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Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries

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Summary

Concern regarding the mounting U.S. trade deficit with China (designated a nonmarket economy country according to U.S. trade laws), combined with China's refusal to allow its exchange rate to float, has led some in Congress to introduce legislation proposing to make countervailing duty laws applicable to China and other nonmarket economy countries. These laws provide for the assessment of duties on imports whose production and/or importation are found to be subsidized by a public entity in their country of origin and are injurious to a U.S. producer of similar merchandise. Antidumping, 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 procedures generally parallel each other, CVD laws contain no specific provisions for investigations on imports from nonmarket economy (NME) countries, while the AD statute does provide such guidelines.

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 the existence and extent of subsidies) that subsidies 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. On March 30, 2007, the ITA reversed some of its previous conclusions — at least with regard to products from China — by announcing a preliminary affirmative determination of subsidy on imports of coated free sheet paper from China.

Legislation to prevent further exemption of NME countries from countervailing action has been introduced in the 110th Congress. This legislation includes S. 364 (Rockefeller, introduced January 23, 2007), H.R. 571 (Tancredo, introduced January 18, 2007), H.R. 708 (English, introduced January 29, 2007), H.R. 782 (Ryan/Hunter, introduced January 31, 2007) and its companion bill S. 796 (Bunning/Stabenow, introduced March 7, 2007), and H.R. 1229 (Davis/English, introduced February 28, 2007). The Bush Administration has also taken some recent steps to address the issue. First, on November 27, 2006, the ITA initiated a CVD investigation against an NME country (China) for the first time since 1991. Second, on February 2, 2007, U.S. negotiators requested World Trade Organization (WTO) talks with China on subsidies, and consultations with China are ongoing as of this writing.

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Recent Developments

Concerns in Congress regarding the mounting U.S. trade deficit with China, combined with China's alleged foreign exchange-rate manipulation (which some regard as a subsidy) and other unfair trade practices have led to calls for making countervailing duty (CVD) trade laws applicable to nonmarket economy (NME) countries.

Some in Congress have introduced bills that seek to direct administrative agencies to apply CVD action to nonmarket economy countries. This legislation includes S. 364 (Rockefeller, introduced January 23, 2007), H.R. 571 (Tancredo, introduced January 18, 2007), H.R. 708 (English, introduced January 29, 2007), H.R. 782 (Ryan/Hunter, introduced January 31, 2007) and its companion bill S. 796 (Bunning/Stabenow, introduced March 7, 2007), and H.R. 1229 (Davis/English, introduced February 28, 2007).

On March 15, 2007, the House Ways and Means Trade Subcommittee held hearings on H.R. 1229, the *Nonmarket Economy Trade Remedy Act of 2007*. Trade Subcommittee Chairman Levin has reportedly said that he hopes to complete work on the bill and have it cleared for floor action soon.[1] Committee staff indicate that work on H.R. 1229 and other related legislation will continue, despite a recent decision by administration officials that it is possible to proceed on countervailing action with regard to China.

The Bush Administration has initiated action against China on two fronts since the end of 2006. First, 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 and to what extent) formally initiated a countervailing duty (CVD) case on coated free sheet paper against China.[2] 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

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[1] Neuman, Dan. "Commerce Does Not Oppose Davis-English Legislation." *Inside U.S.-China Trade*, March 21, 2007.

[2] 71 F.R. 68546.

again consider that issue during the course of the investigation.[3] On March 30, 2007, the ITA announced an affirmative preliminary determination in the CVD investigation. Preliminary estimates of net countervailable subsidy rates ranged from 10.9 to 20.35 percent. A final ITA determination is due on or about June 13, 2007, although the deadline can be postponed until mid-October.

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, which thus refers the case back to the ITA for a determination on subsidies.[4] If the ITC had determined in the negative, the case would have been terminated at that point. A final ITA subsidy determination is expected in mid-June 2007, and the final ITC injury determination is expected in mid-December 2007.

Second, on February 2, 2007, the U.S. Trade Representative announced that the United States has requested consultations with China at the World Trade Organization (WTO) over China's use of "what we contend are illegal subsidies." This is the first step in the WTO dispute settlement process. On March 20, 2007, China accepted the requests of Mexico, Australia, and Japan to join the consultations.

Background

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.[5] CVD laws currently do not apply to nonmarket economy (NME) countries due to a previous 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. However, the ITA has recently found that it may be possible to identify subsidies in China because, even though it

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[3] 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.

[4] 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*.

[5] 19 U.S.C. 1671 *et seq*. See CRS Report RL32371, *Trade Remedies: A Primer*, Vivian C. Jones.

is still designated as a nonmarket economy, many industries operate according to market principles.

For purposes of the trade remedy laws, 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."[6] 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.[7]

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.

Concerns About China

Total U.S.-China trade rose to $343 billion in 2006. China (an NME country) is the United States' second largest trading partner, the second largest source of U.S. imports, and its fourth largest export market. The $232.6 billion (2006) U.S. trade deficit with China and the adverse impact of Chinese imports on competing U.S. industries and workers, among other things, has led some in Congress to support more aggressive enforcement of U.S. trade remedy laws against Chinese products.[8]

One area of concern has been China's alleged use of "illegal" subsidy programs to bolster its industries and spur export growth. Many U.S. domestic producers have complained for years that they are adversely impacted by China's subsidizing its industries, but the 1984 ruling has meant that there has essentially been no recourse to deal with the issue. However, China is the chief target of U.S. antidumping action, with 61 AD duty orders outstanding and six AD investigations pending as of March 30, 2007. In addition, AD duty amounts tend to be higher for Chinese imports, due

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[6] 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.

[7] 19 U.S.C. 1677(18)(B).

[8] See CRS Report RL33636, *China-U.S. Trade Issues*, by Wayne M. Morrison for a more comprehensive treatment of these issues.

in part to the methodology employed by the ITA when calculating AD duties for NME countries.[9]

Another related concern involved China's policy until July 2005 of pegging its currency to the U.S. dollar (and presently, to a basket of currencies that includes the dollar), which has led to renewed congressional interest in applying countervailing action to imports from China, and in turn, to finding such "currency manipulation" countervailable.[10]

China's NME Status

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* (March 1983).[11] On May 15, 2006, the ITA recently reaffirmed this determination (and more comprehensively in an August 30, 2006 memorandum) in the context of an investigation on certain lined paper from China.[12] According to current U.S. law, any determination that a foreign country is a nonmarket economy country remains in effect until specifically revoked by the ITA.[13] Therefore, since the ITA further determined (in December 1983), that subsidies could not be found in NME countries, countervailing action against China had not been initiated since 1991 — until the ongoing case on coated free sheet paper was presented.

In China's case, however, its World Trade Organization (WTO) accession package specified that the "importing WTO member may use a methodology that is not based on a strict comparison with domestic prices or costs in China" for both antidumping and countervailing actions. However, the agreement also specified that this methodology (currently used by the U.S. when determining the amount of dumping in NME countries) is available only for 15 years after the date of accession (or December 11, 2016). After that date, the United States and other World Trade Organization (WTO) members may no longer use this nonmarket economy or "surrogate country" methodology when determining price comparability in CVD or AD investigations.[14]

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[9] See Government Accountability Office. *U.S. - China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties For Some Chinese Companies.* GAO Report No. GAO-06-231, January 2006. [http://www.gao.gov/new.items/d06231.pdf].

[10] See CRS Report RL32165, *China's Currency: Economic Issues and Options for U.S. Trade Policy*, by Wayne M. Morrison and Marc Labonte for a discussion of this issue.

[11] 48 F.R. 9897.

[12] 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.

[13] 19 U.S.C.1677(18)(C)(I).

[14] World Trade Organization. *Accession of the People's Republic of China*. WTO Document
(continued...)

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 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.[15] That U.S. law implemented 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

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[14] (...continued)
WT/L/432, p. 9.

[15] 19 U.S.C. 1671-1671h.

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.[16]

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

1983-1984. Parallel countervailing duty investigations of carbon steel wire rod imports from Czechoslovakia and Poland[17] 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 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 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,[18] it was not resolved then because the CVD petition was withdrawn by the petitioners, meaning that the investigation terminated.[19] The issue, however, was subsequently addressed in the preliminary

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[16] 19 U.S.C. 1671(b).

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

[18] 48 F.R. 46600.

[19] 48 F.R. 55492.

determinations in the two carbon steel wire rod cases.[20] 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

> [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,[21] 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,

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

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

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).

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.[22] 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

[22] 49 F.R. 19374.

bounties or grants, and issued, effective May 7, 1984, final negative countervailing duty determinations.[23]

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.[24] 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 an 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.[25]

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. 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*.[26] The petitioner claimed that, while China was an NME country, "the PRC fan 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,[27] 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

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[23] 49 F.R. 19374 and 19378.

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

[25] 49 F.R. 23428.

[26] 56 F.R. 57616.

[27] 57 F.R. 10011.

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.[28]

Court Decisions Regarding Applicability of Countervailing to NME Countries[29]

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 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 a 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

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[28] 57 F.R. 24018.

[29] 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.

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 patterns — 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.

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 sought to provide operational definitions of countervailable subsidy with respect to China. The bill also would have prohibited double-counting of countervailable subsidies in any antidumping order on the same product imported from the same country. These provisions would have applied to a CVD petition filed on or after 30 days after the enactment date of the act, while the AD double-counting provision would have applied 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*), focused its findings exclusively on problems in trade with China, but in Section 3 subjected 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 specified that the application of CV action to nonmarket economy countries would have in no way affected 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 Services) defined any such manipulation as a countervailable subsidy.

110th Congress

Five bills seeking to apply countervailing duty law to NME countries have been introduced in the 110th Congress to date: S. 364 (Rockefeller, introduced January 23, 2007); H.R. 708 (English, introduced January 29, 2007); H.R. 782 (Ryan/Hunter, introduced January 31, 2007) and its companion bill S. 796 (Bunning/Stabenow, introduced March 7, 2007); and H.R. 1229 (Davis/English, introduced February 28, 2007). H.R. 571 (Tancredo, introduced January 18, 2007), seeks to apply additional tariffs on all imports from designated NME countries. As of this writing, these bills are in committee.

Application of CVD Laws to NME Countries. Five of the bills (S. 364, H.R. 708, H.R. 782/S. 796, and H.R. 1229) seek to direct administrative authorities to apply CVD laws to NME countries.

H.R. 1229 (sec. 2(b)) would expand the description of countervailable subsidy to include all nonmarket economy countries,[30] and provide a China-specific methodology for determining the amount of subsidy if special difficulties are found. "Irrespective of whether" China is designated as a nonmarket economy country, administrative authorities would be directed to use "methodologies that take into account the possibility that terms and conditions prevailing in China may not be applicable as appropriate benchmarks." In these situations, authorities would be directed to adjust the terms and conditions prevailing in China before using those prevailing outside of China. However, if authorities have determined that China is an NME country, they would be directed to "presume" that special difficulties do exist, that it is not practicable to consider and adjust for Chinese terms and conditions, and that "terms and conditions prevailing outside of China" (e.g., surrogate market economy country or world market data) should be used to calculate the amount of subsidy.

H.R. 708 (sec. 110(a)) would amend the CVD statute by providing methodology that would apply to all countries, regardless of market economy status. Authorities would be directed on the basis of a "reasonable indication that a financial contribution" has distorted input prices of the subject merchandise, or if price data are unavailable, to "measure adequacy of remuneration" by referring to input prices for similar goods or services from outside the country subject to investigation or review. Where possible, the data should be adjusted to reflect prevailing market conditions in the country. This surrogate data methodology would also apply to prices within political subdivisions, or other dependent territories of countries.

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[30] See 19 U.S.C. 1677(5).

S. 364 (sec. 301) would also apply CVD for all countries, regardless of market economy status. If there is a reasonable indication that government intervention has distorted prices or other economic indicators, or if prices or other economic indicators are not available, the administering authority would be directed to measure the benefit conferred using price and economic data from a surrogate country or other political subdivision, if applicable.

When measuring the amount of subsidy in nonmarket economy countries, H.R. 782 and S. 796 (sec. 102(b)) would direct the administering authority to use methodologies that take into account the possibility that "prevailing terms and conditions" are not available, or are inappropriate benchmarks. In such cases, unless it can be demonstrated that these conditions can be adjusted to serve as appropriate benchmarks, the administering authority should use terms and conditions prevailing outside the NME country. H.R. 782/S. 796 also direct the administering authority to use "facts otherwise available" and draw "adverse inferences" if a party is in possession of information necessary to identify the amount of subsidy does not provide it for the record in a timely manner.[31]

Revocation of NME Status. H.R. 708 (sec. 118), S. 364 (sec. 206), and H.R. 1229 (sec. 3) in similar (but not identical) language, seek to amend current law so that a country's NME status is revoked by (1) a determination by the administering authority *and* (2) a joint resolution of Congress. In each proposal, the President is directed to notify the committees of jurisdiction if the administering authority has made such a determination, after which the joint resolution would be introduced. The bills also specify procedures and time limits for debate in both houses. S. 364 (sec. 206(d)) and H.R. 708 (sec. 112(d)) also propose specific legislative language for the joint resolution.

Exchange Rate Manipulation Countervailable. S. 364 (sec. 302) and H.R. 782/S. 796 (sec. 103(b)) would provide for the treatment of foreign exchange-rate manipulation ("misalignment" in H.R. 782/S. 796) as a countervailable subsidy and seek to amend current law to include specific definitions and factors for administering authorities to consider when determining its existence.

Additional Tariff on NME Imports. H.R. 571 (Tancredo, introduced January 18, 2007) seeks to apply an additional across-the-board tariff on imports from NME

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[31] The terms in quotes allude to specific methodology provided in U.S. trade remedy laws. When sufficient data are available from the respondent in an AD or CVD investigation, the ITA generally uses these data to calculate AD or CVD duties — in which case, the duties assessed are generally the most favorable to the respondent. If these data are not available, the ITA may use "facts available" (including data gathered from the petitioner or other external sources) which may result in less favorable (higher)duty margins than if the respondent's data were used. An "adverse inference" may be drawn if the ITA finds that the respondent is obstructing or not cooperating with an investigation. In these cases, the ITA may use the least advantageous figures among the facts available when calculating the duty amounts, which generally results in much higher AD or CVD duties. (See Department of Commerce. *Import Administration Antidumping Manual*, Chapter 6 — "Fair Value Comparisons," p. 11, [http://ia.ita.doc.gov/admanual/admanual_ch06.pdf].)

countries and proposes to direct the additional duty revenue to designated Social Security Trust Funds.

Recent Executive Branch Actions

In response to the concerns of domestic manufacturers of import-competing products and some in Congress, the Bush Administration has taken two steps in dealing with China's trade practices since late 2006.

CVD Investigation

First, on November 27, 2006, the ITA announced that it had initiated a CVD investigation (on coated free-sheet paper) against China. In the first phase of the investigation, the International Trade Commission (ITC) preliminarily determined on December 15, 2006, "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 preliminary determination on subsidization. If the ITC had made a negative determination, the investigation (including any ITA determination of the applicability of CV action to NME countries within the context of the investigation) would have terminated at that point.

On January 9, 2007, the government of China filed suit in the Court of International Trade in an effort to prevent the ITA from continuing with the CVD investigation, alleging that the decision by the Court of Appeals for the Federal Circuit held "unequivocally" that the applicable statute did not allow application of the CVD law to NME countries. On March 29, 2007, the Court ruled that it did not have jurisdiction to hear the case because no final determination had been made. Although the Court did not rule on whether the ITA has the legal authority to apply CVD law to NMEs, it did state that "it is not clear that Commerce is prohibited from applying countervailing duty law to NMEs."[32]

On March 30, 2007, the ITA announced an affirmative preliminary determination of subsidy in the CVD investigation. Preliminary estimates of net countervailable subsidy rates were set, ranging from 10.9 to 20.35 percent.[33]

The next phase of the CVD investigation is continuing at the ITA. A final ITA determination is due on or about June 13, 2007, although the deadline can be postponed until mid-October. After the ITA's final determination, the investigation will continue at the ITC for a final determination on injury, expected at the end of July 2007. If both agencies issue final affirmative determinations, an antidumping duty order will be issued on the merchandise about August 6, 2007.

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[32] U.S. Court of International Trade, *Government of the People's Republic of China v. United States*, Slip Opinion 07-50, March 29, 2007.

[33] 72 F.R. 17484.

ITA's Analysis. In the course of its preliminary investigation, the ITA concluded that "while China has enacted significant and sustained economic reforms, the PRC government has preserved a significant role for the state in the economy."[34] Even though the ITA stood by its previous decision reaffirming China's status as an NME country, the agency also found that China's present-day economy is "significantly different" from the "Soviet-style economies" at issue in the *Georgetown Steel* case where

> (p)rices are set by central planners. 'Losses' suffered by production and foreign trade enterprises are routinely covered by government transfers. Investment decisions are controlled by the state. Money and credit are allocated by the central planners. The wage bill is set by the government. Access to foreign currency is restricted. Private ownership is limited to consumer goods.[35]

In contrast, the ITA determined in its March 29, 2007 analysis that market forces actually determine the prices of more than 90% of products in China, that wages seem to be negotiated, as opposed to government-set, foreign currency is more accessible, and private ownership rights are acknowledged by the Chinese government.[36] At the same time, "the current PRC government has instead opted to shrink the role of the state in some areas while preserving it in others, but never ceding fundamental control over the economy to market forces completely."[37] Therefore, the ITA concluded, even though China remains an NME country, the current state of China's economy permits the agency to determine whether the Chinese government has bestowed a benefit on Chinese producer, and whether any such benefit is specific.[38]

WTO Consultations on Subsidies

Second, on February 2, 2007, the USTR announced that the United States has requested WTO dispute settlement consultations with China over its use of "what we contend are illegal subsidies."[39] This is the first step in the WTO dispute settlement process.[40] On March 9, 2007, USTR Susan Schwab announced that China had agreed to terminate one of the nine challenged subsidy programs — a regulation

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[34] Department of Commerce, International Trade Administration. "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China — Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy." Memorandum, March 29, 2007. (Hereinafter ITA March 29, 2007 Memorandum).

[35] *Carbon Steel Wire Rod form Poland; Final Negative Countervailing Duty Determination,* 49 F.R. 19375.

[36] ITA March 29, 2007 Memorandum, pp. 5-9.

[37] ITA March 29, 2007 Memorandum, p. 9.

[38] ITA March 29, 2007 Memorandum, p. 10.

[39] U.S. Trade Representative. Remarks by USTR Susan C. Schwab Regarding U.S. Request for WTO Consultations on China's Prohibited Subsidies. February 2, 2007.

[40] See CRS Report RS20088, *Dispute Settlement in the World Trade Organization: An Overview*, by Jeanne J. Grimmett.

implemented by China's central bank that allowed large exporters to take advantage of discounted loans not available to other companies.[41]

In its formal request for consultations, the United States pointed to several tax laws (including nine specifically cited laws) and other measures that appear to be used by the Chinese government in order to provide tax refunds or exemptions to Chinese businesses if they purchase domestically produced goods instead of foreign products, provided they meet certain export performance criteria.[42] The USTR stated that these subsidies "can distort trade conditions for U.S. manufacturers, small and medium-sized enterprises (SMEs) and their workers in multiple industries. They are available across manufacturing sectors, so they can inhibit U.S. exports of a huge range of products to China, and provide an unfair advantage to China's exports in the United States and around the world."[43]

On February 28, 2007, Mexico also requested talks with China on the same list of subsidies.[44] On March 20, 2007, China accepted the requests of Australia, Japan, and the United States to join in consultations with Mexico on the subsidies issue, as well as the request of Australia, Japan, and Mexico to join with the United States in consultations.[45] If the issues are not resolved through consultations, the United States may request a dispute settlement panel after the consultations period ends in early April. Article 9 of the WTO Dispute Settlement Understanding provides that when more than one WTO Member requests a panel related to the same matter, a single panel may be established to examine the complaints. It is unclear as of this writing, however, what course of action the United States and other complainants may take.

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[41] USTR. "Schwab Laud's China's Move to Halt Subsidized Loans Challenged by the United States in WTO Case." Press Release, March 9, 2007.

[42] Specifically, the United States alleges that China is in violation of Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article III.4 of the General Agreement on Tariffs and Trade 1994, and Article 2 of the Agreement on Trade Related Investment Measures (TRIMS Agreement). According to the United States, these measures also appear to be in violation of China's obligations under its WTO accession protocol. WTO. China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments. Request for Consultations by the United States. Request for Consultations, February 2, 2007. WT/DS358/1.

[43] U.S. Trade Representative. *WTO Case Challenging Chinese Subsidies.* Fact Sheet, February 2, 2007.

[44] WTO. China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, Request for Consultations by Mexico, February 28, 2007. WT/DS359/1.

[45] WTO. China — Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments. Acceptance by China of the Requests to Join Consultations. March 8, 2007 (WT/DS/358/6); March 20, 2007 (WT/DS/359/6).

Issues and Options for Congress

Despite the ITA's affirmative determination that it is able to identify the existence of subsidies in China, House Ways and Means Committee Chairman Rangel and Trade Subcommittee Chairman Levin have indicated that they intend to move forward with legislation to "ensure we are combating all unfair trade — whether it is dumping or subsidies — that puts American workers, farmers and businesses at a disadvantage."[46] Congress may consider some of the following issues as it continues to address application of trade remedies to China.

First, the ITA's decision that it can identify subsidies in China has no effect on China's standing as a nonmarket economy country or on the NME designations of other countries. It also does not affect ITA's ruling that it is unable to find subsidies in NME countries other than China. Therefore, Congress may consider language (H.R. 782, H.R. 1229, and S. 796) to ensure that the CVD law specifically applies to other NME countries as well as China. Vietnam, another U.S. trading partner of increasing significance, is also an NME country. There are two antidumping orders against products from Vietnam as of this writing — on frozen fish filets and frozen or canned warmwater shrimp.[47]

On the other hand, the amount of trade with the remaining NME countries (Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Turkmenistan, and Uzbekistan) is not particularly significant, and there are no currently no outstanding AD orders or other significant trade disputes with these countries.

Second, there are currently no specific factors to consider or methodologies provided for administrative authorities to use when identifying subsidies in nonmarket economies. In contrast, the antidumping statute does provide such methodology for determining normal value in NME countries — including the authority to calculate expenses using inputs and factors of production in a market economy country "considered appropriate to the administering authority."[48] Therefore, Congress may consider such methodologies as in H.R. 782, S. 364, and S. 796 to apply to all NME countries, as well as China (H.R. 1229 provides a China-specific methodology), possibly including guidelines similar to those in the antidumping statute.

It is important to note that making CVD procedures available to U.S. industries is not without its trade-offs. AD duties tend to be higher than CV duties in general, and AD duties on imports from nonmarket economy countries tend to be even higher, in part due to the use of the third-country data methodology to calculate the amount

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[46] House. Committee on Ways and Means. "Rangel and Levin Respond to Commerce Subsidy Investigation," press release, March 30, 2007.

[47] Vietnam's total trade with the United States amounted to about $9.6 billion in 2006, with total U.S. exports of $1 billion and imports of $8.6 billion.

[48] 19 U.S.C. § 1677b(c).

of dumping.[49] If China retained its NME status and subsidies were found on targeted merchandise for which AD duties were already in place, some of the companion AD duties might have to be revised downward in order to avoid "double counting" (or the possible inclusion of export subsidy amounts in certain AD duty calculations). In a June 2005 report, the Government Accountability Office (GAO) stated that this consideration "introduces a level of uncertainty about the magnitude of the total level of protection that would be applied to Chinese products," and "may result in combined rates that are lower than might be expected."[50]

Therefore, a determination by ITA that it can target subsidies in China, or legislation amending the statute, could result in the unintended consequence of an overall reduction in the amount of protection provided.[51] However, since the two remedies address substantially different forms of price manipulation, it is also possible that some U.S. industries that had previously not been able to obtain relief through the AD statute may be able to do so through CVD procedures.

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[49] Government Accountability Office. *U.S. - China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties For Some Chinese Companies*, January 2006, GAO-06-231.

[50] U.S. Government Accountability Office. *U.S. China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, June 2005, GAO-05-474.

[51] Ibid.

Appendix: Summary of Legislation

110th Congress

S. 364 (Rockefeller, introduced January 23, 2007)

Strengthening America's Trade Laws Act. With respect to nonmarket economies, the bill seeks (sec. 206) to amend current law to provide nonmarket economy status will remain in effect until (1) the administering authority (currently the ITA) determines to revoke the NME status, and (2) Congress passes a joint resolution (with specific language and time limits for debate) to that effect. The bill would direct the President to (1) notify the House Ways and Means and Senate Finance committees of such a determination within 10 days of its publication in the Federal Register, and (2) transmit to Congress a request that a joint resolution should be introduced. The bill (sec. 301) also seeks to expand the applicability of countervailing duties to NME countries and directs the administering authority to use surrogate country (or political subdivision, as applicable) pricing and data if that information is distorted or otherwise unavailable. In addition, section 302 seeks to provide for the treatment of exchange-rate manipulation as a countervailable subsidy. Referred to Committee on Finance.

H.R. 571 (Tancredo, introduced January 18, 2007)

Seeks to require that additional tariffs (5 percent *ad valorem* during the one-year period after enactment of the bill and 1 percent additional duty each year thereafter) be imposed on products of any nonmarket economy until the President certifies to Congress that the country is a market economy country. The definition of nonmarket economy country would apply to (1) countries specifically designated (Albania, Armenia, Azerbaijan, Belarus, Cambodia, Georgia, Kyrgyzstan, Laos, Moldova, China, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam); (2) Cuba and North Korea; (3) any other country that the President determines is a nonmarket economy country as defined in section 771 of the Tariff Act of 1930 (19 U.S.C. 1677). The bill further seeks to place the additional tariff revenues in designated Social Security Trust Funds. Referred to Committee on Ways and Means.

H.R. 708 (English, introduced January 29, 2007)

Trade Law Reform Act of 2007. With respect to NME countries, section 112 seeks to amend current law to provide that a country's nonmarket economy status must be revoked only by a joint resolution of Congress approving a determination by the administering authority (currently the ITA). Directs the President to notify the House Ways and Means and Senate Finance committees of such a determination within 10 days of its publication in the Federal Register. The bill provides specific language for the resolution and time limits and conditions for debate. Section 113 seeks to require the application of countervailing procedures to imports from nonmarket economy countries. Referred to Committee on Ways and Means and Committee on Rules.

H.R. 782 (Ryan/Hunter, introduced January 21, 2007), S. 796 (Bunning/Stabenow, introduced March 7, 2007)

Fair Currency Act of 2007. With respect to nonmarket economy countries, Section 102 seeks to apply CVD action to NME countries. When measuring the

amount of subsidy in NME countries, H.R. 782 (sec. 102(b)) seeks to direct the administering authority to use methodologies that take into account the possibility that "prevailing terms and conditions" are not available, or are inappropriate benchmarks. In such cases, unless it can be demonstrated that these conditions can be adjusted to serve as appropriate benchmarks, the administering authority, terms and conditions prevailing outside the NME should be used. Also directs the administering authority to use facts otherwise available, and draw adverse inferences if a party is in possession of information necessary to identify the amount of subsidy does not provide it for the record in a timely manner. Seeks to provide for the treatment of exchange-rate "misalignment" as a countervailable subsidy.

H.R. 1229 (Davis/English, introduced February 28, 2007)

Nonmarket Economy Trade Remedy Act of 2007. Amends the general rule governing imposition of countervailing duties to specifically apply to nonmarket economy as well as market economy countries. Provides a China-specific methodology for determining the amount of subsidy if special difficulties are found. Whether or not China is designated as a nonmarket economy country, administrative authorities are directed to use "methodologies that take into account the possibility that terms and conditions prevailing in China may not be applicable as appropriate benchmarks." In these situations, authorities are directed to adjust the terms and conditions prevailing in China before using those prevailing outside of China. However, if authorities have determined that China is an NME country, they are directed to "presume" that special difficulties do exist, that it is not practicable to consider and adjust for Chinese terms and conditions, and that "terms and conditions prevailing outside of China" (e.g., surrogate market economy country or world market data) should be used to calculate the amount of subsidy. Also would amend current law to provide that a country's NME status may be revoked only if a joint resolution of Congress approves a determination by the administering authority. Directs the President to notify the relevant committees of such a determination within 10 days of its publication in the Federal Register. The bill provides specific language for the resolution and time limits and conditions for debate. Requires an annual report by the International Trade Commission on China's use of government intervention to promote investment, employment, and exports. House Ways and Means Trade Subcommittee hearing held, March 15, 2007.