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Antidumping, Constructed Value, and Non-countervailable Subsidies: A Proposed Inclusion of Subsidies After *Al Tech Specialty Steel Corp. v. United States*

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Antidumping, Constructed Value, and Non-countervailable Subsidies: A Proposed Inclusion of Subsidies After *Al Tech Specialty Steel Corp. v. United States*

James K. Stronski

Abstract

Part I discusses the antidumping law in the context of subsidy inclusion in constructed value calculations. Part II outlines the CIT's exclusion of subsidies from the cost component of constructed value in light of the court's policy rationales, and its interpretation of legislative, judicial, and administrative authority. Part III suggests that when a subsidy that benefits production is not countervailable, such as a subsidy that is generally available, the policy of remedying the unfair advantage created by the subsidy outweighs the CIT's policy concern's in *Al Tech Specialty*.

ANTIDUMPING, CONSTRUCTED VALUE, AND NON-
COUNTERAVAILABLE SUBSIDIES: A PROPOSED
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INTRODUCTION

The antidumping¹ and countervailing duty² laws are remedies available to domestic industries³ injured by foreign producers who benefit from unfair trade practices, such as dumping⁴ or subsidization.⁵ The purpose of the United States antidumping law is to provide a remedy against unfair pricing practices⁶ by foreign importers.⁷ When foreign goods are sold in the United States at less than their fair value,⁸ the antidumping law imposes a duty, in addition to customs duties, equal to the difference between the foreign market value⁹ and the U.S. price¹⁰ of the imported goods.¹¹ If there is no adequate foreign market value or if the foreign producer dumps in its home market,

1. 19 U.S.C.A. §§ 1673-1677h (West 1980 & Supp. 1987).

2. 19 U.S.C.A. §§ 1671-1671h (West 1980 & Supp. 1987).

3. 19 U.S.C. § 1677(9) (A)-(F) (1982 & Supp. III 1985). Standing is not limited to domestic producers. *Id.*

4. See Kaplan, Kamarck & Parker, *Cost of Production and Constructed Value Analysis: A Legal and Policy View*, in U.S. TRADE LAW AND POLICY 31, 33 (1987).

5. 19 U.S.C. § 1677(5) (1982 & Supp. IV 1986).

6. See Epstein, *The Illusory Conflict Between Antidumping and Antitrust*, 18 ANTITRUST BULL. 1, 5 (1973). An exporter engaging in predatory pricing sets his export price at whatever level is necessary to eliminate competition. *Id.*

7. See Epstein, *supra* note 6, at 5 (1973). When one or more firms achieves a price advantage through discrimination rather than through efficiency, the expected mechanisms of competitive markets may be distorted. *Id.* Dumping, a form of international price discrimination, can impair competition if it results in less efficient firms driving more efficient firms out of the market. *Id.* at 7. The result of such an event would be resource misallocation. See also Anthony, *The American Response to Dumping From Capitalist and Socialist Economies—Substantive Premises, and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159, 163-77 (1969).

8. 19 U.S.C. § 1673 (1982 & Supp. III 1985). Fair value is intended to be an estimate of foreign market value. 19 C.F.R. § 353.1 (1987).

9. 19 U.S.C.A. § 1677b (West Supp. 1987); see also 19 C.F.R. § 353.3 (1987).

10. 19 U.S.C. § 1677a (1982).

11. 19 U.S.C. § 1673 (1982 & Supp. III 1985). If the ITA finds that the sales are being made or are likely to be made at less than fair value and the International Trade Commission finds that a U.S. industry is materially injured, threatened with such injury, or that the establishment of an industry in the United States is materially retarded, then an antidumping duty is imposed "equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise." *Id.*

then constructed value¹² may be used as a surrogate for foreign market value.¹³ The United States Court of International Trade ("CIT") recently decided in *Al Tech Specialty Steel Corp. v. United States*¹⁴ that subsidies could not be added to constructed value in a case where the subsidy at issue could be remedied under the countervailing duty law.¹⁵

This Comment concurs with the *Al Tech Specialty* decision, but argues that its holding should not apply where the subsidies in question benefit production and are not countervailable. Part I discusses the antidumping law in the context of subsidy inclusion in constructed value calculations. Part II outlines the CIT's exclusion of subsidies from the cost component of constructed value in light of the court's policy rationales, and its interpretation of legislative, judicial, and administrative authority. Part III suggests that when a subsidy that benefits production is not countervailable, such as a subsidy that is generally available, the policy of remedying the unfair advantage created by the subsidy outweighs the CIT's policy concern's in *Al Tech Specialty*.

I. CONSTRUCTED VALUE IN ANTIDUMPING LAW

Protection against unfair trade practices is based on the need to protect vulnerable domestic industries,¹⁶ because such practices may result in market disruption and the reduction of competition.¹⁷ The countervailing duty law counteracts the ef-

12. 19 U.S.C. § 1677b(e) (1982 & Supp. III 1985).

13. Kaplan, Kamarck & Parker, *supra* note 4, at 33.

14. 651 F. Supp. 1421 (Ct. Int'l Trade 1986).

15. *Id.* at 1429-30. According to the *Al Tech Specialty* court, "The antidumping remedy protects domestic industry from imported merchandise sold at less than fair value, which imports either have caused or threaten to cause material injury. . . . Countervailing duty law, in contrast, was enacted specifically to address the market distortions caused by subsidization." *Id.*

16. Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44 (1958). Dumping has existed as long as the mercantile system, but it has been of major international significance since the late nineteenth century. *Id.* at 51. The cartels of Europe and the United States often dumped products in less-developed markets. *Id.* However, dumping legislation arose in many nations as an attempt to protect "war baby" industries following World War I. *Id.*

17. See Epstein, *supra* note 6, at 2-7. Epstein divides price discrimination between national markets into four categories: Introducing New Products, Meeting Competition, Maximizing Current Revenue, and Predatory Pricing. The most deleterious type of dumping from an economic standpoint is intermittent dumping. *Id.*

fect of foreign government subsidies on products exported to the United States.¹⁸ It generally provides for a duty on imports equal to the foreign government subsidy received by the foreign producer.¹⁹

The antidumping law complements the countervailing duty remedy by counteracting the unfair pricing behavior of foreign producers.²⁰ The antidumping law, as embodied in Title VII of the Tariff Act of 1930,²¹ may be defined as a surtax, in addition to normal duties, imposed on imports whose price is less than the "fair value"²² for such goods. Fair value is not specifically defined but it is generally considered synonymous with foreign market value.²³ The additional antidumping duty is intended to restore the price of goods to their fair value, and thus prevent injury to U.S. producers of similar merchandise.²⁴

Under U.S. antidumping law, dumping margins are measured by calculating the amount that foreign market value ("FMV") exceeds the United States price ("USP") of the imported merchandise.²⁵ The International Trade Administra-

Other commentators have argued in the antitrust context that price predation either does not exist or is too rare to justify an antidumping law. See R. BORK, *THE ANTI-TRUST PARADOX: A POLICY AT WAR WITH ITSELF* 155 (1978). But see Epstein, *Foreign Predation Against U.S. Firms: Reconciling International and Domestic Policies*, in 1984 *FORDHAM CORPORATE LAW INSTITUTE* 41 (B. Hawk ed. 1985).

18. Ehrenhaft, *supra* note 16, at 54. See generally G. BRYAN, *TAXING UNFAIR INTERNATIONAL TRADE PRACTICES: A STUDY OF U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS* 249-54 (1980); J. PATTISON, *ANTIDUMPING AND COUNTERVAILING DUTY LAWS* § 1.04 (1987).

19. 19 U.S.C.A. §§ 1671-1671h (West 1980 & Supp. 1987). These sections provide the countervailing duty law which applies to goods imported from countries under the General Agreement of Tariffs and Trade ("GATT"). *Id.* Section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 (1982), applies to exports from a country not under the Agreement. Although the International Trade Administration ("ITA") applies the same substantive and procedural law to section 303 and Title VII cases, there is no injury requirement for imports from non-agreement countries. See E. ROSSIDES, *UNITED STATES IMPORT TRADE REGULATION* 241-48 (1986).

20. Ehrenhaft, *supra* note 16, at 58.

21. The Trade Agreements Act of 1979 ("TAA"), Pub. L. No. 96-39, § 101, 93 Stat. 144, 150, added to the Tariff Act of 1930 a new Title VII, Countervailing and Antidumping Duties, which replaced and repealed the Antidumping Act of 1921, ch. 14, §§ 201-212, 42 Stat. 9, 11-15. See E. ROSSIDES, *supra* note 19, at 195.

22. 19 U.S.C. § 1673(1) (1982).

23. 19 C.F.R. § 353.1 (1987).

24. Ehrenhaft, *supra* note 16, at 58.

25. 19 U.S.C. § 1673. Foreign market value, 19 U.S.C.A. § 1677b (West Supp. 1987), is the wholesale price for sales in the home market f.o.b. (free on board) the factory. However, this source of foreign market value is often inadequate. If there

tion ("ITA")²⁶ of the Commerce Department calculates the FMV by resort to home market prices.²⁷ If home market sales are below market value for an extended period, or if the product is made solely for export, then the ITA may use constructed value to represent the FMV for the purpose of calculating an accurate dumping duty.²⁸

Constructed value consists of four factors: 1) general production costs; 2) costs incidental to placing the merchandise in condition for exportation to the United States; 3) general expenses reflected by sales of comparable merchandise in the home market; and 4) profits reflected by sales of comparable merchandise in the home market.²⁹ The constructed value formula in 19 U.S.C. § 1677b(e) ambiguously defines general production costs as costs "which would ordinarily permit the

are no home market sales, or if home sales are so small in relation to the quantity sold for exportation to countries other than the United States (third countries), then the foreign market value is determined on the basis of the price at which the merchandise is sold or offered for sale to such third countries. Alternatively, the ITA will construct a foreign market value if there are no adequate third-country prices or if the ITA has reason to believe that the foreign sales are made at less than the cost of production. 19 U.S.C.A. § 1677b (West Supp. 1987). *See generally* E. ROSSIDES, *supra* note 19, at 198-99.

United States price, 19 U.S.C. § 1677a (1982), means the purchase price, or the exporter's sales price, whichever is the first arm's length transaction; that is, the first sale to a non-related entity. *See* E. MCGOVERN, *INTERNATIONAL TRADE REGULATION*, at 360-62 (1986); E. ROSSIDES, *supra* note 19, at 199.

26. *See* H. KAYE, P. PLAIA & M. HERTZBERG, *INTERNATIONAL TRADE PRACTICE* § 18.02 (1981). The ITA has been the administering authority that conducts countervailing duty and antidumping investigations since Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (Dec. 3, 1979). *Id.* The Treasury Department preceded Commerce as the administering authority. *See generally* E. MCGOVERN, *supra* note 25, § 12.14.

27. 19 U.S.C.A. § 1677 (West Supp. 1987); 19 C.F.R. § 353.1.

28. 19 U.S.C. §§ 1677b, 1677e (1982 & Supp. III 1985); *see also* S. REP. NO. 1298, 93d Cong., 2nd Sess. 173 (1974). In explanation of the addition of the cost of production section, 19 U.S.C. § 1677b(b) (1982), the Report stated, "The Committee is concerned that, in the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity." S. REP. NO. 1298, *supra*, at 173. *Id.*

According to Department of Commerce estimates, about fifty percent of current antidumping cases involve cost of production or constructed value analyses. Kaplan, Kamarck & Parker, *supra* note 4, at 33. The increasing importance of constructed value analysis stems, in part, from growing world-wide over-capacity in several sectors, including the steel and semiconductor industries. *Id.* at 146. It is also a result of growth in the number of export-oriented industries targeted towards the United States market. *Id.*

29. 19 U.S.C. § 1677b(e) (1982 & Supp. III 1985).

production of that particular merchandise in the ordinary course of business."³⁰ The statute does not specify which costs may be considered. In the case of a government subsidy that benefits production, the cost could be that expended solely by the manufacturer,³¹ or the manufacturer's costs plus government subsidies, which are, in effect, contributions to the cost of production.³²

The primary statutory issue before the CIT in *Al Tech Specialty Steel Corp. v. United States*³³ was whether the cost of production³⁴ and constructed value³⁵ sections of the antidumping law require the ITA to include subsidies that benefit production as a component of cost in its constructed value of West German tool steel.³⁶ The ITA excluded these subsidies from constructed value, and the CIT affirmed.³⁷

II. *THE AL TECH SPECIALTY DECISION*

In *Al Tech Specialty*, the West German federal and state governments heavily subsidized Arbed Saarstahl GmbH, a West German producer of tool steel imported into the United States.³⁸ The domestic plaintiff contended that these subsidies

30. *Id.* The constructed value section does not clearly specify whether the production costs it lists should be the actual cost of production, including subsidies which benefit production, or the cost expended solely by the manufacturer. In *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421 (Ct. Int'l Trade 1986), the CIT recently chose the latter construction in a case involving countervailable subsidies. See 651 F. Supp. at 1430.

31. See 50 Fed. Reg. 23,170 (Int'l Trade Admin. 1985).

32. *Id.* The *Al Tech Specialty* plaintiffs argued before the ITA that all manufacturing costs should be considered, regardless of who bears the cost, since the subsidies merely shift costs from the producer to the government. 50 Fed. Reg. 23,170 (Int'l Trade Admin. 1985). The statute makes no reference to the production or material costs incurred by an individual producer. *Id.*

33. 651 F. Supp. 1421.

34. 19 U.S.C. § 1677b(b).

35. 19 U.S.C. § 1677b(e).

36. 651 F. Supp. at 1423.

37. 51 Fed. Reg. 10,071, 10,072 (Int'l Trade Admin. 1986); see also *Al Tech Specialty*, 651 F. Supp. at 1423 (Ct. Int'l Trade 1986).

38. See Memorandum in Support of Plaintiff's Renewed Motion for Judgment upon an Agency Record at 3-5, *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421 (Ct. Int'l Trade 1986) (84-08-01192); see also *Saarstahl Will Need More Aid*, Metal Bulletin, July 1, 1983, at 21; *More Aid For Saarstahl*, Metal Bulletin, Sept. 13, 1983 (since 1978, Saarstahl has received DM 3.065 billion in state guarantees, bonuses and debt absorption. Saarstahl requested an additional grant of DM 86 million for 1983, and as of September 1983 had received DM 30 million of this grant).

should be considered as a component of the manufacturer's cost.³⁹ However, the ITA rejected this argument and based its cost calculation on only those expenses actually recorded in the foreign producer's books and records.⁴⁰

The *Al Tech Specialty* court determined that traditional sources of statutory construction—legislative history, judicial precedent, and administrative practice—failed to demonstrate that the ITA's interpretation of cost of production and constructed value was unreasonable.⁴¹ Consequently, the CIT deferred to the ITA's interpretation of cost, adopting both its exclusion of subsidies and its sole reliance on costs as documented in the producer's books and records.⁴²

39. 50 Fed. Reg. 23,170 (Int'l Trade Admin. 1985) Standing to file an antidumping petition is broad. 19 U.S.C. § 1677(9)(A)-(F) (1982 & Supp. III 1985). For instance, an antidumping proceeding can be commenced by an interested party who files a petition with the Commerce Department "on behalf of an industry" in proper form. Rosenthal, *Current Issues in Antidumping Law*, in U.S. TRADE LAW AND POLICY 9, 11-14 (1987). See generally H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 26, §§ 18.23-28 (1986) ("interested parties" includes foreign producers, foreign exporters, U.S. importers, foreign governments, U.S. producers, U.S. wholesalers, labor unions, and U.S. trade associations).

40. 51 Fed. Reg. 10,071, 10,072 (Int'l Trade Admin. 1986).

41. 651 F. Supp. at 1429. After considering these sources of construction, the court concluded that "[t]he sources discussed thus far, even if viewed in toto, are not clearly dispositive of the issues involved in this case." *Id.*

42. See *supra* note 37. Prior to the enactment of the TAA and the Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1771 (1980), commentators considered the statutory scheme for judicial review inadequate. See generally Vance, *Judicial Review of Antidumping Orders in the United States and the European Economic Community*, 26 N.Y.L.S. L. REV. 577 (1981) (recent improvements in judicial review of U.S. administrative determinations compared with those of the E.E.C.). The TAA and the Customs Court Act of 1980 effected a sweeping overhaul of U.S. unfair import law. See Note, *Judicial Review of Antidumping Cases and the Trade Agreements Act of 1979: Towards a Unified System of Review*, 14 J. INT'L L. & ECON. 101 (1979).

The scope of judicial review of final antidumping administrative determinations is defined to be whether the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(3)(b)(1) (1982 & Supp. III 1985). The United States Supreme Court has determined that as long as an agency does not act in express violation of statutory intent, courts should give substantial weight to the agency's interpretation of the statute it administers. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978). The Court explained that administrative practice has special weight when it involves the "construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* at 450 (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933)). Nevertheless, the Supreme Court has qualified the rule of deference to agency determinations, warning: "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for admin-

The court's primary rationale for its decision was that the subsidies in question could be more properly counteracted by the countervailing duty law.⁴³ The court also reasoned that consideration of subsidies exceeded the scope and purpose of the antidumping law.⁴⁴ The court further reasoned that if the subsidies were included in constructed value, the ITA would be required to consider subsidies without undertaking a countervailing duty investigation.⁴⁵ Thus, the court suggested that defendants might be deprived of due process safeguards unique to the countervailing duty law, particularly those concerning whether a countervailable subsidy exists.⁴⁶ Finally, the CIT held that subsidy inclusion would create substantial uncertainty among exporters because benefits which were not previously countervailable could be attacked.⁴⁷

A. Authority for Subsidy Consideration in Constructed Value

Neither the cost of production section⁴⁸ nor the constructed value section⁴⁹ of the antidumping law expressly addresses whether domestic subsidies may be considered in constructed value calculations. Furthermore, legislative history, judicial precedent, and administrative practice establish little controlling authority for the CIT's exclusion of subsidies from constructed value calculations.⁵⁰ These sources of statutory interpretation provide even less authority for the refusal to consider non-countervailable subsidies that benefit or supplement production costs in the constructed value calculation.

istrative action strict and demanding, *expertise*, . . . can become a monster which rules with no practical limits on its discretion.' " *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962); see Kennedy, *Judicial Review of Commerce Department Antidumping Duty Determinations: Deference or Abdication?*, 11 N.C. J. INT'L & COM. REG. 19, 33 (1986).

43. 651 F. Supp. at 1430.

44. *Id.* at 1429.

45. *Id.* at 1430.

46. *Id.*

47. *Id.*

48. 19 U.S.C. § 1677b(b) (1982).

49. 19 U.S.C. § 1677b(e) (1982 & Supp. III 1985).

50. 651 F. Supp. at 1425-29.

1. Legislative History and Subsidy Inclusion in Constructed Value

The Trade Act of 1974⁵¹ broadened the use of constructed value by adding the cost of production section, under which the ITA must use constructed value instead of home market price in cases of home market dumping.⁵² "Home market dumping" is defined as sales in the home market that fall below the cost of production and that do not allow the manufacturer to cover costs within a reasonable time in the normal course of trade.⁵³ The House Report accompanying the 1974 Act comments on the determination of home market dumping, but is inconclusive on the propriety of subsidy inclusion in the cost of production section.⁵⁴ It specifies that the generally accepted accounting principles of the country of origin will be used to determine whether home market dumping exists, as long as such principles reasonably reflect the variable and fixed

51. Pub. L. No. 93-618, 88 Stat. 1978 (1974). The Trade Act of 1974 amended section 205 of the Antidumping Act of 1921, ch. 14, § 205, 42 Stat. 9, 13, to provide for the use of constructed value in cases of home market dumping. This provision remains law. 19 U.S.C. § 1677b(b) (1982). See generally Campbell, *The Foreign Trade Aspects of the Trade Act of 1974* (pt. 2), 33 WASH. & LEE L. REV. 639, 658-63 (1976).

52. See H.R. REP. NO. 571, 93d Cong., 1st Sess. 71 (1973). This House Report accompanied the Trade Act of 1974, which added the cost of production section—19 U.S.C. § 1677b(b)—and explained that the accounting principles generally accepted in the country of export should be used in determining whether merchandise has been sold at less than cost "if [the ITA] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." *Id.* It is ambiguous whether these variable and fixed costs include all costs incurred in the production of the merchandise (costs assumed by manufacturer and subsidizer), or only the costs incurred by the manufacturer. Since a cost of production section finding of home market sales less than value is often followed by a constructed value determination, the cost components of both have similar purposes: to accurately approximate the value of imported goods for the eventual purpose of imposing a dumping duty that reflects the extent of discriminatory pricing. Therefore, the suggested limitation of *Al Tech Specialty* is consistent with the fair price comparison required under the antidumping law. The antidumping law should be applied so that the comparison between foreign market value and United States price is an "apples to apples" comparison that accurately measures the dumping margin. See *Smith-Corona v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

53. 19 U.S.C. § 1677b(b).

54. See H. REP. NO. 571, *supra* note 52, at 71. Due to the similarity of the cost components in the cost of production and constructed value sections, authority to include certain subsidies within the cost of production in order to accurately "reflect the variable and fixed costs of producing the merchandise" would suggest inclusion in constructed value.

costs of producing the merchandise.⁵⁵ Even though the generally accepted accounting principles of the country of export may not expressly require subsidy consideration in cost of production, the consideration of such subsidies may be necessary to reasonably reflect the producer's variable and fixed costs.⁵⁶ Indeed, the primary purpose of the cost of production section was to ensure a more accurate dumping margin.⁵⁷ The issue remains, however, whether the ITA may consider a subsidy that benefits production in calculating cost of production or constructed value to more accurately reflect the variable and fixed costs of production.

The Trade and Tariff Act of 1984⁵⁸ did not incorporate an input dumping proviso⁵⁹ that, in effect, would have permitted the ITA to construct the value of the materials or components used in producing a dumped product if those materials were dumped in the exporter's home market.⁶⁰ Access to a dumped production component would constitute a benefit to production as much as any government subsidy. By counteracting such a government-provided dumped-production input under this proviso, the ITA would have been capable of counteracting a production-benefitting subsidy with the antidumping law.⁶¹

2. Judicial Precedent and Subsidy Inclusion in Constructed Value

Prior to *Al Tech Specialty*, no conclusive judicial precedent existed interpreting whether subsidies may be considered, to the extent they benefit production, in calculating the cost component of constructed value.⁶² Furthermore, no court has resolved this issue in the context of non-countervailable subsi-

55. *Id.*

56. *Id.*

57. *Id.*

58. Pub. L. No. 98-573, 98 Stat. 2948 (codified in scattered sections of 19 U.S.C.); see Bello, *Current Subsidy and Antidumping Issues After the Trade and Tariff Act of 1984*, 21 *STAN. J. INT'L L.* 299 (1985).

59. See Bello, *supra* note 58, at 319-20. The Trade and Tariff Act did add an upstream subsidies section, 19 U.S.C.A. § 1677-1 (West Supp. 1987), which allows the ITA to counteract countervailable subsidies made on production components.

60. Bello, *supra* note 58, at 319-20.

61. *Id.*

62. *Al Tech Specialty*, 651 F. Supp. at 1426-28.

dies that benefit production.⁶³ The first judicial consideration of whether foreign government subsidies may be included within constructed value, *J.H. Cottman v. United States*,⁶⁴ favored subsidy inclusion. The *Cottman* holding probably is distinguishable from the current subsidy issue. If *Cottman* were decided today, the market distortion created by government subsidization would be addressed by the antidumping law's state-controlled economy section, which was enacted in 1974.⁶⁵ Under this section of the antidumping law, the ITA employs the home market price or constructed value of such or similar merchandise from a comparable market economy country.⁶⁶ If *Cottman* were decided under this section, the foreign market value would not be distorted by the foreign government's subsidy as long as the ITA could find a comparable market economy surrogate that produced similar unsubsidized merchandise. Thus, a court would not be compelled to factor this government input subsidy in constructed value.

The persuasiveness of *Cottman* is also limited by *European Trading Co. v. United States*,⁶⁷ which was decided eight years later. In *European Trading*, the Court of Customs and Patents

63. *Id.* Thus, the inclusion of countervailable subsidies in constructed value was a novel issue for the CIT. None of the cases involving subsidies not countervailable under the generally available rule, *see infra* notes 102-108, have considered this issue. *See, e.g.* *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986); *Agrexco Agricultural Export Co. v. United States*, 604 F. Supp. 1238 (Ct. Int'l Trade 1985); *Bethlehem Steel Corp. v. United States*, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984); *Carlisle Tire & Rubber Co. v. United States*, 5 Ct. Int'l Trade 229, 564 F. Supp. 834 (1983).

64. *J.H. Cottman & Co. v. United States*, 20 C.C.P.A. 344, *cert. denied* 289 U.S. 750 (1932). In *Cottman* the Court of Customs and Patent Appeals ("CCPA") found that the government had a monopoly on the production and sale of phosphate in Morocco, and that no usable home market or third country sales existed. *Id.* at 352. In a constructed value calculation, the court held that even though production costs were covered by the government, they could not be discounted to zero. *Id.* at 358-59. By holding that production costs must be greater than zero, the court in effect held that production benefitting subsidies had to be given some value and included in the constructed value calculation. *Id.* at 358-60.

65. 19 U.S.C. § 1677b(c) (1982).

66. 651 F. Supp. at 1427. The *Al Tech Specialty* court suggested that the state-controlled economy section would probably apply if *Cottman* were decided today. *See id.*

67. *United States v. European Trading Co.*, 27 C.C.P.A. 289 (1940). In *European Trading*, a German producer of wire fish netting received an export rebate from its wire rod supplier, which the Customs appraiser categorized as a subsidy, adding it to "cost of production." *Id.* at 296.

Appeals ("CCPA") held that an export subsidy should not be added to constructed value.⁶⁸ Instead, the CCPA unanimously held that the customs appraiser should use the producer's actual cost in constructed value.⁶⁹ The *European Trading* court rejected the use of subsidies in antidumping actions and warned against the unnecessary commingling of antidumping and countervailing duty law.⁷⁰ Nevertheless, *European Trading* is distinguishable from the limited inclusion of non-countervailable subsidies because the export subsidy in that case was countervailable, and, therefore, could be fully counteracted.⁷¹

Customs valuation⁷² cases have held that subsidies may be included in constructed value,⁷³ but such decisions are persuasive only to the extent that the valuation policies in customs law for subsidy inclusion are consistent with the policies of the antidumping law.⁷⁴ The 1958 antidumping amendments abandoned the term "cost of production"⁷⁵ and adopted the term

68. *Id.* at 296.

69. *Id.* at 296-97.

70. *Id.* The *European Trading* court rejected consideration of countervailable export subsidies in antidumping actions and the cross-fertilization of antidumping and countervailing duty concepts. *Id.* at 297. As in *Al Tech Specialty*, the *European Trading* court contemplated the countervailing duty law as a more appropriate remedy. *Id.*

71. 27 C.C.P.A. at 297. The *European Trading* court explained:

[T]he antidumping act contains no express provision covering rebates, gratuities or grants, such as was provided in the countervailing duty provision to the Tariff Act of 1930. Incidentally, it may be said also that at the time of the passage of the antidumping act in 1921, the 1913 Tariff Act, which contained a countervailing duty provision . . . was in force and continued in force for sometime thereafter.

Id.

72. See generally R. STURM, CUSTOMS LAW AND ADMINISTRATION § 43.2 (1986).

73. *Ford Motor Co. v. United States*, 29 Cust. Ct. 553 (1952). The court held that pattern equipment made by a U.S. importer is properly added into the cost of production of rough iron castings manufactured in and exported from Canada. *Id.* at 557. It also said that the purpose of the cost of production statute in customs valuation law is "to derive, not the manufacturer's actual cost, but the actual cost of manufacture." *Id.* at 557; see also *Ravenna Mosaics Inc. v. United States*, 49 Treas. Dec. 699 (1926). In *Ravenna Mosaics*, the court held that the cost of preparing design sketches, which was paid by the U.S. importer, was properly added as a production cost of mosaics exported to the United States. 49 Treas. Dec. 699.

74. *Al Tech Specialty*, 651 F. Supp. at 1427-28; see also *Television Receiving Sets, Monochrome and Color, From Japan; Final Results of Administrative Review of Antidumping Finding*, 46 Fed. Reg. 30,163 (Int'l Trade Admin. 1981) (stating that judicial decisions interpreting the phrase "freely offered" in the context of customs laws are irrelevant to interpreting the antidumping law).

75. S. Rep. No. 1619, 85th Cong., 2d Sess. 14-15, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3499, 3505.

"constructed value,"⁷⁶ which was the term derived from the Customs Simplification Act of 1956⁷⁷ and used in customs valuation.⁷⁸ Notwithstanding the use of identical terms, customs valuation cases are at most suggestive of the possibility of considering subsidies within a constructed value context.⁷⁹

3. Administrative Practice and Subsidy Inclusion in Constructed Value

In the past the ITA has deducted government subsidies from reported costs in calculating constructed value.⁸⁰ However, it no longer subtracts subsidies⁸¹ and recently has refused to add such subsidies to reported costs.⁸² The ITA currently relies on the producer's costs as reflected in properly maintained books and records.⁸³ Thus, there is no long-stand-

76. *Id.*

77. The Customs Simplification Act of 1956, ch. 887, 70 Stat. 943, 944 (1956), applied to all merchandise except a few specific items left on a "final list" for valuation under the retained 1930 Act. E. ROSSIDES, *supra* note 19, at 132-38. Under the 1956 Act constructed value was used if export value and United States value could not be found. Similar to the constructed value of the antidumping law, the constructed value of the 1956 Act was the sum of the following costs: materials, fabrication and processing, plus the cost of containers, coverings, and packing for shipment. E. ROSSIDES, *supra* note 19, at 110-34.

78. E. ROSSIDES, *supra* note 19, at 110-34.

79. *Al Tech Specialty*, 651 F. Supp. at 1427-28.

80. See Preliminary Determinations of Sales at Not Less Than Fair Value: Certain Steel Products from the Netherlands, 47 Fed. Reg. 35,664 (Int'l Trade Admin. 1982) [hereinafter Steel Products From the Netherlands] (production costs absorbed by government grants that were subtracted to calculate cost of production to avoid possible double counting of subsidies in concurrent antidumping and countervailing duty investigations).

81. Compare *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421 (Ct. Int'l Trade 1986) (Commerce relied on the costs reflected in the manufacturer's financial statement) with Steel Products From the Netherlands, *supra* note 80 and Red Raspberries from Canada; Final Determination of Sales at Less Than Fair Value, 50 Fed. Reg. 19,768 (Int'l Trade Admin. 1985) (wage rebate benefits subtracted as offsets to costs since such benefits were attributable directly to raspberry production). See generally *Washington Red Raspberries Commission v. United States*, 657 F. Supp. 537, 541-42 (Ct. Int'l Trade 1987) (CIT affirms ITA's subtraction of wage rebate benefits from costs, citing *Al Tech Specialty* as authority for not adding wage benefits to the cost component of constructed value).

82. See Steel Products from the Netherlands, *supra* note 80; see also Certain Steel I-Beams from Belgium, Antidumping Determination of Sales at not Less than Fair Value, 44 Fed. Reg. 54,579 (Int'l Trade Admin. 1979).

83. The current Commerce policy is articulated in Import Administration Policy Paper #13 as follows:

Where a producer receives an outright grant or other bounty from its gov-

ing administrative practice on which litigants would have relied. Because no long-standing administrative practice exists to support either adding subsidies or reliance on costs as documented in the producer's books and records, prior administrative practice in antidumping actions provides no controlling authority for either approach.⁸⁴

B. *Policy Rationales for the Refusal to Consider Subsidies that Benefit Production when Constructing Foreign Market Value*

In *Al Tech Specialty*, the CIT emphasized that the subsidies in question were countervailable.⁸⁵ Subsidy inclusion was unnecessary because the subsidy could be counteracted through the countervailing duty law. Indeed, the countervailing duty law is the proper remedy for such subsidies.⁸⁶ However, the court's other reasons for excluding subsidies that benefit production from constructed value are less persuasive, particularly in the context of non-countervailable subsidies that benefit production.

1. The Concern About Commingling Countervailing and Antidumping Laws

In *Al Tech Specialty*, the CIT stated that the ITA should rely on the costs as documented in the producer's books and records, and that it would be improper to include subsidies in the cost component of constructed value.⁸⁷ The CIT added

ernment, the amount of the benefit is not included as a cost of production to the producer. Only the actual costs of the producer as reflected in its financial statements and traced down to its accounts is included in its cost of production, that is, there is no imputation of costs.

Id. See H.R. REP. No. 571, *supra* note 52, at 71 (1973).

84. *Al Tech Specialty*, 651 F. Supp. at 1429. The *Al Tech Specialty* court concluded that "past administrative practice in antidumping cases supports neither side." *Id.*

85. 651 F. Supp. at 1430. The *Al Tech Specialty* court wrote "[E]ven if the impact of Saarstahl's subsidies was substantial and it avoided penalties solely through the election of favorable accounting procedures, plaintiffs' claim is still more properly addressed by countervailing duty law." *Id.*

86. *Id.*; see also *Huffy Corp. v. United States*, 632 F. Supp. 50, 55-56 (Ct. Int'l Trade 1986). This case was cited in *Al Tech Specialty* for the proposition that the court should avoid consideration of subsidies in an antidumping determination since the determination of whether a countervailable subsidy exists is a complex one and Congress has provided a separate set of guidelines for this determination. See *Al Tech Specialty*, 651 F. Supp. at 1430.

87. 651 F. Supp. at 1430. The *Al Tech Specialty* court wrote: "Utilizing producers' records of cost of production, kept in accordance with generally accepted local ac-

that the calculation of subsidies is not within the scope of the antidumping law, and further distinguished the purpose of the antidumping law from that of the countervailing duty law.⁸⁸ The court explained that the antidumping law counteracts the comparative advantage of foreign manufacturers who employ inconsistent pricing policies in the international market.⁸⁹ In contrast, it reasoned that countervailing duty law protects domestic industries from the market distortions caused by foreign subsidization.⁹⁰ Thus, both laws protect domestic competitors from unfairly low import prices. The court, however, contended that the amount of foreign subsidies received does not directly correlate to a firm's disparate pricing practices.⁹¹ Prices can be raised or lowered independent of the effects of subsidization. The focus of each law generally differs, and, therefore, the countervailing duty and antidumping remedies should not be commingled if the subsidy can be countervailed.⁹²

counting procedures, which procedures reasonably reflect fixed and variable costs, allows Commerce to administer the antidumping laws without undertaking an unauthorized countervailing duty investigation." *Id.*

88. *Id.* at 1429.

89. *Id.*

90. *Id.* at 1430; see also Ehrenhaft, *supra* note 16, at 58-59.

91. 651 F. Supp. at 1430.

92. E. ROSSIDES, *supra* note 19, at 253-54. The simple, traditional difference between antidumping law and countervailing duty law is best illustrated as follows:

Example 1: A German Sewing machine manufacturer, Singer, sells its product in Germany for \$100. It sells the same machine in the United States for \$75 (after adjustments for shipping, etc.). Singer receives no financial assistance from the German government in connection with the production or export of the machines. Only the antidumping law would apply since there is no element of subsidy. *Id.* at 253.

Example 2: LaCarona, an Italian manufacturer, receives a government subsidy payment equivalent to \$5 for each typewriter it exports. This enables it to sell its typewriters for \$92.50 or the equivalent in both Italy and the United States. Were it not for the subsidy, the price would be \$95 in both places. In this case, only the countervailing duty law would apply because, although there is subsidy, there is no price discrimination. *Id.* at 253.

Example 3: The Netherlands pays exporters of processed cheese an export subsidy of 2 cents per pound. Prochesse, a Dutch company, sells processed cheese for 37 cents a pound in the Netherlands and 35 cents (after adjustments) to the United States. A complaint could be filed with the Commerce Department asking for relief under either or both of these laws, because elements of both price discrimination and subsidy exist in this case. The added duty would, on the facts given, be the same under either law.

Id. at 254.

2. The Concern that Subsidy Inclusion Denies Exporters a Full Hearing on Whether the Benefit is a Subsidy

The CIT also rationalized that subsidy inclusion in constructed value would allow the ITA to counteract subsidization without undertaking any of the procedural protections contained in the countervailing duty statute.⁹³ The CIT explained that exporters should not be deprived of the opportunity to have a full hearing at the agency level concerning whether the benefits are subsidies as defined in Title VII of the Tariff Act of 1930.⁹⁴ This apprehension is overstated because, as demonstrated in *Al Tech Specialty*, exporters may demonstrate to the ITA that the subsidy does not benefit production, and thus should not be included in constructed value.⁹⁵

3. Uncertainty Among Exporters

The CIT also based subsidy exclusion on its concern for certainty in the administration of the United States trade laws.⁹⁶ The CIT explained that subsidy inclusion in constructed value would result in substantial uncertainty among exporters because benefits not previously countervailable

93. *Al Tech Specialty*, 651 F. Supp. at 1430 (citing *Huffy Corp. v. United States*, 632 F. Supp. 50, 55-56 (Ct. Int'l Trade 1986)).

94. The Trade Agreements Act of 1979 ("TAA"), which added a new Title VII to the Tariff Act of 1930, defines "subsidy" as a "bounty or grant" as that term is used in section 303 of this Act [19 U.S.C. § 1303], and includes, but is not limited to, the following:

- (A) Any export subsidy described in Annex A to the [GATT]
- (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class of merchandise:
 - (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
 - (ii) The provision of goods or services at preferential rates.
 - (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
 - (iv) The assumption of any costs or expenses of manufacture, production, or distribution.

19 U.S.C. § 1677(5) (1982 & Supp. III 1985).

95. 49 Fed. Reg. 2995, 2996 (Int'l Trade Admin. 1984). During the dumping proceeding, the defendant in *Al Tech Specialty* argued that the government subsidies it did receive were used to restructure facilities from which its tool steel operations did not benefit. *Id.*

96. *Al Tech Specialty*, 651 F. Supp. at 1430.

could be attacked.⁹⁷ While the uncertainty argument has some merit in a case involving countervailable subsidies, it is much less convincing when non-countervailable subsidies benefit production since the existence of such subsidies in a constructed value case would be rare indeed.⁹⁸

III. A PROPOSED ADDITION OF NON-COUNTERVAILABLE SUBSIDIES TO CONSTRUCTED VALUE

Non-countervailable subsidies that benefit production should be added to constructed value to accurately measure the dumping margin.⁹⁹ One example of a subsidy that is not countervailable is one that is generally available.¹⁰⁰

A. *The Generally Available Rule*

The generally available rule resulted from the ITA's interpretation that the countervailing duty law, which defines a subsidy as a bounty or grant,¹⁰¹ requires that the purported subsidy provide a benefit to a specific enterprise or industry, or

97. *Id.*

98. See *infra* note 129 and accompanying text.

99. See *infra* notes 109-134 and accompanying text. The example of "assists" in customs valuation may lend some support to the argument for subsidy inclusion in constructed value. In customs valuation, assists are added to constructed value. See *Lionel Trading Co. v. United States*, 24 C.C.P.A. 432 (1937); *Troy Textiles v. United States*, 64 Cust. Ct. 654 (1970); *Ford Motor Co. v. United States*, 29 Cust. Ct. 553 (1952); *Ravenna Mosaics Inc. v. United States*, 49 Treas. Dec. 699 (1926). There is no definition of "assists" in the statutes or regulations, but they generally constitute anything of value furnished to a manufacturer, free of charge or at less than full value, which is necessary for the production of the particular imported good. R. STURM, *supra* note 72, § 43.2, at 12.

The use of "assists" as an example of how constructed value could be interpreted in antidumping law is persuasive only to the extent that the policies for subsidy inclusion in customs valuation are consistent with the policies of the antidumping law. See *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421 (Ct. Int'l Trade 1986). The ITA often has refused to follow customs valuation precedents where to do so would impede the specific policies of the antidumping law. See *Television Receiving Sets, Monochrome and Color, From Japan: Final Results of Administrative Review of Antidumping Finding*, 46 Fed. Reg. 30,163 (Int'l Trade Admin. 1981) (ITA stated that judicial precedent interpreting the phrase "freely offered" in the customs valuation context is irrelevant to interpreting the antidumping law).

100. See Bello, *supra* note 58, at 312-14; Powell & Concannon, *Stare Decisis in the Court of International Trade: One Court or Many?*, in U.S. TRADE LAW AND POLICY 375-85 (1987).

101. 19 U.S.C. § 1677(5) (1982); see *supra* note 94 and accompanying text.

group of enterprises or industries.¹⁰² Under this requirement, a nation-wide domestic subsidy, such as a two-hundred-percent tax deduction for employee training, would not be subject to countervailing duties.¹⁰³ More recently, the ITA has refused to countervail several subsidies because their benefits were not limited to a specific group of enterprises or industries.¹⁰⁴ Such non-countervailable benefits include: a government funded fisheries management program, the results of which were published and generally accessible; government grants and loan insurance that were not limited to a specific industry or enterprise; programs that cover half the cost of attending important

102. See E. McGOVERN, *supra* note 25, § 12.113. The statute's reference to "specific" enterprises or industries has been taken by the ITA to mean that generally available assistance is excluded from the scope of the countervailing duty law. *Id.* at 351. The ITA has held to this view even when the number of domestic firms which could make use of the particular advantage was very small. *Id.*; see S. REP. NO. 249, 96th Cong., 1st Sess. 84, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 470. The definition of "subsidy" is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term "bounty or grant" under section 303 and the Tariff Act of 1930, unless that practice or interpretation is inconsistent with the bill. *Id.*

Several examples of non-countervailable production benefits exist. See, e.g., Unprocessed Float Glass from Mexico, 49 Fed. Reg. 23,097 (Int'l Trade Admin. 1984) (aid to firms with foreign indebtedness are not subsidies); Certain Fresh Cut Flowers from Mexico, 49 Fed. Reg. 15,007 (Int'l Trade Admin. 1984) (loans for agricultural production are not subsidies); Pork Rind Pellets from Mexico, 48 Fed. Reg. 39,105 (Int'l Trade Admin. 1983) (loans to all small and medium-sized firms are not subsidies, but preferential loans to priority-status medium-sized firms are countervailable subsidies); Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522 (Int'l Trade Admin. 1983) (low-priced natural gas available to all industries is not a subsidy); Certain Softwood Products from Canada, 48 Fed. Reg. 39,105 (Int'l Trade Admin. 1983) (standing timber generally available to industry is not a subsidy); Industrial Nitrocellulose from France, 48 Fed. Reg. 11,971, 25,254 (Int'l Trade Admin. 1983) (aid to firms employing young people is not a subsidy); Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618 (Int'l Trade Admin. 1983) (water for farmers is not a subsidy); Certain Steel Products from Netherlands, 47 Fed. Reg. 39,372 (Int'l Trade Admin. 1982) (funding for a relatively small group of high-technology industries is not a subsidy); Certain Steel Products from France, 47 Fed. Reg. 39,332 (Int'l Trade Admin. 1982) (aid towards pensions in extractive industries are not a subsidy). See generally E. McGOVERN, *supra* note 10, at 351.

103. See *Bethlehem Steel Corp. v. United States*, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984). According to this court, "[t]ax laws become bounties or grants to the taxpayer only if the elimination, or reduction of the tax is selective." *Id.* at 349.

104. Certain Refrigeration Compressors from the Republic of Singapore; Final Results of Administrative Review of Suspension Agreement, 50 Fed. Reg. 30,493 (Int'l Trade Admin. 1985) [hereinafter Refrigeration Compressors from the Republic of Singapore]. See Bello, *supra* note 58, at 312-14; Powell & Concannon, *supra* note 100, at 375-85.

trade shows in cases where the firm can demonstrate that it will be in a position to pursue business orders received at such shows; and a program offering up to a \$50,000 grant for manufacturers to develop new market opportunities and new products in Newfoundland, Canada.¹⁰⁵

While the generally available rule first emerged as a broad limitation on countervailing subsidies, it has been a point of contention between the CIT and the ITA.¹⁰⁶ In apparently contradictory opinions, the CIT first severely limited, and then later broadened the scope of the generally available rule.¹⁰⁷ Nonetheless, this rule remains an exception to countervailable subsidies.¹⁰⁸

B. An Argument for the Inclusion of Non-countervailable Subsidies That Benefit Production in Constructed Value

In the case of non-countervailable subsidies which benefit

105. Final Affirmative Countervailing Duty Determination; Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,107-09 (Int'l Trade Admin. 1985).

106. For example in *Carlisle Tire & Rubber Co. v. United States*, 5 Ct. Int'l Trade 229, 564 F. Supp. 834 (1983), the court found two accelerated depreciation programs generally available, thus not countervailable. *Id.* at 836. Both programs allowed corporations to take an additional twenty percent depreciation beyond that normally taken. The requirements for taking advantage of one of these benefits was that the factory or machinery in question was in operation at least twelve hours daily. *Id.* The second benefit applied to all corporations with a history of keeping accurate records, including tax returns. In *Bethlehem Steel Corp.*, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984), the CIT limited the generally available rule to tax laws and criticized the broader rule it established in *Carlisle Tire & Rubber*, 7 Ct. Int'l Trade at 349-50, 590 F. Supp. at 1246. See Powell & Concannon, *supra* note 100, at 375-85. Nonetheless, the ITA in *Refrigeration Compressors from the Republic of Singapore*, *supra* note 104, at 30,494 wrote: "We do not consider generally available programs to be countervailable. The petitioner's reliance on *Bethlehem Steel* is misplaced since the court in that case upheld our determination that a generally available tax benefit is not countervailable. The court's further comments in *Bethlehem Steel* on general availability are dicta." *Id.*

107. Compare *Bethlehem Steel Corp. v. United States*, 7 Ct. Int'l Trade 339, 590 F. Supp. 1237 (1984) with *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985) and *Carlisle Tire & Rubber Co. v. United States*, 5 Ct. Int'l Trade 229, 564 F. Supp. 834 (1983). See generally Bello, *supra* note 58, at 312-14; Powell & Concannon, *supra* note 100, at 375-85.

108. See E. McGOVERN, *supra* note 25, § 12.113; Bello, *supra* note 58, at 312-14; Bello & Homer, *Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test*, 18 GEO. WASH. J. INT'L L. & ECON. 297 (1984); Jameson, *The Administration of the United States Countervailing Duty Laws with Regard to Domestic Subsidies: Where It's Been, Where It Is and Where It May Go*, 12 SYRACUSE J. INT'L L. & COM. 15, 78-86 (1985).

production the inclusion of subsidies would not conflict with precedent. Moreover, the original purpose of constructed value—the accurate measurement of foreign market value—is furthered by the addition of subsidies that are not countervailable, but that still benefit production.¹⁰⁹

Since the enactment of the Trade Agreements Act of 1979 ("TAA"),¹¹⁰ countervailing duty and antidumping laws have been administered by the same agencies under similar procedures.¹¹¹ Dumping margin and subsidy determinations are both made by the ITA, and the injury determinations under both statutes are made by the International Trade Commission ("ITC").¹¹² Therefore, the administrative details of providing adequate process for subsidized defendants in an antidumping proceeding should not be as onerous as the CIT suggests.¹¹³

109. The purpose of antidumping law is to counteract discriminatory pricing between national markets that allows foreign producers to sell below cost in the United States. J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923); see Applebaum, *The Antidumping Laws—Impact on the Competitive Process*, 43 ANTITRUST L.J. 590, 591-93 (1974); see also Applebaum, *Foreign Predation and Price Discrimination Against U.S. Firms—Antidumping Under Title VII*, in 1984 FORDHAM CORPORATE LAW INSTITUTE 1 (B. Hawk ed. 1985). The cost of production section, 19 U.S.C. § 1677b(e) (1982 & Supp. III 1985), of the Trade Act of 1974 emphasizes the importance of accurately detecting and measuring dumping:

The purpose of the amendment is to prevent foreign sales below cost of production being used as the basis for determining whether sales of such merchandise to the United States are at less than the foreign market value. Otherwise, sales below cost to purchasers in the United States could be exempted from the provisions of the Act if sales prices in the home market or to third countries are also below cost by an equal or greater amount.

The Trade Reform Act of 1973: Hearings on H.R. 10710, Before the Senate Committee on Finance, 93d Cong., 2d Sess. 311 (1974).

According to the Report of the Senate Finance Committee, "[t]he Committee is concerned that, in the absence of such a provision, sales uniformly made at less than cost of production could escape the purview of the Act, and thereby cause injury to United States industry with impunity." S. REP. NO. 1298, 93d Cong., 2d Sess. 173, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7310.

110. Pub. L. No. 96-39, 93 Stat. 144 (1979). See generally Barcelo, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 285 (1980).

111. See generally Barringer & Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1 (1980); Note, *The Trade Agreements Act of 1979: Countervailing Duty and Antidumping Duty Procedures*, 14 J. INT'L L. & ECON. 63 (1980).

112. H. KAYE, P. PLAIA & M. HERTZBERG, *supra* note 26, § 18.03.

113. Cohen, *The Trade Agreements Act of 1979: Executive Agreements, Subsidies, and Countervailing Duties*, 15 TEX. INT'L L.J. 96, 109 (1980). The procedure for imposition of dumping duties closely resembles that for countervailing duties. The dumping

Furthermore, concurrent consideration of subsidy and dumping issues might expedite proceedings where the foreign producer arguably has benefitted from subsidies that may be found generally available. Although concurrent consideration of subsidy and dumping data would complicate the ITA's administrative responsibilities, a plaintiff may clearly petition the ITA under both the antidumping and countervailing duty laws where dumping and subsidization exist. The administrative burden of considering alleged subsidies in the context of the antidumping law could be minimized if limited to actions where the petitioner makes a prima facie showing that a subsidy exists. If the ITA then determines that a subsidy that benefits production exists but is generally available, it should be free to include the subsidy in constructed value to the extent it benefits production.

The *Al Tech Specialty* court based its holding on the fact that the subsidies in question would be better counteracted with the countervailing duty law.¹¹⁴ In the case of a generally available subsidy that cannot be countervailed, the *Al Tech Specialty* court's most compelling rationale—that the subsidy may be countervailed—would not exist. Furthermore, the CIT's other policy concerns fail to compel the *Al Tech Specialty* holding in the context of non-countervailable subsidies.

1. Subsidy Inclusion in Constructed Value and the Proper Scope of U.S. Antidumping Law

The CIT's first policy consideration, the scope of the antidumping law, militated against blurring the distinction between antidumping and countervailing duty law. However, the purpose of both laws is to eliminate the advantage of an importer that can unfairly underprice domestic competition.

investigation begins in the same manner as under the countervailing duty law, and the threshold determinations under both laws are very similar. *Id.* at 109. Since antidumping and countervailing duty determinations are roughly similar in procedure, the administrative burden of occasionally considering non-countervailable subsidies in antidumping determinations would not be prohibitively burdensome and would be within the ITA's authority. See generally G. BRYAN, *supra* note 18, at 7. Because of the vagueness of the statutory definitions and the generality of those regulations that have been issued, agency discretion has been widely exercised in interpreting this statute. *Id.*

114. See *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1430 (Ct. Int'l Trade 1986).

While each law counteracts a different unfair activity—*i.e.*, price discrimination and subsidization—both exist to protect domestic producers from the unfairly low pricing practices of foreign exporters.¹¹⁵

If a non-countervailable subsidy benefits production and the foreign market value is constructed, then the subsidy should be added to constructed value in order to accurately reflect the producer's variable and fixed production costs.¹¹⁶ If the subsidy in question is not countervailable, there is no blurring or commingling of the laws, as the countervailing duty law does not come into play. Subsidy inclusion is essential for the accuracy of the constructed value calculation. Such inclusion results in a more accurate foreign market value, as measured by constructed value, and ensures that the dumping duty will more accurately approximate the true degree of disparate pricing.¹¹⁷ Moreover, if the subsidy benefits production, but is not countervailable, its inclusion in constructed value is consistent with the purpose of accurately measuring discriminatory pricing between national markets.¹¹⁸

2. Subsidy Inclusion in Constructed Value and the Defendant's Right to Process

The *Al Tech Specialty* court's concern that subsidy inclusion would allow the ITA to counteract subsidization without a determination of whether a subsidy exists, as defined in Title VII,¹¹⁹ also would not apply to non-countervailable subsidies.¹²⁰ In a determination of whether certain subsidies should be considered within constructed value, the relevant issue is the extent to which these subsidies diminished the foreign manufacturer's production costs, *i.e.*, the extent to which they benefitted production.¹²¹ Furthermore, whether the subsidy

115. *Id.* at 1429-30.

116. G. BRYAN, *supra* note 18, at 15-16.

117. *See supra* note 109 and accompanying text.

118. *See supra* note 109 and accompanying text.

119. 19 U.S.C. § 1677(5) (1982).

120. *See supra* notes 93-95 and accompanying text.

121. *See* 50 Fed. Reg. 23,170 (Int'l Trade Admin. 1982). The *Al Tech Specialty* plaintiffs argued before the ITA that all manufacturing costs should be considered regardless of who bears the cost, since the subsidies merely shift costs from the producer to the government. *Id.* This interpretation of cost is consistent with the purpose of the constructed value and cost of production sections, which was to more

falls within the definition of bounty or grant is relevant only to determining whether it is countervailable, not whether it benefits production.¹²² Generally available subsidies clearly are not countervailable,¹²³ thus, whether such a subsidy falls within the statutory definition of subsidy is irrelevant. Accordingly, generally available subsidies are not subsidies under the Title VII definition.¹²⁴ Additionally, the non-countervailable subsidy situation suggests only a narrow application of subsidies to constructed value.¹²⁵

In the context of non-countervailable subsidies that benefit production, the concern that subsidy inclusion would deny exporters a full hearing on whether a countervailable subsidy exists is not germane. The appropriate issue in such a constructed value calculation is whether the generally available subsidy benefits production, and, if so, the extent of such benefit.¹²⁶ As demonstrated by the *Al Tech Specialty* defendant, defendants in dumping actions have the opportunity to contend that any alleged subsidies they may have received did not benefit production, and, therefore, could not be considered in a constructed value calculation.¹²⁷

accurately approximate foreign market value. *See supra* note 109 and accompanying text. According to the Senate Report that accompanied the Antidumping Act of 1921, the purpose of the old cost of production section, which is now the constructed value section, was

to create a constructive foreign market value based on the cost of material and labor at a time preceding the date of shipment of the imported merchandise which would ordinarily permit the manufacture or production of such merchandise in the usual course of business. It is *not limited to the actual cost of the imported merchandise*.

S. REP. NO. 16, 67th Cong., 1st Sess. 13 (1921) (emphasis added).

122. *See supra* notes 101-02 and accompanying text.

123. *See supra* notes 100-08 and accompanying text.

124. *Id.*

125. *See infra* note 129 and accompanying text.

126. *See supra* note 121 and accompanying text.

127. 49 Fed. Reg. 2995, 2996 (Int'l Trade Admin. 1984). In *Al Tech Specialty*, the defendant West German producer argued before the ITA that the benefits received did not accrue to the production of the tool steel under investigation. *Id.* In reference to non-countervailable subsidies under consideration in an antidumping investigation, the relevant defense is that the subsidies in question did not benefit the production of the merchandise in question. *Id.* Since the *Al Tech Specialty* defendant made this argument to the ITA, this case demonstrates that the defendant has the opportunity to assert the most relevant defense to subsidy inclusion in constructed value. *Id.* In an antidumping proceeding, the defendant has adequate process to argue that the non-countervailable subsidies at issue did not benefit the production of the goods under investigation.

3. Subsidy Inclusion and Uncertainty Among Exporters

The CIT's final policy concern was that subsidy inclusion would create uncertainty among exporters because benefits not previously countervailable could be counteracted.¹²⁸ This concern overstates the reality of including generally available subsidies in constructed value because this suggested inclusion would be rare. Indeed, the inclusion of subsidies is suggested only when the following four conditions concurrently exist: 1) the subsidy in question is not countervailable; 2) the subsidy significantly benefits production; 3) the ITA employs constructed value to represent foreign market value; and 4) the dumping in question is deleterious enough to materially injure or tend to materially injure domestic industry.¹²⁹ By focusing on uncertainty among exporters, the CIT has not considered the importance of accurately measuring foreign market value. If non-countervailable benefits subsidize production, then failure to consider them in constructed value represents a systematic flaw in the comparison of foreign market value and United States price.¹³⁰

In an earlier CIT case, *Connors Steel Co. v. United States*,¹³¹ the court decided that the existence of, or suspicion that, a subsidy benefits production should not affect the determination of whether the ITA investigates the prospect of home market dumping.¹³² Therefore, the ITA will not employ a constructed value as a result of home market dumping unless sufficient additional evidence, other than the presence of a subsidy,

128. *Al Tech Specialty*, 651 F. Supp. at 1430.

129. This Comment has not discussed the material injury requirement in detail, as this is not germane to the issue of statutory construction and the occasional inclusion of some subsidies in constructed value. Nonetheless, dumping is not actionable unless it either materially retards the establishment of an industry in the United States, or has materially injured or threatened material injury to an established domestic industry. 19 U.S.C. § 1671(a)(2) (1982 & III Supp. 1985).

130. See *supra* note 109 and accompanying text.

131. 2 Ct. Int'l Trade 242, 527 F. Supp. 350 (1981), *terms of remand modified*, 3 Ct. Int'l Trade 79, 566 F. Supp. 1521 (1982).

132. 2 Ct. Int'l Trade at 250, 527 F. Supp. at 358. If foreign market value is constructed because actual sales were disregarded pursuant to the cost of production section, see 19 U.S.C. § 1677b(b) (1982), evidence other than the subsidy of home market dumping should exist. Therefore, in constructed value determinations which result from a finding of sales at less than cost of production, there must exist additional evidence of below-cost home market sales apart from subsidies. *Connors Steel*, 2 Ct. Int'l Trade at 249-50, 527 F. Supp. at 358.

warrants an investigation of whether the home market price is less than fair market value.¹³³

The suggested inclusion of subsidies in constructed value is so narrow as to provide uncertainty among but a few foreign exporters, many of whom have benefitted from foreign subsidies and then dumped their products in the United States. Furthermore, the decision to investigate the existence of home market dumping is independent of subsidies.¹³⁴ Thus, if the ITA constructs foreign market value as a result of home market dumping, evidence of dumping must exist apart from the existence of subsidization. In the few cases embraced by this suggested inclusion of subsidies, the policy of accurately measuring the extent of dumping and remedying its unfair advantage outweighs any concern for uncertainty among a few exporters.

CONCLUSION

The Court of International Trade in *Al Tech Specialty* recently established a rule of excluding subsidies from constructed value, but it has yet to consider this issue in the context of non-countervailable subsidies. The determinative factors for subsidy exclusion were policy concerns, not judicial precedent, legislative history, or long-standing administrative practice. Where subsidies are generally available, however, economic policy and the need to accurately measure the dumping margin suggest that subsidies should be added to constructed value to the extent they benefit production. Thus, the CIT's refusal to add subsidies to constructed value should be limited to countervailable subsidies. The inclusion of non-countervailable subsidies to the extent they benefit production would not be inconsistent with precedent and legislative history, and would promote fair trade through the effective enforcement of U.S. antidumping law.

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133. *Connors Steel*, 2 Ct. Int'l Trade at 250, 527 F. Supp. at 358.

134. *Id.*

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