RECENT DEVELOPMENTS

COUNTERVAILING DUTIES AND NON-MARKET ECONOMIES: THE CASE OF THE PEOPLES REPUBLIC OF CHINA

I. INTRODUCTION

The issue of whether U.S. countervailing duty (CVD) laws[1] are to be applied in investigations of imports from non-market economy (NME) countries[2] was the subject of a November 6, 1983 hearing before the U.S. Department of Commerce (DOC).[3] Prompted by the filing of a countervailing duty petition[4] against the Peoples Republic of China (PRC), these "novel issue" hearings represented the first time that the DOC has been called upon to evaluate the countervailability of alleged producer subsides in an NME country.[5] The subsidy alleged in the petition was the PRC's dual exchange rate system[6] whereby one particular yen conversion rate is offered to

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1. U.S. countervailing duty laws are those which levy an import duty on goods from countries where producer costs are subsidized by the government. The purpose is to restore free comparative advantage by offsetting the amount of the foreign producer subsidy. U.S. countervailing duty laws are found at 19 U.S.C. §§ 1303, 1671 (1980 & Supp. VI 1983).

2. Non-market economy countries are those where the resources for and the means of production are allocated and put to use through central government planning. Usually the government claims ownership of most or all such means of production and bases decisions as to what will be produced on pre-determined goals. There is no price mechanism where supply and demand interact to allocate resources or incentive or disincentive various production decisions. Typically, non-market economy countries are those in the communist or eastern block.

3. The hearings were held in Washington, D.C. over the period November 3-4, 1983. Department of Commerce Docket No. C570-005.

4. The countervailing duty petition against the PRC was filed with the Department of Commerce pursuant to 19 U.S.C. § 1303 (1980) on behalf of the American Textile Manufacturers Institute (ATMI), the Amalgamated Clothing and Textile Workers Union (ACTWU), and the International Ladies' Garment Workers Union (ILGWU). The imported merchandise in question were textiles, apparel and related products from the PRC. *See* Countervailing Duty Petition of the ATMI, the ACTWU and the ILGWU, Sept. 12, 1983, Department of Commerce Docket No. C570-005 [hereinafter Countervailing Duty Petition].

5. Prior to the institution of this petition, all countervailing duty investigations had been related to imports from market economy countries, such as Western European nations.

6. The significance of this practice as a means of subsidizing producer behavior, while admittedly ambiguous in centrally planned economies, is not totally without merit. While it is arguable that without a market mechanism which determines a norm against which subsidies can be granted, there is no subsidy; the dual rate serves as a means of redistributing profits on import transactions to offset the losses on export transactions. Whether or not

producers of certain non-export goods[7] and another more generous rate is offered to producers of goods keyed for export.[8] The keyed goods in this case were textiles, apparel and related products.[9]

The issues presented at the hearing, which was also a part of the DOC's preliminary finding investigation,[10] were framed to reflect both the novelty of a non-market application of U.S. CVD law, and the specifics of the PRC case giving rise to that novelty. The first was whether under U.S. CVD law,[11] bounties or grants may be found in NME countries, and second, whether dual exchange rates can confer a subsidy where the entire trade sector is subject to a single rate and the currency is not convertible.[12]

This article offers a summary of the arguments that were presented to the DOC on the issues recited above. Arguing for the petitioners were the American Textile Manufacturers Institute, the

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this is the type of transaction that Congress intended to be countervailable under § 1303, is the subject of the rest of this discussion.

7. This rate is called the "official rate" and applies to certain limited non-trade transactions, such as tourism, remittances, certain invisibles unrelated to trade and transactions with such organizations as the IMF. The official rate, pegged to a basket of other foreign currencies stood at 1.9939 yen to the dollar on May 31, 1983. *See* Preconference brief of Walter S. Surrey, Counsel for the National Council for U.S.-China Trade at 15. DOC DKT No. C570-005.

8. This rate is called the "internal settlement rate" and applies to all foreign trade transactions, including invisibles related to trade. This higher rate of 2.8 yen to the dollar was introduced to stimulate PRC exports on January 1, 1981. *See* Countervailing Duty Petition, *supra* note 4, at 3.

9. U.S. Department of Commerce, Notice of Initiation of Countervailing Duty Investigation, Oct. 15, 1983, DOC DKT No. C570-005.

10. Pursuant to 19 U.S.C. § 1671b(b), within 85 days after a countervailing duty petition is filed, the Department must determine whether there is a reasonable basis to believe or suspect that a subsidy is being provided with respect to the merchandise which is the subject of the investigation. 19 U.S.C. § 1671b(b) (1980).

11. 19 U.S.C. § 1303 (1980). The text of § 1303(a)(1) is as follows:

> Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacturer or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the country, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

12. Department of Commerce, Notice of Conference on Novel Issues, Oct. 5, 1983, DOC DKT No. C570-005.

Amalgamated Clothing and Textile Workers Union, and the International Ladies' Garment Workers Union.[13] Arguing for the opposition were a mixed group of twenty importers comprised of major U.S. clothing retailers and trade associations.[14] A brief analysis of the implications of this debate is offered by way of a conclusion.

Before moving to the arguments themselves, it is important to note that certain events have taken place since the DOC hearing which have placed the resolution of these issues on hold. These events, however, are current evidence of the dangerous political leverage, to be discussed below, inherent in granting domestic producers this novel cause of action against NME producers.

On December 6, 1983, in the wake of strong PRC protests and warnings, Commerce Secretary Baldrige asked the producers' association to withdraw the CVD petition in favor of a Presidential initiative to resolve the textile producers' concerns.[14a] The petitioners agreed, and on December 16, 1983, President Reagan announced new, more lenient criteria for triggering the "call" mechanism whereby imports from communist countries are restricted under the Trade Act of 1974.[14b] As a condition for withdrawal, the petitioners were granted and still hold the right to reintroduce the petition, without prejudice, if the President's initiative proves unsatisfactory.[14c] Thus, while the arguments below are presented as an on-going controversy, they are yet even more significant because of the implications arising from their non-resolution.

II. CAN BOUNTIES OR GRANTS BE FOUND IN NON-MARKET ECONOMY COUNTRIES?

The phrasing of the question presented above is that which appeared in the DOC notice announcing the "novel issue" hearing

13. *See* Notice of Initiation of Countervailing Duty Investigation, *supra* note 9, at 2.

14. *See* Countervailing Duty Petition, *supra* note 4, at 14.

14a. On December 6, 1983, Secretary Baldrige convinced the Textile producers to withdraw the CVD petition and promised to reinstate the investigation if later requested to by the industry. He further promised that the Department would make an expedited finding within two working days if the petition were reinstated. 9 U.S. Import Weekly [BNA] No. 10, at 373 (Dec. 7, 1983).

14b. This "call" procedure is part of the regulations implementing section 406 of the Trade Act of 1974. Section 406 allows the President to invoke import relief whenever "market disruption" exists with respect to products imported from Communist countries. 19 U.S.C. § 2436 (1980). Market disruption occurs "whenever imports of an article, like or directly competitive with an article produced by such domestic industry are increased rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat thereof, to such domestic industry." 19 U.S.C. § 2436(e)(2) (1980).

14c. *Supra*, note 14a.

under discussion in this article.[15] Petitioners, in their preconference submission however, offered a different version of the question: do U.S. countervailing duty laws apply to state-controlled economies?[16] While there is no doubt great similarity between these two questions,[17] the arguments presented by the domestic producers and the clothing importers are indeed somewhat incongruous. For petitioners, the threshold question is a pure "plain language" question of statutory construction: do the laws apply?[18] Whereas for the importers, the statutory applicability issue is fundamentally dependent upon the economic reality, to which the statute refers, being found in NME countries.[19]

A. *ARGUMENTS BY THE PETITIONERS*[20]

1. The Plain Language of the CVD Statute Requires its Application to Imports from NME Countries.

Interpretation of a statute always begins with the language of the statute itself.[21] Moreover, unless otherwise defined, words in a statute should be interpreted as taking their ordinary meaning.[22] Looking at the CVD statute, petitioners' attention is focused on the words which state that CVD law applies to "any country, dependency, colony, province, or other political subdivision of government."[23] These words, petitioners conclude, are clear and unambiguous. The CVD law applies to all countries and makes no exceptions based on economic preconditions or form of government.[24]

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15. Department of Commerce, Notice of Conference on Novel Issues, *supra* note 12.

16. Submission on Behalf of the ATMI, the ACTWU, the ILGWU and the AAMA, Oct. 28, 1983, DOC DKT No. C570-005.

17. The connection being isolated comes from the language of the CVD statute, 19 U.S.C. § 1303(a)(1) (1980), which reads in pertinent part: "whenever any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon. . . ."

18. *See* Submission on Behalf of the ACTWU, the ILGWU and the AAMA, Oct. 28, 1983, at 1-10. DOC DKT No. C570-005.

19. *See* Post-conference Brief on Behalf of Kmart Corporation, Nov. 14, 1983 at 2-5, DOC DKT No. C570-005.

20. *See* Submission on Behalf of ACTWU, the ILGWU and the AAMA, Oct. 28, 1983, at 1-10, DOC DKT No. C570-005 [hereinafter Submission by Petitioners].

21. Petitioners cite here G.R. Dickerson v. New Banner Institute, Inc., 103 S.Ct. 986, 990 (1983); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Submission by Petitioners, *supra* note 20, at 4, n.2.

22. Diamond v. Chakrabarby, 447 U.S. 303, 308 (1980); Perin v. United States, 444 U.S. 37, 42 (1979). Submission by Petitioners, *supra* note 20, at 4, n.4.

23. 19 U.S.C. § 1303(a)(1) (1980).

24. Submission by Petitioners, *supra* note 20, at 5.

2. The Legislative History of the CVD Law is Consistent with its Plain Language.

Citing their own extensive review of the legislative history of U.S. CVD law, petitioners state that equal application of the law to both market and non-market economy countries is fully consistent with the statute's intended purpose.[25] The CVD law specifically acts to prevent domestic producers from being placed in "jeopardy" by the "unfair competitive advantages" that foreign governments, either market or NME countries, can provide for exporters through subsidies.[26] Such subsidies, petitioners point out, are no less threatening to fair competition because they are levied in non-market rather than in market economy countries.[27]

3. International Agreements to which the United States is a Party Reflect an Equal Application of CVD Law to Market and Non-Market Economy Countries.[28]

a. The General Agreement on Tariffs and Trade (GATT)[29]

While the PRC is not a party to GATT,[30] petitioners argue that under the most-favored-nation (MFN) principle,[31] U.S. trade laws must not grant state-controlled economy countries exemptions not granted to free market countries. To do so, they argue, would be

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25. The purpose of the CVD law is to redress unfair trade practices that "distort world trade and discriminate against United States sales." S. Rep. No. 1298, 93d Cong., 2d Sess. 183 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7328; Submission by Petitioners, *supra* note 20, at 7, n.10.

26. H.R. Rep. No. 317, 96th Cong., 1st Sess. 45-46 (1979); Submission by Petitioners, *supra* note 20, at 8, n.11. In this regard, however, petitioners make very limited arguments to explain or refute strong challenges that NME countries cannot confer subsidies.

27. Submission by Petitioners, *supra* note 20, at 8.

28. While none of the agreements referred to below require U.S. domestic trade laws to apply equally to all countries without condition, they are offered in support of petitioners' positions based on an argument of promoting consistency in international practice.

29. General Agreement on Tariffs and Trade, *done* October 30, 1947, 61 Stat. A3 (1947), T.I.A.S. No. 1700.

30. There are six socialist countries which have joined the GATT: Yugoslavia, Cuba, Poland, Romania, Hungary and Czechoslovakia. The PRC, the Soviet Union, East Germany and Bulgaria are not members.

31. The most-favored-nation principle is a central feature of GATT. It assures each contracting party that any "advantage, favor, privilege or immunity" respecting "customs duties and charges of any kind" that is granted by one of their number to any trading partner "shall be immediately and unconditionally" extended to all other contracting parties. General Agreement on Tariffs and Trade, *supra* note 29, Part I, art. 1, para. 1, at A12.

to violate both the letter and the spirit of the GATT.[32] Such a policy would not only severely disadvantage our major trading partners,[33] but would create an incentive for all NME countries to vigorously subsidize all exports in order to enhance foreign exchange earnings.[34]

b. GATT Agreement on Subsidies and Countervailing Measures

Petitioners look to paragraph 1 of article 15 of the GATT Agreement on Subsidies and Countervailing Measures (Subsidy Code) as further support for applying U.S. CVD law to imports from NME countries.[35] Under this agreement, there are express provisions which impose countervailing duties against imports from NME countries.[36] Consistency in international practice, therefore, requires the United States to do the same.

B. ARGUMENTS BY THE IMPORTERS

1. The Plain Language of the CVD Statute Applies to an Economic Reality Nonexistent in NME Countries.

Contrary to petitioners' emphasis on the words "any country" found in the CVD statute, the importers stress the dependency of that phrase with the next phrase of the statutory scheme: "[that] shall pay or bestow . . . [a] bounty or grant."[37] Such "grants," the importers claim, are not found in NME countries.[38] The importers argue that the CVD law, in concept, is based upon a world in which free market forces are the norm and is designed to offset aberrations from that norm.[39] In NME countries, however, where market forces do not determine the allocation of resources for manufacturers, producers or exporters, there is no norm, "as we know it," against which aberrations can be measured.[40] Such grants, which

32. Submission by Petitioners, *supra* note 20, at 12.

33. On this point see especially the scenario of Pakistan and the PRC presented in Submission by Petitioners, *supra* note 20, at 15-17.

34. *Id.* at 12-13.

35. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, *done* April 12, 1979, (1979) 31 U.S.T. 513, T.I.A.S. No. 9619.

36. *Id.* at Part IV, art. 15, para. 1, at 538.

37. This concept of dependency is found in the Post-Conference Brief on Behalf of Kmart Corporation, Nov. 3, 1983, DOC DKT No. C570-005, at 2 (hereinafter Kmart Brief).

38. *Id.* at 3.

39. *Id.* at 4.

40. *Id.* at 3.

are by definition ones bestowed in *contrast* to market allocations, are nonexistent where there is *no* market which allocates.[41]

2. There is No Legislative Purpose or History Which Requires the Application of U.S. CVD Laws to NME Countries.

The importers stress that while there is no specific mention of NME countries in the CVD law, there *is* explicit methodology for dealing with NME countries set forth in the antidumping legislation[42] and section 406 of the Trade Act of 1974.[43] Moreover, while congressional concerns are evident regarding lower priced NME exports flooding U.S. markets, those concerns are appropriately addressed *only* through antidumping and section 406 procedures.[44] Evidence of this is the clear dissatisfaction with then current trade laws, *including* the CVD statute, which was expressed by Congress when NME antidumping and section 406 procedures were implemented.[45] Whereas no parallel NME procedures were added to the CVD law, the importers conclude that U.S. CVD law is simply "inappropriate" for use against imports from NME countries and was not considered "salvagable" by Congress to ever be so.[46]

3. International Agreements to Which the United States is a Party Do Not Require Blanket Application of U.S. CVD Laws to NME Countries.

a. The General Agreement on Tariffs and Trade (GATT)[47]

According to the importers, it is well established practice under GATT that contracting parties possess the discretion to treat NME countries differently from market economy countries.[48] The GATT itself, in its Notes and Supplemental Provisions, provides for NME uniqueness through special treatment of imports from such

41. *Id.* at 4.
42. 19 U.S.C. § 1673 (1980).
43. 19 U.S.C. § 2436 (1980).
44. Kmart Brief, *supra* note 37, at 6-7.
45. S.Rep. No. 93-1298 at 210; H.Rep. No. 93-571 at 82; Kmart Brief, *supra* note 38, at 7, n.6.
46. Kmart Brief, *supra* note 37, at 7.
47. General Agreement on Tariffs and Trade, *supra* note 29.
48. Kmart Brief, *supra* note 37, at 12.

countries.[49] U.S. law, the importers stress, takes a similar approach. In section 406 of the Trade Act of 1974, there are special provisions which cover *only* imports from NME countries—even those entitled to MFN treatment.[50] Under petitioners' approach, if section 406 establishes a different method for achieving relief for nonmarket as opposed to market economy countries, U.S. law must already violate the MFN principle. This, the importers stress, is not the case because of the clearly recognized discretion for dealing with NME countries under GATT. Thus, a similarly excepting U.S. CVD law does not and can not violate U.S. MFN obligations.

b. GATT Agreement on Subsidies and Countervailing Measures

The importers argue here that because article 15 of the Subsidy Code clearly contemplates NME trade sanctions *only* where domestic injury is alleged,[51] and U.S. CVD law does not,[52] there is no analogy found in the Subsidy Code for applying U.S. CVD law to NME countries.[53] Moreover, because the injury test required by the Subsidy Code represents a higher standard of proof for achieving import relief[54] than that found in the U.S. CVD law in NME cases,[55] an application of U.S. CVD law to NME countries would be both arbitrary and inequitable.[56]

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49. General Agreement on Tariffs and Trade, *supra* note 29, Annex I, art. VI, para. 1, point 2, at A86.

50. Kmart Brief, *supra* note 37, at 12.

51. Agreement on the Interpretation and Application of Articles VI, XVI and XXIII, *supra* note 35, Part IV, art. 15, para. 1, at 538.

52. Under current CVD law, a material injury test applies to investigations of dutiable products only from countries which have signed the International Agreement on Subsidies and Countervailing Measures or assume similar obligations. *See* Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, *supra* note 35. Investigations concerning dutiable products from other countries continue to be conducted pursuant to § 1303 without the necessity of showing injury. No NME countries are currently party to the Subsidies Code and therefore would require no finding of injury if U.S. CVD law were to be applied to them. *See* Kmart Brief, *supra* note 37, at 8-9.

53. Conclusion drawn from Kmart Brief, *supra* note 37, at 8-9.

54. An injury test, paralleled in U.S. trade law, requires the finding that a U.S. industry is materially injured or there is threat thereof, before a CVD can be imposed. 19 U.S.C. § 1677(7) (1980). As defined by § 1677(7), a material injury is harm which is not inconsequential, immaterial or unimportant. 19 U.S.C. § 1677(7) (1980). Thus, an imposition without such a finding would indeed be easier to implement.

55. *See supra* note 52.

56. Kmart Brief, *supra* note 37, at 8-9.

III. DOES A DUAL EXCHANGE RATE REGIME CONFER A SUBSIDY WHERE THE ENTIRE TRADE SECTOR IS SUBJECT TO A SINGLE RATE AND THE CURRENCY IS NOT CONVERTIBLE?

A. ARGUMENTS BY THE PETITIONERS

1. Legal Precedent Requires an Affirmative Finding that a Dual Exchange Rate System Does Confer a Subsidy.

Petitioners rely primarily on the 1940 case of *F.W. Woolworth Co. v. United States*[57] in which a Treasury Department finding[58] of a countervailable subsidy based on Germany's nonconvertible dual rate was upheld by the Court of Customs and Patent Appeals. While the facts of the case are complex and the working of the subsidy is readily distinguishable from the PRC system,[59] petitioners stress, as did the court, that it is the *effect* of the practice on producer returns which is dispositive.[60] Like the *Woolworth* case, the dual exchange rate in the PRC, "through various devices and through different authorized government agencies [sought] to aid its manufacturers in invading foreign markets."[61] Moreover, in both instances, the currency was non-convertible and the dual rate was applied to all sectors of export trade.[62] Therefore, as in the German case, petitioners conclude the Chinese system must represent a subsidy because it also enables producers to sell below world market prices and still realize more local currency than they would recover if the transaction had occurred at the official rate.[63]

2. Dual Exchange Rate Systems Possess All the Legal Characteristics Of a Countervailable Subsidy.

Petitioners characterize a subsidy as a state practice which constitutes "preferential treatment" for a particular class of

57. F.W. Woolworth Co. v. United States, 115 F.2d 348 (C.C.P.A. 1940).

58. T.D. 49,719, 74 Treas. Dec. 192 (1938); T.D. 48,360, 69 Treas. Dec. 1008 (1936). Prior to the time the DOC took over administration of U.S. CVD law, the Department of the Treasury held the responsibility.

59. *See* Submission by Petitioners, *supra* note 20, at 20-26.

60. *Woolworth*, 115 F.2d at 353; Submission by Petitioners, *supra* note 20, at 23-24.

61. *Woolworth*, 115 F.2d at 353.

62. *Woolworth*, 115 F.2d at 348; Submission by Petitioners, *supra* note 20, at 24. The *Woolworth* case is silent on the question of whether the German system could be used for import transactions.

63. Submission by Petitioners, *supra* note 20, at 25.

persons.[64] In determining whether a particular practice qualifies as a subsidy, petitioners cite four criterion derived from the decisions of both U.S. courts and administrative agencies. They are: (1) the economic consequences of the program for producers and exporters;[65] (2) the economic consequences of the program on exports;[66] (3) the foreign government's intent in establishing the subject program;[67] (4) whether the program acts as a substitute for another, directly and obviously countervailable subsidy.[68] Petitioners assert that a dual exchange rate program, involving a nonconvertible currency, and applicable to all sectors of trade, may have all the recognized characteristics of a countervailable subsidy.[69]

Applying these criteria to the PRC system, petitioners argue, the dual yen rate confers an undeniable subsidy on producers.[70] For exporters using the more favorable internal rate, the conversion rate is approximately 41 percent above the official rate.[71] For all others who wish to convert, only the lower official rate is available.[72] The effect on producers is clearly preferential. For exports, the effect of the dual rate is equally dramatic. In 1981, the year the dual rate was established, the PRC showed the first positive balance of trade since 1977.[73] Moreover, for the year 1982, that positive balance had increased over 500 percent.[74] Finally, not only is the dual rate called a "subsidy rate" by PRC officials,[75] but it was expressly intended to simplify a number of other subsidies that were used to stimulate Chinese exports prior to 1981.[76] Therefore, according to the standards set by U.S. courts and administrative agencies, the PRC dual rate qualifies as a countervailable subsidy.

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64. Downs v. United States, 113 F. 144, 147 (4th Cir. 1902), *aff'd* 187 U.S. 496 (1903); Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834,838 (Ct. Int'l Trade 1983); Submission by Petitioners, *supra* note 20, at 28, n.38, 39.

65. Industrial Fastners Group, American Importer v. United States, 710 F.2d 1576, 1579 (D.C. Cir. 1983); Submission by Petitioners, *supra* note 20, at 28, n.40.

66. United States v. Zenith Radio Corp., 562 F.2d 1209, 1216 (C.C.P.A. 1977), *aff'd* 437 U.S. 443 (1978); Submission by Petitioners, *supra* note 20, at 28, n.41.

67. Nicholas and Co. v. United States, 7 C.C.P.A. 97, 107 (1916), *aff'd*, 249 U.S. 34, 219 (1919). Submission by Petitioners, *supra* note 20, at 27-29, n.37.

68. *Woolworth*, 115 F.2d at 353; Submission by Petitioners, *supra* note 20, at 29, n.43.

69. Submission by Petitioner, *supra* note 20, at 29.

70. *Id.* at 30.

71. *Id.* at 31.

72. *Id.*

73. *See* Countervailing Duty Petition, *supra* note 4, figure A, at 16.

74. *Id.*

75. Statement of Wei Yunning, Vice Chairman of the PRC's Foreign Investment Control Commission and the Import-Export Commission, *cited in* Countervailing Duty Petition, *supra* note 4, at 4.

76. Submission by Petitioners, *supra* note 20, at 33.

3. A Dual Exchange Rate, Where One Rate Applies to the Entire Trade Sector, is Not Analagous to a Currency Devaluation Nor is It Trade Neutral.

A dual exchange rate system is not a devaluation and, in fact, is implemented to achieve wholly different objectives than a devaluation.[77] A system of dual rates, petitioners point out, is used to isolate the domestic economy from the competitive effects of international cost and price differentials.[78] A devaluation, on the other hand, implies a recognition of international cost and price differentials and is an attempt to equalize them and the associated balance of payments disequilibrium.[79] Moreover, petitioners stress, evidence shows that the PRC expressly refused devaluation because of the potential costs devaluation would have on receipts from tourism and remittances from overseas.[80] Perpetuating a dual exchange rate, therefore, is clearly in *contrast* to a devaluation.

On the issue of trade neutrality, a dual exchange rate is a classic example of trade distortion.[81] Where a trade account exchange rate, such as the PRC internal rate, is lower than the rate previously in effect for exports and imports, such a rate acts to promote exports and discourage imports.[82] Such rates are, by definition, export promotion devices.[83] Not only are they not trade neutral, petitioners conclude, but they have precisely the same effect as a cash payment on exports, and a surcharge on imports.[84]

B. ARGUMENTS BY THE IMPORTERS

1. Legal Precedent is Consistent with a Finding that the PRC Dual Rate System Does Not Confer a Subsidy.

The PRC dual rate system applies a single unified rate to all transactions in China's export/import sector.[85] By contrast, only when a system grants benefits to specified categories within that

77. *Id.* at 37.
78. *Id.*
79. *Id.*
80. *Id.* at 37-38.
81. *Id.* at 39.
82. *Id.*
83. *Id.*
84. *Id.* at 39-40.
85. Post-Conference Statement of the Footwear Group of the American Association of Exporters and Importers, Nov. 11, 1983, DOC DKT No. C570-005, at 1 [hereinafter Statement by Footwear Group].

sector can it amount to a subsidy.[86] This is the rule, the importers assert, under applicable United States precedent.[87] The PRC single export rate, therefore, does not confer a subsidy.

Just like the petitioners, the importers cite the 1940 Customs Court case of *F.W. Woolworth Co. v. United States* in support of the above proposition and their application of it.[88] In *Woolworth*, the importers assert, the finding of a countervailable subsidy was predicated upon a dual rate system in which classes or types of exports were granted a preferential rate of exchange.[89] For further support in applying CVD law only in cases of "preferential treatment," the importers look to two administrative decisions, *Pork Rind from Mexico*,[90] and *Lamb Meat from New Zealand*,[91] where dual systems were applied to *all* exports and were *not* found to confer subsidies.[92] U.S. legal precedent, therefore, is consistent with a finding that the PRC dual rate system does not confer a subsidy.

2. No Evidence Exists to Support a Characterization of the PRC Dual Rate As a Subsidy.

The importers generally agree with petitioners' characterization of a subsidy, as stated above.[93] They conclude, however, that no evidence exists upon which to base a finding that these criteria have been fulfilled.[94]

In terms of the effect on exporters, because the PRC dual rate applies a single rate to all trade transactions, the required preferential treatment is not present.[95] Relying on the case of *Carlisle Tire & Rubber Co. v. United States*,[95a] the importers stress that the term "subsidy" under the CVD statute does not refer to *generally*

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86. *Id.*

87. *Id.*

88. *Woolworth*, 115 F.2d at 348.

89. *Id.*; Statement by Footwear Group, *supra* note 85, at 3.

90. *Pork Rind Pellets from Mexico*, 48 Fed. Reg. 39105, 39107 (1983), *cited in* Statement by Footwear Group, *supra* note 85, at 3.

91. *Lamb Meat from New Zealand*, 48 Fed. Reg. 58120 (1983), *cited in* Statement by Footwear Group, *supra* note 85, at 3.

92. Statement by Footwear Group, *supra* note 85, at 3.

93. *See supra* text accompanying notes 64-69; Post-conference Brief presented by Counsel Siegel, Mandell & Davidson, P.C., Nov. 14, 1983, DOC DKT No. C570-005, at 12. Reference here is to petitioners emphasis on the need for "preferential treatment" to be part of any characterization of a subsidy under U.S. CVD laws.

94. Statement by Siegel, Mandell & Davidson, *supra* note 93, at 12.

95. *Id.* at 12-13.

95a. *Carlisle*, 564 F. Supp. at 834.

available benefits, such as a single rate applied to the entire trade sector.[96] As for the effect on exports, the importers point out that while there has been an increase in PRC exports, there is no evidence which *links* this rise to the dual rate practice.[97] Finally, the materials presented by petitioners consist of English translations of various Chinese documents which petitioners allege contain the word "subsidy."[98] As a basis for inferring intent, the importers argue that these translations may well be totally out of context to what an official Chinese translation would include.[99] The Chinese Government, in its statement to the DOC, denies that any subsidy exists.[100] As long as such conflict continues, the importers conclude, no determination of intent based on potentially biased translations can be conclusive.[101]

3. Dual Exchange Rates for Non-Convertible Currencies, Applied to the Entire Trade Sector, Are No Different Than a Trade Neutral, General Devaluation.

In non-convertible currency countries, those exporters who earn foreign exchange in open market transactions have only one source to redeem that currency for domestic trade: their own central bank. It is this inability to openly convert, and therefore the access to only *one* rate at which to convert, which makes the PRC dual rate trade neutral.[102] Where there is no access, as in the PRC, for exporters to "reconvert" their admittedly overvalued yen to dollars at the official market rate, the benefit accrued is an internal one that is not advantageous for future trade transactions.[103] The result, therefore, is trade neutrality.

Similarly, it is a uniform application of the single rate to the entire trade sector which also makes the PRC system no different

96. Statement by Seigel, Mandell & Davidson, *supra* note 93, at 14.

97. *Id.*

98. Posthearing Brief on Behalf of Wal-Mart Stores, Inc. and the Association of General Merchandise Chains, Nov. 15, 1983, DOC DKT No. C570-005, at 5 (hereinafter statement by Wal-Mart).

99. *Id.*

100. *See* Statement by Spokesman of Minister of Foreign Economic Relations and Trade, Nov. 3, 1983, DOC DKT No. C570-005.

101. Statement by Wal-Mart, *supra* note 98, at 5-7. The argument stresses that in this case of conflicting statements, the "best-evidence" test requiring use of petitioners' evidence is highly questionable in light of the PRC Minister's Statement.

102. Kmart Brief, *supra* note 37, at 14.

103. *Id.*

than a general devaluation of the domestic currency.[104] Devaluation, the importers stress, has never been considered countervailable.[105] While devaluations may convey some benefit to the PRC's balance of payments by making exports cheaper and imports more expensive, the latter effect also increases production costs for countries, such as the PRC, which rely heavily on imports of capital equipment and raw materials.[106] Overall, in contrast to subsidies, devaluations made for balance of payment reasons are inherently costly.[107]

IV. ANALYSIS

While the issues presented above are themselves both controversial and challenging, they hold a broader significance in the overall development of Sino-American trade relations. In the PRC's trade relations with the West, the complicated range of political and ideological questions have always made progress contingent upon careful negotiation and narrowly drawn bilateral agreements.[108] The emergence of a countervailing duty investigation against the PRC has upset this deliberate course of action and threatens to set a precedent challenging the stability of future trade relations with the PRC.[109] As a November 1983 statement by the Ministry of Foreign Economic Relations and Trade warns, the United States should "keep in mind the broad spectrum of economic and trade relations" between the United States and the PRC, and thereby "handle the [CVD investigation] carefully and properly so that these relations will not be jeopardized."[110]

To the Chinese, a CVD investigation represents more than just an isolated contest within the general realm of trade relations. From

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104. *Id.* at 14-15.

105. *Id.* at 15.

106. *Id.*

107. *Id.*

108. *See, e.g., Treaties in Force*, United States Department of State Publication 9285, Jan. 1, 1982, p. 32-33. *See also*, FRANKLIN D. HOLZMAN, INTERNATIONAL TRADE UNDER COMMUNISUM - POLITICS AND ECONOMICS, 129-32 (1976).

109. The contrast being isolated here is that the delicate balance in trade relations between the United States and the PRC is best met through negotiation at the Executive level. Trade remedies, such as the CVD, however, can be initiated by Congress or the domestic industry. They are problematic because they contain no discretionary mechanism by which their political spillover into other trade areas can be factored into a proper solution. While a final recommendation may hinge on Presidential enforcement, the process of reaching and altering those recommendations is arguably too inflexible for the delicate balance accompanying trade relations with the Communist countries.

110. Statement by Spokesman of Ministry of Foreign Economic Relations and Trade, Nov. 30, 1983, DOC DKT No. C570-005, at 2.

the perspective of Sino-American trade relations, the application of U.S. CVD law to NME countries doubly handicaps U.S. trade and political relations with much of the communist world. First, because of clear economic and social differences between market and non-market economies, a U.S. CVD investigation signifies not only a judgment of how the Chinese economy should be run, but it is a direct attempt to ascribe capitalist values to the socialist ideology. This, even more than the significance of adding a duty to Chinese goods, is a direct assertion of U.S. superiority, an assertion inimical to Chinese ideology. A U.S. CVD investigation, therefore, represents a public attack on the Chinese ideology. Second, because of the linkages in Chinese trade policy, such as that currently between agricultural trade and textile trade issues,[111] a President needs unencumbered discretion to negotiate solutions and either accept or reject the views of domestic industry.[112] As long as an industry knows it can disrupt relations through the initiation of a CVD investigation, such industries threaten any stable negotiated balance.[113] Therefore, setting a precedent that industry initiated U.S. CVD procedures apply to NME countries severely escalates the level of difficulty in achieving lasting trade policy objectives with NME countries.[114]

A major obstacle in this debate, as in most debates over statutory construction and legislative history, is that the world has changed so dramatically since the laws were written. When countervailing duties were first implemented in the Tariff Act of 1897,[115] who would have considered trade from non-market economies to be a threat to domestic producers? Even if Congress had, given the ethnocentric obsession of "American" lawmaking, it is hard to

111. Evidence of this linkage within PRC trade policy can be gleaned from Chinese refusals to purchase American soybeans, man-made fibers, cotton and wheat when the United States restricted textile imports earlier in 1983 and then delayed in arriving at a new textile agreement to replace that which expired in January 1983. 8 U.S. Import Weekly [BNA] No. 18, at 678 (Aug. 3, 1983).

112. Reference here is made to use of the President's power to engage in foreign trade agreements under the Trade Act of 1974, 19 U.S.C. § 2112(b) (1980).

113. Some industry officials, such as Peter Handal, Chairman of the American Association of Exporters and Importers' Textile and Apparel Group, would argue such is the current position of the U.S. textile producers. *See* 9 U.S. Import Weekly [BNA] No. 11, at 428 (Dec. 14, 1983).

114. The difficulty here is heightened by the fact that Communist countries ascribe to the President the power to directly influence the outcome of CVD investigations—a power the President does not possess.

115. What is now 19 U.S.C. § 1303, was originally enacted in 1897 as a part of the Tariff Act of that year.

argue that U.S. laws are based on any assumptions except those to which *we* ascribe and upon which our *own* system, economic and social, is based. Therefore, in determining the congressionally intended scope of U.S. CVD law, in the absence of explicit history, presumption would favor only those applications to economic systems with distinct parallels to our own. An application of U.S. CVD law to NMEs, therefore, is arguably a clear *mis*application of the basic assumptions of countervailability.[116]

V. CONCLUSION

Having isolated the various areas of contention presented by this debate, the last point to be made is that the need for concern is indeed real. While both sides present strong and clearly articulated arguments, the importers theoretical assertions are of little political weight when compared to the concrete evidence which shows that textile imports from the PRC have surged in past months.[117] While there is no doubt that a full investigation may absolve the Chinese dual system of its alleged countervailability, for the present, no legal theory is going to stop the political tide that has arisen against textile imports.[118] As is often the case with novel applications of the law, the rationality of a legal determination is worthless when partisanship and special interests have yet to be heard.

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116. *See supra* text accompanying notes 37-41. *See also* HOLZMAN, *supra* note 108, at 38-40.

117. *See supra* text accompanying notes 73-74.

118. See especially statements by Senators Moynihan (Nov. 4, 1983) and Thurmond (Nov. 3, 1983) and Governor King of North Carolina (Nov. 4, 1983), DOC DKT No. C570-005.