

APPLICATION OF THE UNITED STATES' LAW OF  
COUNTERVAILING DUTIES TO NONMARKET IMPORTS:  
EFFECTS OF THE RECENT FOREIGN REFORMS

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## I. INTRODUCTION

The last several years have been marked by considerable economic reform in nonmarket countries. The changes which have occurred have undoubtedly impacted upon United States' law and policy with respect to the United States' treatment of those countries. The purpose of this paper is to examine the effects, or potential effects, this reform has had, or could have, on the United States' law of countervailing duties with respect to nonmarket economies. In particular, this paper seeks to demonstrate, through case analyses, how these effects are, or likely will be, driven by those basic principles already established under the United States' countervailing duty law. Part I is a general look at the United States' trade law, highlighting some recent changes made to it by the Uruguay Round Agreement. Part II outlines how the United States Commerce Department (Commerce), which is responsible for administering this law, developed the United States' policy on countervailing duty law and nonmarket economies. Part III is devoted to a discussion of important antidumping law developments which impact upon the application of countervailing duties to nonmarket economies in transition. Part IV examines what can already be said about the application of countervailing duty law to reforming nonmarkets given the fact this is still a very new area for Commerce. This paper will then conclude with some final thoughts on related foreign policy concerns.

## II. GENERAL UNITED STATES' LAW OF COUNTERVAILING DUTIES

The purpose of United States' countervailing duty law is "to offset the unfair advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."<sup>1</sup> Before the Commerce Department can impose countervailing duties on any imports, it must make a two-part determination. First, the goods are being subsidized by the foreign government; and second, a United States' industry is materially injured, or is threatened with material injury, or the establishment of a United States' industry is slowed because of the subsidized imports.<sup>2</sup> Upon making a positive finding for countervailing duties, the Commerce Department will publish a countervailing duty order covering the subsidized goods, or "subject merchandise"<sup>3</sup> in the Federal Register pursuant to this order. The Commerce Department will then direct Customs to impose countervailing duties equal to the amount of the net subsidy.<sup>4</sup>

The Commerce Department defines subsidies as direct and indirect government grants, whether in the form of direct cash payments, tax credits, or artificially low-interest loans, for the production or exportation of goods.<sup>5</sup> In its statutory definition of subsidy, the Tariff Act of 1930 lists two types: export and domestic.<sup>6</sup> The former kind are defined to include those examples which the General Agreement on Tariffs and Trade (GATT) Subsidies Code enumerates in its Illustrative List of Export Subsidies. That list includes various subsidies, credits, and preferential tax treatments contingent upon export.<sup>7</sup>

In defining domestic subsidies, the Tariff Act holds that subsidies must be provided "to a specific enterprise or industry, or group of enterprises or industries."<sup>8</sup> Thus, United States' trade law aims at countervailing, not foreign government programs designed to achieve

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1. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (quoting *Zenith Radio Corp. v. United States*, 437 U. S. 443, 455-56 (1978)).

2. Tariff Act of 1930, 19 U.S.C. § 1671(a)(1) (1995) [hereinafter Tariff Act].

3. 19 U.S.C. § 1671(d).

4. 19 U.S.C. § 1671(c). An estimated amount is used before Commerce makes a more definite assessment.

5. 19 U.S.C. § 1671(a)(1).

6. 19 U.S.C. § 1671(a)(1).

7. General Agreement on Tariffs and Trade, Agreement on Interpretation and Application of articles, VI, XVI and XXIII of the agreement of Oct. 30, 1947 as rectified by the process-verbal of Dec. 17, 1979. Done at Geneva Apr. 12, 1979, 31 U.S.T. 513, TIAS No. 9619 [hereinafter GATT]. This is part of the Tokyo Round.

8. 19 U.S.C. § 1677(5)(A)(I), (ii).

broad economic goals such as lower inflation or unemployment, but the government aid which benefits a specific economic sector. The Tariff Act states such aid includes provisions of capital, low-interest loans, debt forgiveness, and cost assumptions.<sup>9</sup>

### III. SIGNIFICANT URUGUAY ROUND CHANGES TO UNITED STATES COUNTERVAILING DUTY OBLIGATIONS

Until recently, United States' trade law did not require Commerce to conduct a material injury test for subsidized goods from all countries. Under the Trade Agreements Act of 1979, the United States was obligated to conduct such a test on imports only from those nations which: (1) were signatories to the Tokyo Round Subsidies and Countervailing Measures Code; (2) had assumed comparable obligations; (3) or were not signatories to GATT but had bilateral trade agreements with the United States requiring unconditional Most Favored Nation (MFN) treatment.<sup>10</sup> Otherwise, countervailing duties could be imposed without an injury test. This bifurcated system changed, however, with the Uruguay Round. All signatories to that accord are afforded an injury test, and since all World Trade Organization (WTO) members are parties to these agreements, an injury test must now be applied by the United States in every countervailing duty case involving a WTO member.<sup>11</sup>

Prior to the Uruguay Round, controversy frequently arose regarding exactly what type of government-conferred benefits constitute "subsidies" under GATT.<sup>12</sup> At times it was unclear just when the United States could hold such benefits as actionable, under the GATT law of countervailing duties. The Uruguay Round Subsidies Agreement clarified this area of GATT obligations when it defined a subsidy as a "financial contribution" provided directly or indirectly by a government which confers a benefit.<sup>13</sup> The Agreement more completely developed this definition of an actionable subsidy by establishing a classification of subsidies. The classes include subsidies which are: (1) prohibited, or "red

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9. 19 U.S.C. § 1677(5)(A)(I), (ii).

10. Walter Kolligs, *The United States Law of Countervailing Duties and Federal Agency Procurement After the Tokyo Round: Is it 'GATT Legal'?* 23 CORNELL INT'L L.J. 553, 568 (1990); see also JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 785 (1995).

11. 19 U.S.C. § 1671b(b)(1)(a).

12. JACKSON, *supra* note 10, at 783, 785.

13. GATT, *supra* note 7, art.1, §1.1.

light;" (2) permissible, but actionable if they cause adverse trade effects or "amber light;" and (3) nonactionable, or "green light."<sup>14</sup>

Under this new Uruguay Round classification, the United States may continue to treat export subsidies as a violation of GATT obligations, but may also treat as prohibited any de facto export subsidies or subsidies contingent upon the manufacturer's use of domestic materials for production.<sup>15</sup> The United States may now also legally take countervailing action when it can demonstrate, by means proscribed under the "amber light" category, the use of subsidies by a nation has adversely affected United States' trade interests through price or market share effects; whether they have caused "serious prejudice" to United States' interests.<sup>16</sup> In cases where serious prejudice is presumed, the burden is on the subsidizing nation to demonstrate harm was not caused to the importing nation. The new classification prohibits the United States from taking countervailing action in certain cases of governmental assistance for: industrial research, regional development, or the adaptation of existing plants or equipment to meet new environmental standards.<sup>17</sup> A notification provision allows for other countries to judge the permissibility of subsidies before they are granted by a government.

#### IV. HISTORICAL DEVELOPMENT OF UNITED STATES' POLICY ON COUNTERVAILING DUTIES LAW AND NONMARKET ECONOMIES AWARDED

##### A. *Imports of Carbon Steel Wire from Poland and Czechoslovakia*

The first three petitions for application of countervailing duties against nonmarket economies were filed in 1983.<sup>18</sup> In September of that year, the American Textile Manufacturers Institute filed a petition alleging subsidization of textile and apparel imports from the People's Republic of China.<sup>19</sup> That petition was ultimately withdrawn on the day the Commerce

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14. See also U.S. COMMERCE DEP'T, UNITED STATES-CHINA LEGAL SEMINAR—UNITED STATES ANTIDUMPING AND COUNTERVAILING LAWS: IMPLICATIONS FOR THE PEOPLE'S REPUBLIC OF CHINA 23 (1994) [hereinafter SEMINAR].

15. GATT, *supra* note 7, art. 3, § 3.1(a). The United States must, however, allow a three-year grace period from the Agreement's entry into force before it may act on the latter two practices. SEMINAR, *supra* note 14, at 24.

16. GATT, *supra* note 7, art. 6; see also SEMINAR, *supra* note 14, at 24.

17. GATT, *supra* note 7, art. 6.

18. Michael G. Egge, *The Threat of United States Countervailing Duty Liability in the New Emerging Market Economies in Eastern Europe: A Snake in the Garden*, 30 VA. J. INT'L L. 941, 953 (1990).

19. *Id.*

Department was scheduled to issue its preliminary determination. Later that year in November, a group of United States' producers of carbon steel wire rod filed a petition against imports of that product from Poland, and another petition against imports from Czechoslovakia.<sup>20</sup> In March of 1984, United States' producers of potassium chloride (potash) filed petitions against imports of potash from the Soviet Union and East Germany.<sup>21</sup>

In May 1984, the Commerce Department finally declared its stance on the applicability of countervailing duties to nonmarket economy countries. In its final determination on the cases of the carbon steel wire rod imports from Czechoslovakia and Poland, Commerce decided countervailing duty law could not be applied to nonmarket economies.<sup>22</sup> The Department's rationale in each case was that it was impossible to identify a countervailing subsidy in a nonmarket economy. Under the United States' law of countervailing duties, the Department recognized a subsidy as "any action that distorts or subverts the market process and results in a misallocation of resources."<sup>23</sup> Yet, in nonmarket economies, there is no such market process to distort. Nonmarket economies rely on the central government rather than market forces to determine prices and resource allocation. As a result, anything which results in such markets is caused by the central planning, and not by subsidization.<sup>24</sup> Thus, Commerce found it lacked the grounds to find a nonmarket government action to be a countervailing subsidy.<sup>25</sup>

As a result of its conclusions, the Commerce Department denied the petitions for duties against the Polish and Czechoslovakian imports.<sup>26</sup> One month later, the Commerce Department dismissed the petitions against the Soviet Union and East German imports and rescinded the initiations of the related countervailing duty investigations.<sup>27</sup> The above determinations were appealed by the petitioners, and the Commerce Department's ruling was reversed by the United States Court of

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20. *Id.*

21. *Id.* at 954.

22. Carbon Steel Wire Rod from Czechoslovakia, Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370, 19,374 (1984).

23. *Id.* at 19,371.

24. *Id.*

25. *Id.*

26. *Id.* at 19,370.

27. Potassium Chloride From the German Democratic Republic, Recision of Initiation of Countervailing Duty Investigation and Dismissal of the Petition, 49 Fed. Reg. 23,428 (1984); Potassium Chloride from the Soviet Union, Recision of Initiation of Countervailing Duty Investigation and Dismissal of the Petition, 49 Fed. Reg. 23,428 (1984).

International Trade in *Continental Steel Corp. v. United States*.<sup>28</sup> The court held that the language of section 303 of the Tariff Act of 1930 did not make any distinctions concerning a country's economy, and that it did not matter whether a subsidy could be said to exist in a nonmarket economy under our legal definitions.<sup>29</sup> Finally, the case was brought before the Court of Appeals for the Federal Circuit in *Georgetown Steel v. United States*.<sup>30</sup> The court reversed the Court of International Trade and sustained the Commerce Department's position against the nonapplicability of countervailing duties against imports from nonmarket economies.<sup>31</sup>

### B. *Georgetown Steel*

The basis of the *Georgetown Steel* decision was the court's determination that the concepts of subsidization and its resultant misallocation of resources, indeed had no meaning outside the context of market-based economic systems since commercial activity in nonmarket economies is controlled according to central plans.<sup>32</sup> The court was convinced by the Commerce Department's argument that subsidies cannot affect the allocations of resources when the state establishes such allocations pursuant to a central economic plan.<sup>33</sup> The court found that, in such markets, government subsidies may aid producers in accomplishing their set economic goals, but the subsidies "do not create the kind of unfair competitive advantage over American firms against which the countervailing duty act was directed."<sup>34</sup> Since such nonmarket economy subsidies do not help producers make sales in the United States which they otherwise may not have made, the court held countervailing duties to be inapplicable under United States' trade law.<sup>35</sup>

It is interesting to note that in its reasoning, the *Georgetown Steel* court went back to the basic purpose of United States' countervailing duty law. The court went beyond the narrow analysis of the International Trade Court and sought out whether or not the benefit conferred by a nonmarket government actually gave its producers an unfair competitive advantage in foreign markets such as the United States. By showing that the nature of

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

29. *Id.* at 551; see also 19 U.S.C.S. May 1995 JM Supp. § 1303 repealed.

30. *Georgetown Steel Corp. v. United States*, 801 F.2d at 1308 (Fed. Cir. 1986).

31. *Id.*

32. *Id.* at 1315.

33. *Id.* at 1316.

34. *Id.* at 1315.

35. *Georgetown Steel Corp.*, 801 F.2d at 1315.

nonmarket economies precludes such an effect, the court made it clear why countervailing duty law cannot be applied to nonmarket economies to accomplish the law's purpose.<sup>36</sup>

The *Georgetown Steel* court strengthened its position by pointing out that in a nonmarket economy the government owns everything. Thus, if the government were to give a true subsidy, it would effectively be giving itself a subsidy, which is impossible.<sup>37</sup> The court also added its belief that Congress did not intend the countervailing duty laws to apply to nonmarket economies.<sup>38</sup> The court stated, if Congress had intended the countervailing duty laws to apply to nonmarket economies, it would not have remained silent with regard to countervailing duties when it amended the antidumping laws in 1974 and 1979 to cover goods from nonmarket economies.<sup>39</sup> Such silence led the court to believe Congress meant for the antidumping laws to be the sole defense for United States' manufacturers against unfairly traded goods from nonmarket economies.<sup>40</sup> Finally, the court declared that the Commerce Department was neither unreasonable nor abusive of its discretion in its determination that countervailing duty law was inapplicable to nonmarket economies.<sup>41</sup>

### C. Commerce's Current Challenge: Nonmarket Economies in Transition

In recent years, a number of the traditional nonmarket economies have undergone considerable political and economic reforms. Included in these reforms has been a shift from centrally planned to market oriented economies. During this period of transition, these countries have had neither pure centrally controlled economies, nor true market economies. As these countries continue their transitions, the Commerce Department's challenge has become the determination of whether, or to what degree, countervailing duty law should apply to them.<sup>42</sup> The Department's task is to fairly and accurately determine whether certain government-subsidized imports from these countries are produced in an industry which operates under a free market system. A positive finding, in this regard, means that

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36. David W. Richardson & Robert E. Nielsen, *Recent Developments in the Treatment of Nonmarket Economies Under the AD/CVD Laws*, in THE COMMERCE DEPARTMENT SPEAKS 1995, at 162 (PLI Corp. L. & Prac. Course Handbook Series No. B-789).

37. *Georgetown Steel Corp.*, 801 F.2d at 1316.

38. *Id.* at 1315.

39. *Id.* at 1317-18.

40. *Id.* at 1318.

41. *Id.*

42. Richardson & Nielsen, *supra* note 36, at 151.



our countervailing duty law ought to apply to these imports. While making these evaluations, the Commerce Department must also seek to balance competing United States' foreign and domestic policy goals, namely the encouragement of further transitions to market economies and the protection of United States' industries from subsidized imports.<sup>43</sup>

As already discussed, countervailing duty law has not been considered applicable to nonmarket economies since the *Georgetown Steel* court concluded subsidies have no meaning outside the context of market-based economic systems.<sup>44</sup> However, when a reforming nonmarket economy begins to exhibit elements of both market and nonmarket economies, it becomes more difficult to justify the inapplicability of this law. During this time of transition, prices and costs which were previously set by the state begin to be set by the emerging market forces of supply and demand.<sup>45</sup> Thus, it becomes inappropriate to hold countervailing duty law inapplicable under the assumption that subsidies to these transitional economy industries fail to either distort resource allocation, or to give these industries a competitive advantage in the United States' marketplace. If a manufacturer in a certain foreign industry has suddenly been freed from central planning and is now basing its production decisions on market forces, government subsidies would influence this manufacturer to produce more or less different products.<sup>46</sup> Likewise, these subsidies would help the manufacturer make sales it would otherwise not have been able to realize. This is exactly the kind of unfair competitive advantage which our countervailing duty law was meant to prevent. Therefore, the Commerce Department would need to find some way to legally apply the countervailing duty law in these circumstances.<sup>47</sup>

Perhaps due to efforts by some foreign countries to honor their international obligations to restrict subsidies, or perhaps due to the inability of some countries to afford subsidization, the Commerce Department has yet been faced with a petition for countervailing action against imports from reforming nonmarket economies.<sup>48</sup> However, if a foreign government from a transitional economy nation in question began to recover from their current economic difficulties, and can afford subsidy programs once again, it is certainly possible such petitions may eventually

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43. *Id.* at 152.

44. *Georgetown Steel Corp.*, 801 F.2d at 1308.

45. Richardson & Nielsen, *supra* note 36, at 164.

46. *Id.* at 165.

47. *Id.*

48. Telephone Interview with Paulo Mendes, Policy Analyst, United States Department of Commerce (Apr. 7, 1995) [hereinafter Interview].

be brought to the Commerce Department. The Commerce Department may have to turn to existent United States' antidumping law for help in determining how to treat such imports. Currently, there exists no legislation or case law which specifically addresses the application of countervailing duties to reforming nonmarket economies.<sup>49</sup>

Nevertheless, Congress and the courts have provided helpful direction in this area in the related realm of antidumping law. Congress' decision to amend the nonmarket economy provisions of the antidumping law would provide the legal basis for the Commerce Department to apply our countervailing duty law in the case of a reforming nonmarket economy.<sup>50</sup> Thus, it is necessary to examine relevant antidumping law which the Commerce Department would consider.

## V. ANTIDUMPING LAW AND REFORMING NONMARKET ECONOMIES

### A. *The Problem with Valuation*

Antidumping law is aimed at offsetting the margin amount in price by which an imported good is being unfairly dumped on the United States' market.<sup>51</sup> Thus, the Commerce Department obviously must determine this dumping margin as accurately as possible if it is to truly carry out the purpose of this law.<sup>52</sup> In normal antidumping investigations, the Commerce Department compares an import's foreign market value to the United States' value to determine the margin amount by which the imported good is being dumped into the United States' market.<sup>53</sup> If the import comes from a market economy country, the Commerce Department may base the foreign market value on prices in the exporting country, in another foreign country, or on a constructed value.<sup>54</sup>

Valuation is not as simple when an import arrives from a nonmarket economy nation. In these cases, the Commerce Department cannot use the nonmarket economy prices since, from a United States' perspective, the prices are distorted by central planning and have nothing to do with market forces.<sup>55</sup> Since the economic principles upon which nonmarket economy prices are based are incompatible with the supply and

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49. *Id.*

50. Richardson & Nielsen, *supra* note 36, at 165.

51. *Id.* at 155.

52. *Id.* (quoting Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190 (Fed. Cir. 1990)).

53. 19 U.S.C. § 1673(1).

54. 19 U.S.C. § 1677-b(a).

55. Richardson & Nielsen, *supra* note 36, at 155-56; see 19 U.S.C. § 1677(18)(A).

demand principles upon which United States' prices are established, use of the nonmarket economy prices in determining the dumping margin would not produce a meaningful result.<sup>56</sup>

Section 1316 of the Omnibus Trade and Competitiveness Act of 1988<sup>57</sup> provided the Commerce Department with a method for more accurately calculating the foreign market value of nonmarket economy imports.<sup>58</sup> The statute directs the Commerce Department to determine foreign market values by totaling the amounts of the input factors used in the production of goods.<sup>59</sup> The factors are computed by using their values in a "surrogate" market economy country where is economically comparable.<sup>60</sup> Thus, the distortion of nonmarket economy prices is eliminated and the Commerce Department can make a meaningful calculation of the dumping margin.

Over the next several years following the Act of 1988, a number of nonmarket economy countries continued to make transitions to market economies. Prices in some industries within these countries began to be driven by market forces rather than by central planning. In these cases, the Commerce Department would better meet its goal of accurate dumping margin measurements by foregoing its use of surrogate market economy values, and simply using the nonmarket economy countries' prices for the goods in question.<sup>61</sup> In the Omnibus Trade and Competitiveness Act of 1988, Congress made the provision for the Commerce Department to use nonmarket economy prices in those cases where the prices of the imports in question are found to be sufficiently market driven.<sup>62</sup> The Department's problem was Congress gave no statutory guidance in determining when the exporting country's prices were market oriented and sufficiently free from the value distortions caused by central planning.<sup>63</sup> Consequently, the Commerce Department had to develop an approach for determining value distortions which would be consistent with the purpose of antidumping law and its nonmarket economy provisions.<sup>64</sup>

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56. Richardson & Nielsen, *supra* note 36, at 155-56.

57. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316, 102 Stat. 1186-88 (1988) (amending 19 U.S.C. § 1677-b(c) (1988)).

58. 19 U.S.C. § 1677-b(c)(1)(A)-(B) (1995).

59. 19 U.S.C. § 1677-b(c)(1)(A)-(B) (1995).

60. 19 U.S.C. § 1677-b(c)(1)(A)-(B) (1995).

61. Richardson & Nielsen, *supra* note 36, at 157.

62. 19 U.S.C. § 1677b(c)(1)(A)-(B) (1995).

63. Richardson & Nielsen, *supra* note 36, at 154-55.

64. *Id.* at 155.

*B. The Bubbles Test: Imports of Lug Nuts and Fans From the People's Republic of China (PRC)*

The Department's first test for determining whether or not certain nonmarket economy prices were distorted was the "bubbles of capitalism" test.<sup>65</sup> This test was developed by the Commerce Department in 1991 from an investigation of certain imports of fans from the People's Republic of China (PRC).<sup>66</sup> This test was also used by the Commerce Department in another 1991 case involving lug nuts from the PRC.<sup>67</sup> The PRC remains the only country against which the bubbles test has ever been used.<sup>68</sup> Under the "bubbles test," or the "100% test," if the Commerce Department finds that 100% of the nonmarket economy prices of manufacturers' costs were "market driven," then it will consider those foreign producers as operating within a "bubble of capitalism."<sup>69</sup> In such cases, the Department uses the reported nonmarket economy input prices rather than surrogate market values in determining the foreign market values of the imports in question.<sup>70</sup>

The following case analysis is used to illustrate how and why the Commerce Department applied the "bubbles test" to imports from China. In *Oscillating Fans and Ceiling Fans from the People's Republic of China; Preliminary Determinations of Sales Less than Fair Value*, the Commerce Department first had to get information from each individual company on its sources of cost inputs, manufacturing processes, distribution channels, controls on external trade, profit retention, and the nature of its ownership.<sup>71</sup> The Commerce Department then stated that it would decide whether each company was a "bubble of capitalism" on the basis of whether a company could demonstrate, *de jure* and *de facto*, that it was free from central economic controls.<sup>72</sup> A finding for *de jure* absence of central control could be supported by, but does not require, evidence of: "(1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; and (2) any legislative enactments

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65. *Id.* at 157.

66. *Preliminary Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 25,664 (1991).

67. *Final Determination of Sales at Less than Fair Value: Chrome-Plated Lug Nuts From the People's Republic of China*, 56 Fed. Reg. 46,153 (1991).

68. Interview, *supra* note 48.

69. Richardson & Nielsen, *supra* note 36, at 158.

70. *Id.*

71. 56 Fed. Reg. 25,664.

72. 56 Fed. Reg. 25,664.

[sic] devolving central control of export trading companies.”<sup>73</sup> De facto absence of central control could be supported by evidence that: “(1) each exporter sets its own export prices independently of the government and other exporters; and (2) . . . each exporter can keep the proceeds from its sales.”<sup>74</sup>

The PRC manufacturers submitted evidence in order to support their market oriented status so their own prices or costs could be used in the Commerce Department’s dumping calculations. First, PRC industries involved in the case were privately owned and operated on market principles.<sup>75</sup> Second, the overwhelming majority of their input materials were purchased from outside the PRC, or from other foreign investment projects in the southern part of China.<sup>76</sup> Third, all of their output was sold outside the PRC. Finally, evidence was submitted to prove that the labor market in the southern part of the PRCs was subject to competitive forces.<sup>77</sup>

The PRC manufacturers then attempted to convince the Commerce Department that their industry was market oriented as a whole by arguing that: their producers are generally foreign-owned; their government does not control prices, production, profits distribution, or the use of capital; materials used by their manufacturers generally come from outside the PRC; those materials which are purchased from within the PRC are generally done so at arm’s length; the government does not control prices for materials or involve itself with labor; companies in the industry deal freely with their employees; PRC companies pay a higher rate for electricity than those in Hong Kong; and the government does not impose foreign exchange controls on the companies.<sup>78</sup> Therefore, the PRC manufacturers argued their own prices could be used because their industry was sufficiently free of state control under section 771(18) of the amended United States Tariff Act of 1930.<sup>79</sup>

The Commerce Department’s written reaction to the above evidence seems to convey the frustration which must have influenced

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73. 56 Fed. Reg. 25,664.

74. 56 Fed. Reg. 25,664.

75. 56 Fed. Reg. 25,664.

76. 56 Fed. Reg. at 25,666.

77. 56 Fed. Reg. at 25,666.

78. 56 Fed. Reg. at 25,666-67.

79. 56 Fed. Reg. at 25,667. That section lists the factors Commerce must take into account in evaluating whether an economy is a nonmarket one: currency convertibility, freely bargained wage rates, government ownership or control over production factors.

Commerce to decide on such a stringent, "all-or-nothing," rule such as the "bubbles test." Commerce stated

These assertions, and our understanding of the circumstances under which these respondents produce and sell the subject merchandise, require us to consider how any industrial sector or any commercial entity in an NME can be said to be operating on market principles such that costs and prices are acceptable, reliable measures of fair market value.<sup>80</sup>

Commerce then indicated, since the legislative history of the Tariff Act provided no helpful guidance in determining the fair market value for producers from nonmarket economies in transition, Commerce would require a showing by the manufacturers that all of their costs and prices are market oriented.<sup>81</sup> Absent such a showing, the manufacturers could not use their own prices in the dumping calculations of fair market value, and instead factors of production methodology would be used.<sup>82</sup> In the case of the fan manufacturers, the Commerce Department's preliminary determination was not all of their manufacturing costs were market based, therefore, they could not be used in the calculations.<sup>83</sup>

### *C. The Mini-Bubbles Test: Initiation of Countervailing Duties Investigation of the Lug Nut Imports*

Eventually, the Department must have realized an "all-or-nothing" test was not appropriate for evaluating the market orientations of reforming nonmarket economy producers. The reality is manufacturers in reforming nonmarket economies use some production materials which have market driven prices, and other materials which have centrally controlled prices. To allow the "100% test" to accommodate for this fact, the Department added a second "mini-bubbles" test.<sup>84</sup> Under this test, it is not necessary for 100% of the manufacturer's costs to be market driven. If the manufacturers can demonstrate that at least some of their costs are market driven, then those nonmarket economy values will be used in the Department calculations; the surrogate market values are then used only for the remaining distorted prices.<sup>85</sup> Under the "mini-bubbles test," a

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80. 56 Fed. Reg. at 25,667.

81. 56 Fed. Reg. at 25,667.

82. 56 Fed. Reg. at 25,667.

83. 56 Fed. Reg. at 25,667.

84. Richardson & Nielsen, *supra* note 36, at 158.

85. *Id.* at 159.

nonmarket economy value was considered market driven if it were shown to be free of direct or overt central government influence.<sup>86</sup>

The “mini-bubbles test” was applied by Commerce in the PRC lug nuts case, which concerned manufacturing costs. To determine whether the manufacturing costs paid by the lug nut manufacturer were free of distortion, Commerce examined the nature of the individual transactions which took place between the manufacturer and its suppliers.<sup>87</sup> The shortcoming of this test was Commerce failed to take into account any price distortion which resulted indirectly from the manufacturing of a product within a nonmarket economy.

The Commerce Department’s published investigation of the PRC lug nut producers is used below in order to analyze the nature of an indirect distortion.<sup>88</sup> A study of this report helps explain why the “mini-bubbles test” was inadequate for properly determining whether a manufacturer’s operations are truly market oriented. The petitioners in the report pointed out to the Commerce Department that manufacturers in the PRC lug nut industry were benefiting from upstream subsidies<sup>89</sup> which were being bestowed upon their steel and chemical suppliers.<sup>90</sup> In other words, subsidies being conferred by the PRC, upon steel and chemical producers, were significantly affecting the lug nut manufacturers’ production costs. Lower costs for suppliers indirectly resulted in lower costs for the lug nut manufacturers, thus the latter were enjoying a competitive benefit from the upstream subsidies. Under section 701(e) of the Tariff Act,<sup>91</sup> the Commerce Department has the power to investigate such upstream subsidies if it has reasonable grounds for doing so.<sup>92</sup>

The Department indicated the petitioners had demonstrated ample evidence of the existence of upstream subsidies.<sup>93</sup> However, it seemed the problem for the Commerce Department was the same one which was at the heart of the *Georgetown Steel* decision; the Department was simply incapable of identifying or quantifying those subsidies because they were

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86. *Id.*

87. *Id.*

88. Chrome-Plated Lug Nuts and Wheel Locks from the People’s Republic of China; Initiation of Countervailing Duty Investigation, 57 Fed. Reg. 877 (1992) [hereinafter Countervailing Duty Investigation].

89. Tariff Act, 19 U.S.C. § 771A(a)(1) (1995).

90. Countervailing Duty Investigation, 57 Fed. Reg. 878 (1991).

91. Tariff Act, 19 U.S.C. § 1671.

92. Tariff Act, 19 U.S.C. § 1671.

93. 57 Fed Reg. 878.

granted in the context of a nonmarket economy.<sup>94</sup> As the court in *Georgetown Steel* held, subsidies in nonmarket economies simply have no meaning within our sense of the concept. As a result, the Department declined, in the lug nut case, to initiate a separate investigation of the upstream subsidies.<sup>95</sup> This is why the Commerce Department failed to take into account the indirect price distortions surrounding the lug nut manufacturers' operations.

The Commerce Department realized this shortcoming and asked the Court of International Trade for a remand so it could reconsider the use of this test. During the remand, the Commerce Department developed another test which would take into account both the direct and indirect effects of central planning in the determination of whether a particular nonmarket economy industry is market oriented.<sup>96</sup>

#### *D. The Market Oriented Industry Test: Redetermining the Dumping Investigations of the Lug Nut and Fan Imports*

The Commerce Department's new test was called the market oriented industry test.<sup>97</sup> This test has three parts. To be considered market oriented, the foreign industry under investigation must: (1) have no government involvement in the setting of its prices or scheduled output; (2) "be characterized by private or collective ownership;"<sup>98</sup> and (3) pay market driven prices for all its significant inputs and government determined prices for only an insignificant proportion of the total value of production.<sup>99</sup> To determine if prices are market driven, the Commerce Department looks at the circumstances under which the inputs were purchased from the supplier and also looks at the supplier itself.<sup>100</sup> If the supplier also provides input materials for centrally planned production, it is unlikely the Commerce Department will find that the suppliers prices are entirely market driven.<sup>101</sup> Through this three part test, the Commerce

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94. 57 Fed. Reg. 878.

95. 57 Fed. Reg. 878.

96. 57 Fed. Reg. 878.

97. 57 Fed. Reg. 15,052, 15,054.

98. Amendment to Final Determination of Sales at Less than Fair Value and Amendment to Antidumping Duty Order: Chrome-Plated Lug Nuts From the People's Republic of China, 57 Fed. Reg. 15,052 (1992).

99. 57 Fed. Reg. 15,052.

100. 57 Fed. Reg. 15,052.

101. Richardson & Nielsen, *supra* note 36, at 161.



Department seeks to ensure the foreign market value of the final goods be determined by market forces, and not by government influence.<sup>102</sup>

While the lug nut and fan cases were on remand, the Commerce Department applied the market oriented test for the first time on the imports of Sulfanilic Acid from the People's Republic of China.<sup>103</sup> There the Commerce Department concluded that the Chinese producers did not produce enough documentary evidence to overcome the presumption that their input prices were not market driven.<sup>104</sup> Consequently, the Commerce Department used surrogate country values to determine the foreign market value of the Chinese imports.<sup>105</sup>

Shortly following the Sulfanilic Acid case, the Commerce Department applied the market oriented test to the remanded PRC lug nut and fan cases.<sup>106</sup> Thus, in the lug nut case, the Commerce Department looked beyond the manufacturer's individual transactions for its inputs.<sup>107</sup> The Commerce Department found the Chinese government played a significant role in setting suppliers' prices and outputs of steel, a major input for the lug-nut manufacturers.<sup>108</sup> As a result, the Commerce Department concluded the prices the lug nut manufacturers paid for their steel inputs could not really be considered market driven.<sup>109</sup> Thus, surrogate input prices would have to be used to determine the foreign market value of the lug nuts. The Commerce Department permitted the fan manufacturers in the other case, however, to use their own prices of significant inputs since those inputs came from outside the Chinese market.<sup>110</sup>

### *E. The Challenges of Foreign Production Investigations*

The above decisions on the proper classification of particular Chinese industries are obviously much easier to discuss in retrospect than they were for the Commerce Department to make. This writer gained an appreciation for the type of nuances with which the Commerce Department

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102. *Id.* at 141.

103. Preliminary Determination of Sales at Less Than Fair Value: Sulfanilic Acid From the People's Republic of China, 57 Fed. Reg. 9409 (1992).

104. 57 Fed. Reg. 9409.

105. 57 Fed. Reg. 9409.

106. Judith H. Bello et al., *Searching for Bubbles of Capitalism*, 25 GEO. WASH. J. INT'L L. & ECON. 665, 715 (1992).

107. *Id.* at 716.

108. *Id.*

109. *Id.*

110. *Id.* at 716-17.

had to deal with by studying a particular public document memorandum which was sent by an import compliance specialist in the Commerce Department to his division director of antidumping investigations in January of 1994.<sup>111</sup> The compliance specialist, Andrew McGilvray, had just participated in a meeting at the Beijing offices of the PRC's Ministry of Foreign Trade and Economic Cooperation on matters regarding an antidumping duty investigation of silicon imports from the PRC.<sup>112</sup> At the meeting, the Ministry's Treaty and Law Department Division Chief, Zhang Yuging, had to explain what he had meant when he informed the Commerce Department earlier that the Chinese government does not own or control producers of silicon because they were owned "by all the people."<sup>113</sup>

Zhang explained China has a different ownership concept than other countries, and when companies in China are said to be owned by all the people, it does not mean the PRC's central government owns or controls the companies.<sup>114</sup> What this really means, said Zhang, is that the company "belongs to the community," and cannot be taken over by any individual. Under this setup, the company's employees are responsible for the company's management. Zhang told the Commerce Department when a company is owned by all the people, the government cannot interfere in decision making, nor can it involve itself in the handling of profits, aside from assessing taxes.<sup>115</sup> Likewise, such a company is responsible for financing its own losses or selling off its assets.

The memorandum also includes Zhang's explanation of a provincial government's role in the ownership and control of such community owned companies. Zhang explained provincial governments were authorized by the central government to license businesses, but that did not mean that these second level governments could legally dictate the decision making processes of the companies.<sup>116</sup> When asked by the Commerce Department compliance specialist if the provincial governments were still permitted to influence companies to comply with any of the Commerce Department's import regulations, Zhang explained the

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111. Memorandum to Gary Taverman, Director, Division I, Office of Antidumping Investigations, Investigation Public Document A-570-824 (Feb. 15, 1994) [hereinafter Memorandum to Taverman].

112. *Id.* at 3.

113. *Id.* Commerce was concerned that this meant that the state still had ownership control.

114. *Id.*

115. *Id.*

116. Memorandum to Taverman, *supra* note 11.

governments could not force compliance but could give incentives for it. In sum, the memorandum is valuable as an example of the attention the Commerce Department must give to the meanings which different countries attach to their economic terminology. Such attention is necessary if the Commerce Department is to properly evaluate the economic information it has on a country in order to make an accurate market oriented industry analysis. If the Commerce Department is to correctly apply or not apply countervailing duty law to countries in transition, it has to know which industries are in fact state controlled and which industries only sound as if they are because of the foreign terminology used to describe them.

*F. A Market Oriented Manufacturer: Imports of Magnesium from the Russian Federation*

While the Chinese cases involved market orientation analyses of whole industries, a recent final determination was issued by the Commerce Department in the spring of 1995 which involved a decision on whether a single manufacturer within a reforming nonmarket economy was sufficiently market oriented in its operations for antidumping pricing purposes. The purpose of the investigation was to decide whether the Russian magnesium sector from the Russian Federation was sufficiently market oriented to permit use of Russian producers' own prices in the dumping determination.<sup>117</sup> One of the two Russian manufacturers involved, SMW, requested the Department to conduct an individual market orientation examination of the company, rather than the usual examination of the entire industry within which the company operates.<sup>118</sup> SMW wanted to demonstrate that government ownership and control were absent from its own individual operations.<sup>119</sup> SMW was ultimately seeking to have the Commerce Department make an individualized dumping calculation for its own exports of alloy and pure magnesium, which was separate from other potential Russian exporters of magnesium.<sup>120</sup>

The Commerce Department granted SMW's request for the opportunity to demonstrate its own market independence, but asserted that to make such a positive showing, SMW would have to demonstrate the absence of both de jure and de facto governmental control over its export

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117. Notice Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation, 60 Fed. Reg. 16,440 (1995).

118. 60 Fed. Reg. 16,443.

119. 60 Fed. Reg. 16,443.

120. 60 Fed. Reg. 16,443.

operations.<sup>121</sup> Evidence which the Commerce Department indicated SMW could use, but did not require in order to support a finding of de jure absence of central controls included: "(1) an absence of restrictive stipulations associated with [its] business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measures by the government decentralizing control of companies."<sup>122</sup> To determine whether governmental control over SMW was absent de facto, the Commerce Department stated it would weigh the following factors:

(1) whether [SMW's] export prices are set by or subject to the approval of [governmental] authority; (2) whether [SMW] has authority to negotiate and sign contracts and other agreements; (3) whether [SMW] has autonomy from the government in making decisions regarding the selection of management; and (4) whether [SMW] retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.<sup>123</sup>

Pursuant to its stated guidelines, the Commerce Department decided that central control of SMW was absent de jure on the basis of the following findings.<sup>124</sup> First, the President of the Russian Federation had issued a decree in July of 1992 that joint stock companies, such as SMW, were out of the control of state authority.<sup>125</sup> Second, a law had been passed in July of 1991 which mandated the privatization of former state held enterprises, such as SMW.<sup>126</sup>

The Department was also satisfied with findings on SMW's de facto independence. The Commerce Department found that SMW set its own prices, had free access to its own export profits, could finance its own losses, and could purchase foreign currency or dispose of assets.<sup>127</sup> In addition, the Commerce Department found that the Russian government did not interfere with SMW's disposition of its sales proceeds, and that the board of SMW was responsible for the appointment of its management.<sup>128</sup>

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121. 60 Fed. Reg. 16,444.

122. 60 Fed. Reg. 16,444.

123. 60 Fed. Reg. 16,444.

124. 60 Fed. Reg. 16,444.

125. 60 Fed. Reg. 16,444.

126. 60 Fed. Reg. 16,444.

127. 60 Fed. Reg. 16,444.

128. 60 Fed. Reg. 16,444.

This writer believes that the Russian magnesium case is significant in that it demonstrates the level of sensitivity with which the Commerce Department now deals in matters of market orientation determinations. "Sensitivity" refers to the degree to which the Department is willing to go beneath the nonmarket surface of an economy to find individual entities of capitalism. With final determinations on the Chinese fan and lug nut cases, we saw the Commerce Department go beyond the nonmarket exterior of the PRC's economy in order to investigate the possible market oriented nature of a particular industry. With the Russian magnesium case, the Department went further by looking beyond the nature of a certain industry within the reforming Russian economy to examine the status of a particular company in that industry. Thus, to this writer, this methodology in "Magnesium from the Russian Federation" seemed as if it were a return to the type of analysis once used by the Commerce Department in the mini-bubbles test, as discussed previously. Recall that this test, used only in the preliminary determinations of the Chinese fan and lug-nut cases, involved a thorough investigation of certain individual manufacturers within a particular industry, for purposes of determining whether their own prices were market driven. In the Russian magnesium case, the Department was doing essentially the same thing. It is worth noting that the above *de jure* and *de facto* tests used in the Russian case for determining the absence of government control are substantially similar to the corresponding tests used in the preliminary determinations of the Chinese fan case, as discussed previously.

The Commerce Department's willingness to look beyond whole industries and to focus instead on individual companies indicates that, as reforming nonmarkets move closer to capitalism, an industry wide investigation will not always yield a proper finding for whether countervailing duty law ought to apply to certain imports. Perhaps one of the marks of an economy in transition is that some companies within a particular industry move more quickly toward market orientation, while others take more time to free themselves from state control. By confining an investigation to a single producer, rather than the producer's whole industry, the Department seems to be sensitive to the microcosmic levels on which capitalism sometimes apparently exists in transitional markets. This has particular import to this study on countervailing duties: The greater willingness the Department has to find capitalistic entities within reforming markets, and the more likely such markets are to find countervailing duty law applied to their imports.

## VI. APPLICATION OF COUNTERVAILING DUTY LAW TO REFORMING NONMARKET ECONOMIES

### *A. Market Oriented Industry Analysis: Countervailing Duty Investigations of the Lug Nut and Fan Import Cases*

The above developments in antidumping law are important to our discussion of countervailing duty law and reforming nonmarket economies. As previously noted, the Commerce Department faces the near future possibility of having to decide whether to apply countervailing duties to imports from nonmarket economy countries in transition. The current Commerce Department policy is that such duties are inapplicable to nonmarket economies. However, the Commerce Department might find that a foreign industry in question is a market oriented part of an otherwise nonmarket economy. In that case, the Department may be forced into making a determination as to whether countervailing duty law is inapplicable. The Department would not have any countervailing duty law to aid it in a decision such as this. It would, however, have the above antidumping laws and policies to turn to. Using the market oriented industry analysis, the Commerce Department may one day come to the conclusion that countervailing duty law is applicable to a particular industry within a nonmarket economy.

The Commerce Department has already used the market oriented test in two countervailing duty investigations which it recently conducted. In the cases involving the importation of fans and lug nuts from the People's Republic of China, the Commerce Department used this test to determine if countervailing duties were applicable on the basis that the industries in question were actually market oriented.<sup>129</sup> In neither case did the Department find that the industry in question was really market oriented, so countervailing duty orders were not issued.<sup>130</sup>

In these countervailing duty cases, the Commerce Department applied a system of evaluation which it had developed for the purposes of antidumping law. For example, in its preliminary determinations in the *Ceiling Fans* countervailing duty case, the Commerce Department first sought to determine whether the Chinese government was involved in

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129. See *Initiation of Countervailing Duty Investigations: Oscillating and Ceiling Fans From the People's Republic of China (PRC)*, 56 Fed. Reg. 57,616 (1991); *Initiation of Countervailing Duty Investigation: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China*, 57 Fed. Reg. 877 (1992).

130. See *Final Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China*, 57 Fed. Reg. 24,018 (1992); *Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China (PRC)*, 57 Fed. Reg. 10,459 (1992).

setting prices and production amounts in the fan industry.<sup>131</sup> Then the Commerce Department tried to determine whether or not the industry was generally characterized by private and collective ownership by fan producers.<sup>132</sup> Finally, the Commerce Department sought out whether the fan producers under investigation paid state set or market driven prices for their major inputs purchased within China.<sup>133</sup> Here, as in the lug nuts antidumping case, the Department found that the government played a significant role in setting prices and outputs of suppliers of steel. Since steel represents a major portion of the fan manufacturers' input purchases, the Department decided that the fan industry cannot be considered a capitalistic industry within an otherwise nonmarket economy.<sup>134</sup> Thus, countervailing duties could not be applied to the fan imports.

The Commerce Department decided that countervailing duties were inapplicable to the lug nut imports as well.<sup>135</sup> Again, the final determination was based on finding the steel industry in China was heavily controlled by central planning. Thus, the industry could not be considered to be market oriented either.

### *B. Reforming Nonmarket Economy Manufacturers Absorbed by Capitalism: Imports of Steel from Germany*

The previous cases involving Chinese imports demonstrated the Commerce Department would be making more decisions on the applicability of countervailing duty law to reforming nonmarket economy imports in the near future. As previously noted, such cases have yet to be brought before the Department. As a result, the Commerce Department has not taken an official stance on when countervailing duties could be applied to imports from reforming countries, such as those in Eastern Europe. One countervailing duty case, which did come before the Department and which is of interest to this study, involved subsidies to certain German manufacturers of carbon steel products.<sup>136</sup> In this case, subsidies to the manufacturers were found to clearly exist, and the International Trade Code found a reasonable indication of material injury or threat of material injury to United States' manufacturers of like

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131. Preliminary Negative Countervailing Duty Determinations: Oscillating and Ceiling Fans From the People's Republic of China, 57 Fed. Reg. 10,011-12 (1992).

132. 57 Fed. Reg. 10,012.

133. 57 Fed. Reg. 10,012.

134. 57 Fed. Reg. 10,013.

135. 57 Fed. Reg. 10,459.

136. Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Germany, 58 Fed. Reg. 37,315 (1993).

products.<sup>137</sup> Since Germany is a market oriented country, it would have seemed that the determination to apply countervailing duties would be routine.

The final determination in this case was not so routine, and this is interesting because of the German manufacturers' defense. The manufacturers argued that the United States' countervailing duty law was inapplicable to them because they were located in the former East Germany.<sup>138</sup> The manufacturers asserted the Commerce Department exempts countervailing duty law companies located in countries still considered to have nonmarket economies. Under this policy, the manufacturers proceeded to argue countervailing duty law should likewise be inapplicable to producers located in a former nonmarket economy which is adapting to a market economy.<sup>139</sup>

This was an unusual case because subsidized manufacturers in a market country were asking for an exemption from United States' countervailing duty law. The manufacturers were recently operating within a nonmarket economy. The manufacturers felt that the application of countervailing duty rules to their case would result in an unequal treatment of producers in the former East Germany and those in other former East Bloc countries.<sup>140</sup> The manufacturers argued they should be treated equally with producers in reforming countries such as Poland and Romania where antidumping proceedings had initiated, but where no countervailing duty action has been taken. According to the German manufacturers, countervailing duty law was inapplicable in those countries because of their status as former nonmarket economies in transition.<sup>141</sup>

A further argument for exemption from the United States' countervailing duty law by the German producers is the United States' obligation to MFN treatment under GATT.<sup>142</sup> The producers pointed to the Department's recent decision not to apply countervailing duties to the oscillating and ceiling fan imports from China. They felt that, under the MFN status, Chinese imports were going to be exempted from countervailing duty law, then there ought to be an exemption as well for imports from the former East Germany, which was a former nonmarket economy in transition.<sup>143</sup>

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137. 58 Fed. Reg. 37,315.

138. 58 Fed. Reg. 37,324.

139. 58 Fed. Reg. 37,324.

140. 58 Fed. Reg. 37,315, 37,324.

141. 58 Fed. Reg. 37,315-24.

142. 58 Fed. Reg. 37,315-24.

143. 58 Fed. Reg. 37,315-24.



With respect to this last argument, the German producers perhaps misunderstood the reasoning upon which the Commerce Department based its decision in oscillating and ceiling fans from the PRC. The Department did not decide to exempt the Chinese imports because they were from a nonmarket economy which was undergoing some reform. As demonstrated previously, The Commerce Department was more than willing to apply countervailing duties to the imports, regardless of the PRC's political-economic status. What the Commerce Department was concerned with was the status of the individual Chinese industry in question. The Commerce Department ultimately decided against countervailing duties because it could not find sufficient evidence that the fan industry was really market oriented. Thus, the German producers could not claim the same exemption under the most favored nation principle because they were indeed operating in a recognized market economy.

With respect to the rest of the German producers' argument, the Department sided with the claims of the petitioning American producers. The Commerce Department agreed with the Americans the imports under investigation ought to be looked at as imports from the Federal Republic of Germany (FRG), not from the former German Democratic Republic.<sup>144</sup> Furthermore, the subsidy programs being examined were funded by the FRG.<sup>145</sup> These simple facts appeared to have made the difference in this case. Because the FRG is a market economy, government subsidies have real economic meaning. Additionally, they can certainly be identified and quantified. Contrast this with subsidies given to producers in nonmarket economy countries. Nonmarket economy subsidies have no meaning in our capitalistic sense because they cause market distortions and result in sales which would not have otherwise been achieved. They cannot be identified anyway since prices are controlled by the state. This is the fundamental reason why the Commerce Department generally exempts nonmarket economy imports from countervailing duties. Thus, it is futile for producers such as the German manufacturers in this case, or their counsel, to attempt to introduce issues of political economic status, or MFN status, as grounds for exemption from countervailing duty law. In short, the Commerce Department will apply this law as long as it finds the subsidies in question have real economic meaning and can be identified, regardless of whether the foreign industry in question operates within a nonmarket economy or one in transition.

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144. 58 Fed. Reg. 37,324.

145. 58 Fed. Reg. 37,324.

The petitioners were correct to assert the subsidies in question were exactly those which United States' countervailing duty law was designed to counteract.<sup>146</sup> Thus, the petitioners were also correct in pointing out the Commerce Department would be violating the United States' obligations to GATT if it did not apply countervailing duties to these imports because the United States would be extending preferential treatment to Germany against the interests of other producers in market oriented economies.<sup>147</sup>

In its final determination to impose countervailing duties on the carbon steel imports from Germany, the Department emphasized that United States' countervailing duty law does not prohibit a domestic industry from a countervailing duty petition against a reforming nonmarket industry, whether it has been absorbed into a market oriented economy, as with the GDR, or whether it is still in a transitional process.<sup>148</sup> In each case, the basic test will be whether the industry under investigation is sufficiently market oriented for the law to apply. In addition, the Department noted that application of our countervailing duty law is consistent with our GATT obligations under Article 15 of the subsidies code allows a country to apply either a countervailing duty law or an antidumping law to imports from a country with a state controlled economy.<sup>149</sup>

The final determination on the German carbon steel case is an important statement by the Commerce Department, if for no other reason than reasserting the major factors upon which it makes its countervailing duty decisions. The determinations on the Chinese imports were grounded on the market oriented industry test discussed earlier, and not on the fact that China was a nonmarket economy undergoing reform. Had prices within the Chinese fan industry been found to be sufficiently market driven, the result would have been different.

## VII. TREATING REFORMING NONMARKET ECONOMIES AS MARKET ECONOMIES

### *A. Analyzing an Economy for Market Orientation: the Russian Magnesium Imports*

The Commerce Department need not look at a country's whole economy in order to make a market orientation determination for purposes

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146. 58 Fed. Reg. 37,324.

147. 58 Fed. Reg. 37,324.

148. 58 Fed. Reg. 37,324.

149. 58 Fed. Reg. 37,324.

of antidumping or countervailing duty law cases. As demonstrated in the cases concerning Chinese and Russian imports, the Department can restrict its investigations to a particular industry, or even a single producer. However, the very recent Russian magnesium case also demonstrated, as numerous reforming nonmarket economies move closer to market orientation, the Commerce Department may soon be using individual antidumping or countervailing duty cases to decide whether particular nonmarket economies ought to be reclassified. Though not mentioned in the earlier discussion of the Russian case, the two Russian producers involved actually first asked the Department to use their own prices on the basis that the Russian economy as a whole ought to be reclassified by the Commerce Department from its previous nonmarket status.<sup>150</sup>

In *Magnesium from the Russian Federation*, the Russian manufacturers claimed that the current economic conditions, which were prevalent throughout Russia, warranted revocation of the country's nonmarket economy status for purposes of antidumping law price determinations.<sup>151</sup> The Commerce Department asserted that such a finding would center on an analysis of the Russian government's role in the country's general economic activity.<sup>152</sup>

In determining whether to revoke the Russian Federation's status as a nonmarket economy, the Commerce Department turned to the factors listed under section 771(18) of the amended Tariff Act of 1930.<sup>153</sup> In particular, these criteria are: (1) the extent to which the currency of the foreign country is convertible into the currencies of other countries; (2) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management; (3) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country; (4) the extent of government ownership or control of the means of production; (5) the extent of government control over the allocation of resources and over the price

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150. 60 Fed. Reg. 16,443.

151. 60 Fed. Reg. 16,443. Recall from the earlier discussion that nonmarket producers' costs are presumed to be distorted unless the producers demonstrate otherwise under the market oriented industry test.

152. 60 Fed. Reg. 16,443.

153. 60 Fed. Reg. 16,443.

and output decisions of enterprises; and (6) other factors the Commerce Department considers appropriate."<sup>154</sup>

Pursuant to the above guidelines, the Department concluded that the Russian Federation still merited a nonmarket economy treatment for purposes of antidumping law.<sup>155</sup> Though it was evident to the Commerce Department that Russia had made significant steps toward a market economy by freeing most prices, and privatizing most state held enterprises, the Commerce Department was not convinced that functioning markets had replaced state controls. Nor was the Commerce Department satisfied that prices and costs in Russia adequately reflected market considerations.<sup>156</sup>

### *B. Foreign Policy Concerns for the Commerce Department to Consider*

The Russian magnesium case demonstrates the significant authority vested in the Commerce Department for classifying individual foreign markets for purposes of applying countervailing duty law or making antidumping calculations. Under the trade statutes, the Commerce Department may at any time make a determination that a foreign country is or is not a nonmarket economy.<sup>157</sup> As of the end of 1994, Poland is the only country which the Commerce Department has reclassified from a nonmarket to a market nation.<sup>158</sup> As illustrated above, the Commerce Department's decision to treat a nation as a market or nonmarket economy revolves around the application of a thorough statutory test. However, the decision to begin treating a nonmarket nation as a market country means the Commerce Department can begin applying countervailing duties to exports in appropriate situations. Thus, the making of this decision ought to perhaps also include a careful consideration of certain important foreign policy issues.

Chief among the policy issues to consider is the fact that the application of countervailing duties to the imports of reforming markets can substantially slow their transitions. Countervailing duties obviously impose a cost on a foreign producer sales within the United States. The lost sales have a heightened significance when the foreign producer is new

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154. 19 U.S.C. § 771(18); 19 U.S.C. § 1671.

155. 60 Fed. Reg. 16,440, 16,443.

156. 60 Fed. Reg. 16,440, 16,443.

157. SEMINAR, *supra* note 14, at 10.

158. Stanislaw J. Stoltynski, *The U.S. Import Relief Laws and Trade with Centrally Planned Economies*, 3 FLA. J. INT'L L. 59 80-81 (1987).

to the competition of the free market because it becomes more difficult for the producer to establish products in the United States. If the producer cannot successfully break into an important market such as the United States, its market share might never grow. It follows such producers might begin believing the move to a free market was not as good a change as it might have originally promised.

Countervailing duties are also viewed by many in Eastern Europe as an unfair United States' practice which threatens to undermine much of the political and economic reform going on in the area. Some are concerned that the negative feeling which it stirs among producers might only serve to strengthen the arguments of those who would prefer to see a return to full central planning.<sup>159</sup> Others are convinced such duties are just another example of the "capricious and discriminatory policies of the West."<sup>160</sup>

The United States has certainly demonstrated that it wants to develop trade with Eastern Europe, as evidenced in large part by our substantial funding of economic development in that region, as well as by numerous political announcements and promises. For instance, the United States clearly would like to see a continued development in the former East Germany in order to expand our trade interests in Germany. The more rapidly that area can develop, the more quickly United States' exporters can benefit from the large potential market there. However, the United States retards that expansion when it applies countervailing duties to those imports being purchased from manufacturers operating in the reforming region of Germany.<sup>161</sup> Countervailing duties hurt exporters' profits, which hurts industry in general and slows development.

Does the Commerce Department really even have a choice in these matters? On the one hand, the Department probably joins United States' exporters in its desire for continued development in reforming areas. On the other hand, the Commerce Department has its duty to United States' manufacturers to apply the law of countervailing duties wherever it is applicable, regardless of policy concerns. United States' producers obviously view an unfairly subsidized import as an unfairly subsidized import, regardless of the import's country of origin. To United States' manufacturers, countervailing duty law exists to protect them from just such imports, from where ever those imports may arrive. Moreover, the Commerce Department must consider United States' MFN status

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159. Egge, *supra* note 18, at 959.

160. *Id.* (quoting Stoltysinski, *The United States Import Relief Laws and Trade with Centrally Planned Economies*, 3 FLA. J. INT'L L. 59, 80-81 (1987)).

161. 58 Fed. Reg. 37,315.

obligations under GATT. Exemption of countervailing duties for a certain country might be supported by foreign policy, but it is certainly not supported by the GATT.