of enactment; such application of CV action to nonmarket economy countries in no way affects the NME status of a country in any antidumping action. Introduced July 14, 2005; referred to committees on Ways and Means, International Relations, and Financial Services.