

1988

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Recommended Citation

Eid, Richardson N. "The Effect of *Georgetown Steel Corp. v. United States* on Nonmarket Economy Imports." *American University International Law Review* 3, no. 1 (1988): 65-97.

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NOTES AND COMMENTS

THE EFFECT OF *GEORGETOWN STEEL CORP. V. UNITED STATES* ON NONMARKET ECONOMY IMPORTS

Richard N. Eid*

INTRODUCTION

Foreign industrial competition increasingly threatens industry in the United States.¹ Media attention² focuses on the fact that United States companies have been unable to modernize and compete with lower priced foreign imports.³ Consequently, United States companies have been seeking legislative relief to curtail the damage foreign imports

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1. Comment, *U.S. Legislative Import Relief Options: A Comparison of Procedures*, 13 N.Y.U.J. INT'L L. & POL. 1049, 1049 (1981) [hereinafter Comment, *Import Relief Options*]; see also Thurow, *America Among Equals*, in *ESTRANGEMENT: AMERICA AND THE WORLD* 163-66 (S. Unger ed. 1985) (noting the decrease in United States economic strength and productive efficiency compared to other countries; Kennedy, *The (Relative) Decline of America*, ATLANTIC, Aug. 1987, at 29-30 (noting the relative decline of United States industrial and manufacturing output); S.D. COHEN, *THE MAKING OF U.S. INTERNATIONAL ECONOMIC POLICY* 207 (3d ed. 1987) (showing the decline of the United States manufacturing sector and global competitiveness and the increase of imports into the United States); D. MILLER, *INDUSTRIAL IMPORT SHOCK: POLICY CHALLENGE OF THE 1980'S* 1-62 (1985) (describing the decline of United States industrial competitiveness and output).

2. Comment, *Import Relief Options*, *supra* note 1, at 1049; see also Chirello, *Foreign Rivals Imperil U.S. Firms' Leadership in the Service Sector*, Wall St. J., Mar. 21, 1988, at 1, col. 6 (discussing foreign technological advances in the service industry, and how such advances have made global expansion easier); Rowen, *Legislation No Solution to Trade Deficit*, Wash. Post, Feb. 2, 1987, at A1, col. 3 (discussing the inability of United States industry to compete with foreign countries); Auerbach, *Senate Panel Seeks Japan Sanction*, Wash. Post, Mar. 12, 1987, at E1, col. 3 (noting the failure of Japan to maintain its semiconductor trade agreement, and discussing the Japanese practice of dumping computer chips in the United States and abroad at less than fair market value).

3. Comment, *Import Relief Options*, *supra* note 1, at 1049; see also Note, *Protecting Steel: A Time for a New Approach*, 96 HARV. L. REV. 866, 877 (1983) [hereinafter Note, *Protecting Steel*] (examining the inability of the United States steel industry to modernize and maintain efficient plants vis-à-vis foreign competition).

cause.⁴

One of the most confusing import relief issues concerns the redress that United States businesses seek against communist or nonmarket economies (NMEs).⁵ Complications arise in transactions with NMEs because a NME has no supply and demand forces, thus, creating difficulty in deriving the value of NME products.⁶ Until recently, courts used the antidumping law,⁷ countervailing duty law,⁸ and section 406⁹

4. Comment, *Import Relief Options*, *supra* note 1, at 1049; *see also* Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1574-75 (1984) (discussing the regulation of imports through legislative relief options). The clear trend of statutes Congress has enacted is toward a greater "legalization" or "judicialization" of the system, which serves to accelerate and facilitate judicial recourse to nontariff measures for restraining imports. *Id.* at 1573.

5. *See* Sandler, *Primer on U.S. Trade Remedies*, 19 INT'L LAW. 763, 766 (1985) (citing the complexities inherent in import legislation involving Communist countries); Horlick & Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807, 817-25 (1984) (discussing import relief measures involving NMEs); Comment, *Import Relief Options*, *supra* note 1, at 1049-50 (discussing the confusing array of remedies available to United States companies seeking relief against communist countries).

6. *See* *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314 (Fed. Cir. 1986) (stating that subsidies cannot be measured without a market economy); Horlick & Shuman, *supra* note 5, at 808-09 (discussing the problems countries with NMEs caused in drafting trade legislation).

7. 19 U.S.C. §§ 1673-1675 (1982 & Supp. IV 1986). The United States assesses an antidumping duty on imports sold at a price lower than fair value. *Id.* § 1673. The antidumping statute states:

If—

- (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
- (2) the Commission determines that —
 - (A) an industry in the United States
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

Id. § 1673.

8. 19 U.S.C. § 1303 (1982); 19 U.S.C. § 1671-1671f (1982 & Supp. IV 1986). The United States imposes countervailing duties when foreign governments convey subsidies to exporters that result in lower-priced goods. *Id.* § 1671(a). The countervailing duty statute states:

If—

- (1) the administering authority determines that—
 - (A) a country under the Agreement, or
 - (B) a person who is a citizen or national of such a country, or a corporation, association, or other organization organized in such a country,

of the Trade Act of 1974 as the primary remedies in import relief situations. The United States Court of Appeals for the Federal Circuit in *Georgetown Steel Corp. v. United States*, however, limited the application of these options when it held that the countervailing duty law is inapplicable to NMEs because the statute encompasses only market economy subsidies.¹⁰

This Note focuses on the decision of the court in *Georgetown Steel Corp. v. United States* and its effect on available import remedies. Part I provides a brief overview of the law on import relief. Part II examines the case history of *Georgetown Steel* and the court's reasons for proscribing the use of the countervailing duty law. Part III criticizes the analysis of the court in light of case law precedent and statutory laws.

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

- (2) the Commission determines that —
 - (A) an industry in the United States —
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

Id.

9. 19 U.S.C. § 2436 (1982). Under section 406 of the Trade Act of 1974, the two part process leading to an award of import relief begins with an ITC finding that imports cause serious injury. *Id.* Section 406 provides:

(1) Upon the filing of a petition by an entity described in section 2251(a)(1) of this title, upon request of the President or the United States Trade Representative, upon resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate, or on its own motion, the International Trade Commission (hereafter in this section referred to as the "Commission") shall promptly make an investigation to determine, with respect to imports of an article which is the product of a Communist country, whether market disruption exists with respect to an article produced by a domestic industry.

(3) The Commission shall report to the President its determination with respect to each investigation under paragraph (1) and the basis therefor and shall include in each report any dissenting or separate views. If the Commission finds, as a result of its investigation, that market disruption exists with respect to an article produced by a domestic industry, it shall find the amount of the increase in, or imposition of, any duty or other import restriction on such article which is necessary to prevent or remedy such market disruption and shall include such finding in its report to the President.

Id. § 2436(a).

10. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

Part IV discusses the effectiveness of the remaining remedial trade statutes. Part V proposes that to provide the most effective remedy for NME import situations, Congress should repeal the antidumping law and refine section 406.

I. OVERVIEW OF IMPORT RELIEF

Georgetown Steel involved a complex and unsettled area of international trade. No case prior to *Georgetown Steel* specifically addressed whether the countervailing duty law was applicable to countries with NMEs.¹¹ Previous courts had held that the United States may countervail subsidies from countries with a highly centralized government.¹² The court in *Georgetown Steel*, however, explicitly ruled for the first time on the applicability of the countervailing duty law to countries with NMEs.

In addition to the *Georgetown Steel* decision on the application of the countervailing duty law, congressional actions have affected the import relief laws.¹³ First, Congress amended the antidumping law in 1974 and 1979 to respond more effectively to the economic realities of NMEs.¹⁴ Unfortunately, congressional attempts were futile as the antidumping law became a confusing and elusive statute, resulting in inconsistent decisions.

Second, Congress added section 406 of the 1974 Trade Act¹⁵ to provide an additional safeguard to domestic industries.¹⁶ Specifically, the act provided relief from rapidly increasing imports from NME countries, regardless of fairness.¹⁷ As with the antidumping law, section 406 is a confusing alternative.¹⁸ To date, no domestic company has suc-

11. See *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 555 (Ct. Int'l Trade 1985) (stating that although previous judicial proceedings did not address the applicability of the countervailing duty law to countries with NMEs, judicial proceedings have involved states with complete control over industries), *rev'd sub nom.* *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

12. See *infra* notes 61-67 and accompanying text (discussing two cases in which courts applied the countervailing duty law to situations where foreign governments heavily regulated the markets).

13. See *infra* note 52 (setting forth recent relevant amendments to trade legislation).

14. See Horlick & Shuman, *supra* note 5, at 808-09 (tracing the development and rationale of the antidumping act).

15. 19 U.S.C. § 2436 (1982).

16. See Horlick & Shuman, *supra* note 5, at 811 (noting that Congress recognized that the United States could not apply the antidumping law effectively to imports from NMEs).

17. See Comment, *Import Relief Options*, *supra* note 1, at 1052 (noting that a petitioner is not required to show that an unfair trade practice exists).

18. See *infra* notes 133-55 and accompanying text (discussing the details of section

ceeded in a section 406 proceeding.¹⁹

II. CASE HISTORY OF GEORGETOWN STEEL

A. ADMINISTRATIVE DECISION

The appellees, Georgetown Steel Corporation, Raritan River Steel Company and Atlantic Steel Company (collectively, Georgetown Steel), and Continental Steel Corporation (Continental Steel), filed two countervailing duty petitions with the International Trade Administration (ITA) in November 1983 on behalf of domestic producers of carbon steel wire rod.²⁰ Georgetown Steel and Continental Steel claimed that the Czechoslovakian and Polish governments had subsidized carbon steel wire rod imported into the United States and, therefore, the United States should impose countervailing duties under section 303 of the Tariff Act of 1930.²¹ The petitioners claimed that the following acts of the foreign government were subsidies: (1) the benefit of exchange rates higher than the official rates, (2) the receipt of direct payments on goods sold abroad at prices below domestic prices, (3) the exporting entity's retention of part of the "hard currency" obtained from nonmarket export sales, (4) the application of trade conversion coefficients to change the exchange rate providing a more favorable return on exports, and (5) the granting of income tax rebates for such sales.²²

The ITA instituted countervailing duty investigations based on the

406).

19. Rosen & Benjamin, *Appeals Court Ends Longstanding Debate on Tariff Act's Scope*, Legal Times, Oct. 20, 1986, at 18, col. 1; see also Recent Development, *Relief from Imports from Communist Countries: The Trials and Tribulations of Section 406*, 13 LAW & POL'Y INT'L BUS. 617, 619 n.18 (1981) [hereinafter Recent Development, *Relief from Imports*] (noting that at least until 1981, no appeals court heard a section 406 case).

20. Carbon Steel Wire Rod from Czech., 49 Fed. Reg. 19,370, 19,371 (ITA 1984) (final negative countervailing duty determination) [hereinafter Wire Rod from Czech.], *rev'd sub nom.* Continental Steel Corp. v. United States, 614 F. Supp. 548 (Ct. Int'l Trade 1985), *rev'd sub nom.* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986); Carbon Steel Wire Rod from Pol., 49 Fed. Reg. 19,374, 19,375 (ITA 1984) (final negative countervailing duty determination) [hereinafter Wire Rod from Pol.], *rev'd sub nom.* Continental Steel Corp. v. United States, 614 F. Supp. 548 (Ct. Int'l Trade 1985), *rev'd sub nom.* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986); see 19 U.S.C. § 1671a(b)(1) (1982 & Supp. IV 1986) (stating that a countervailing duty proceeding begins when a party, on behalf of an industry, files a petition with the administering authority alleging the requirements for imposition of the duty).

21. Wire Rod from Czech., *supra* note 20, at 19,371; Wire Rod from Pol., *supra* note 20, at 19,375.

22. Wire Rod from Czech., *supra* note 20, at 19,370; Wire Rod from Pol., *supra* note 20, at 19,375.

petitioners' five subsidy allegations.²³ After an investigation of the complaints and a hearing, the ITA concluded that no subsidies existed because the Czechoslovakian and Polish wire rod exports had not received any countervailable subsidies.²⁴ Based on this reasoning, the ITA dismissed a similar investigation initiated by AMAX Chemical Corporation and Kerr-McGee against the Soviet Union and the German Democratic Republic.²⁵

The ITA held that section 303 did not apply to imports from NMEs because a subsidy can have no meaning in an economy that does not have true market forces.²⁶ The ITA defined a subsidy as a transaction that alters the market procedure, causing economic problems in production and resource allocation leading to a reduction in world wealth.²⁷ Consequently, the ITA concluded that the concept of subsidies was inapplicable in an economy that had no markets.²⁸ Georgetown Steel Corporation and Continental Steel Corporation asked the Court of International Trade (CIT) to review the negative finding of the ITA, while AMAX Chemical and Kerr-McGee, whose petition

23. Wire Rod from Czech., *supra* note 20, at 19,371; Wire Rod from Pol., *supra* note 20, at 19,375; *see also* 19 U.S.C. § 1671b(b) (1982 & Supp. IV 1986) (stating that the administering authority shall determine whether a reasonable basis exists to believe or suspect that a government is providing a subsidy). If the administering authority makes a positive determination, it shall include an estimate of the net subsidy. *Id.*

24. Wire Rod from Czech., *supra* note 20, at 19,374; Wire Rod from Pol., *supra* note 20, at 19,378.

25. Continental Steel Corp. v. United States, 614 F. Supp. 548, 549 (Ct. Int'l Trade 1985), *rev'd sub nom.* Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). While the ITA was considering the wire rod cases, AMAX Chemical, Inc. and Kerr-McGee Chemical Corporation filed petitions with the ITA alleging that the Soviet Union and the German Democratic Republic had provided subsidies for potash the two countries imported into the United States. *See* Potassium Chloride from the Soviet Union, 49 Fed. Reg. 23,428, 23,428 (ITA 1984) (rescission of initiation of countervailing duty investigation and dismissal of petition) [hereinafter Potash from U.S.S.R.] (holding that the petitions of AMAX Chemical and Kerr-McGee to countervail against Soviet exporters were invalid, because the Soviet Union is a NME); Potassium Chloride from the German Democratic Republic, 49 Fed. Reg. 23,428, 23,428 (ITA 1984) (rescission of initiation of countervailing duty investigation and dismissal of petition) [hereinafter Potash from E. Ger.] (holding that the petitions of AMAX Chemical and Kerr-McGee to countervail against East German exporters were invalid, because the German Democratic Republic is a NME). After deciding the wire rod cases, the ITA dismissed the investigation of the Soviet Union and the German Democratic Republic because both countries had NMEs and, therefore, section 303 did not apply. Potash from U.S.S.R., *supra*, at 23,428; Potash from E. Ger., *supra*, at 23,428.

26. Wire Rod from Czech., *supra* note 20, at 19,371; Wire Rod from Pol., *supra* note 20, at 19,375.

27. Wire Rod from Czech., *supra* note 20, at 19,371; Wire Rod from Pol., *supra* note 20, at 19,375.

28. Wire Rod from Czech., *supra* note 20, at 19,371; Wire Rod from Pol., *supra* note 20, at 19,375.

the ITA dismissed based on the same grounds,²⁹ also appealed the dismissal of their petitions. The CIT consolidated these cases.³⁰

B. THE COURT OF INTERNATIONAL TRADE

The CIT reversed the ITA and held that the countervailing duty law applies to exports from NMEs.³¹ The ITA held that the purpose of the statute is to extract subsidies from entering commerce and to protect domestic industry from the effects of subsidies.³² The CIT, however, determined that the ITA erred in its conclusion that a subsidy cannot exist in a NME, and that the ITA decision contradicted the plain meaning of the statute.³³ The CIT stated that the countervailing duty

29. See *supra* note 25 (discussing the potash cases).

30. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1310 (Fed. Cir. 1986).

31. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 557 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

32. *Id.* at 553. The court stated that the countervailing duty law makes no distinctions based on the economy of a country. *Id.* at 550. The ultimate question concerns the conveyance of a bounty or grant, not a market base of the economy. *Id.* The language of the statute clearly establishes a theoretical ideology. *Id.* The relevant language of section 1303 that discusses this theory is the following: "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation shall grant or bestow . . ." 19 U.S.C. § 1303(a)(1) (1982).

33. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 550 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The CIT held that the countervailing duty law contained in 19 U.S.C. § 1303 governed the proceedings in *Georgetown Steel* because the agreement did not include the countries producing the products within the meaning of section 1671(b). *Id.* According to section 1671(b), a "country under the Agreement" means a country

- (1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under § 2503(b) of this title,
- (2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President, or
- (3) with respect to which the President determines that —
 - (A) there is an agreement in effect between the United States and that country which —
 - (i) was in force on June 19, 1979, and
 - (ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States,
 - (B) the General Agreement on Tariffs and Trade does not apply between the United States and that country, and
 - (C) the agreement described in subparagraph (A) does not expressly permit —
 - (i) actions required or permitted by the General Agreement on Tariffs and Trade or required by the Congress, or
 - (ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

law does not make distinctions based on the form of the economy of a country³⁴ and, therefore, the ITA concluded incorrectly that the countervailing duty law cannot apply to countries with NMEs.³⁵ The CIT remanded the cases to the ITA for further proceedings consistent with its opinion.³⁶

C. UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

At the outset, the court's analysis focuses on the claims of Kerr-McGee and AMAX Chemical regarding potash imported from the Soviet Union and German Democratic Republic, and not on Georgetown Steel's claim regarding the wire rod imported from Poland and Czechoslovakia. The Federal Circuit vacated the order of the CIT with respect to Georgetown Steel based on a lack of jurisdiction.³⁷ Because the facts of both cases are virtually identical, this decision does not affect the analysis of the court of appeals with respect to the applicability of countervailing duties to NMEs.

The Court of Appeals for the Federal Circuit rejected the CIT deci-

19 U.S.C. § 1671(b) (1982).

Finding that the countries involved fell outside of this definition meant only that the assessment of countervailing duties would not require an injury determination if the administering authority found that a bounty or grant existed. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 550 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). Section 303 generally does not require that subsidized imports injure a domestic industry before the government imposes countervailing duties. *Id.* at 551. If the international obligations of the United States, such as Article VI of the General Agreement on Tariffs and Trade, demand otherwise, however, section 303(a)(2) will apply and the administering authority must make an injury determination. *Id.* at 556.

Outside of the injury determination aspect, sections 303 and 1671 are identical and can be used interchangeably. Thus, the analytical problems discussed below apply with equal weight to both statutes. *Id.* at 556-57.

34. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 550 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

35. *Id.* at 557.

36. *Id.*

37. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1313 (Fed. Cir. 1986). Georgetown Steel mailed the complaint to the clerk within 30 days of the filing of the summons, but because there was insufficient postage, the summons was returned to Georgetown Steel and, therefore, was not timely filed. *Id.*; see *Tariff Act of 1930*, § 516A, 19 U.S.C. § 1516a(a)(2)(A) (1982 & Supp. IV 1986)) (requiring that a party appealing to the CIT must file a summons within 30 days of the date of publication in the Federal Register and then file a summons within 30 days of the complaint). Rule 5(g) of the Rules of the Court of International Trade provides that a party completes a filing by mail when the CIT receives the complaint with the proper postage affixed. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986) (discussing the filing requirements of the CIT). The Court of Appeals concluded that the complaint was not timely filed as it was not mailed "with proper postage affixed" until 43 days after the summons was filed. *Id.*

sion and held that the countervailing duty law does not apply to NMEs.³⁸ Initially, the court focused on the implication of the statutory intent of the countervailing duty law codified in section 303 of the Tariff Act of 1930.³⁹ The court determined that the purpose of the countervailing duty law⁴⁰ and recent legislative actions were inconsistent with their applicability to imports from NMEs.⁴¹ Finally, the court held that a "subsidy" cannot exist in a country without a market-based economy.⁴²

First, the court held that the Tariff Act has remained unchanged since the time of its original enactment in 1897 — a time when NMEs did not exist.⁴³ Congress, therefore, did not address the issue of the presence of a market in drafting section 303. Since that time, Congress has reenacted section 303 six times without making any significant changes relating to NMEs.⁴⁴ The Court of Appeals for the Federal Cir-

38. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

39. *Id.* at 1314 (citing Tariff Act of 1930 § 303, as amended, 19 U.S.C. § 1303 (1982)).

40. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314-17 (Fed. Cir. 1986); see 19 U.S.C. §§ 1671a-1671f (1982 & Supp. IV 1986) (providing the procedures for obtaining relief under the countervailing duty law).

41. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

42. *Id.* at 1318.

43. *Id.* at 1314. The original statute provided that

[W]henever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States . . . there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

Tariff Act of July 24, 1897, ch. 11, § 5, 30 Stat. 151, 205 (codified as amended at 19 U.S.C. § 1303(a) (1982)).

44. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314 (Fed. Cir. 1986). The current revision of section 303 represents the sixth reenactment of the 1897 provision without any major changes. Tariff Act of 1909, ch. 6, § 6, 36 Stat. 11, 85 (codified as amended at 19 U.S.C. § 1303(a) (1982)) (adding only "province or other political subdivision" after "colony"); Tariff Act of 1913, ch. 16, § IV(E), 38 Stat. 114, 193 (codified as amended at 19 U.S.C. § 1303(a) (1982)) (retaining the language of section 6 of the Tariff Act of 1909); Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935 (codified as amended at 19 U.S.C. § 1303(a) (1982)) (adding "person, partnership, association, cartel, or corporation" after "political subdivision of government" and changing "any article or merchandise from such country" to any article or merchandise "manufactured or produced in such country"); Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687 (codified as amended at 19 U.S.C. § 1303(a) (1982)) (retaining the language of prior legislation with minor changes); Trade Act of 1974, Pub. L. No. 93-618, § 303, 88 Stat. 1978, 2049 (1975) (codified as amended at 19 U.S.C. § 1303(a) (1982)) (deleting "any" before "such article or merchandise," and deleting "addi-

cuit concluded that the failure of Congress to address this issue in its subsequent amendments to the statute constituted strong proof that Congress intended to limit these disputes to the antidumping provisions of the Trade Act.⁴⁵ In essence, the court stated that because subsequent amendments fail to mention NMEs specifically, the statute should not apply to such countries.⁴⁶

Second, the court held that the intended purpose of the countervailing duty remedy was inconsistent with the nature of NMEs⁴⁷ because petitioners use this remedy to offset unfair competitive advantages arising from government-based subsidies.⁴⁸ Because the state controls the market forces, the court determined that a NME government could not convey subsidies.⁴⁹ If the Soviet Union or German Democratic Republic had sold its product directly rather than through a government instrumentality, the product probably would sell at a higher price.⁵⁰ The court, therefore, concluded that the government of a NME technically cannot subsidize a company because this action is actually a "subsidy of itself."⁵¹

The court also considered congressional action regarding import relief. Congress specifically addressed NMEs in its antidumping amendments in 1974 and 1979, but failed to make similar revisions with respect to the countervailing duty laws.⁵² The court concluded that congressional inaction clearly indicated that the legislature intended to use the antidumping law to protect the United States market from un-

tional" before "duty equal to the net amount of such bounty or grant"); Trade Agreements Act of 1979, Pub. L. No. 96-39, § 103, 93 Stat. 144, 190 (codified as amended at 19 U.S.C. § 1303(a) (1982)) (making various revisions, none of which related to NMEs).

45. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314 (Fed. Cir. 1986).

46. *Id.*

47. *Id.* at 1315-16.

48. *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (discussing countervailing duties as related to nonexcessive tax remissions).

49. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986); *see also* G.M. PICKERSGILL & J.E. PICKERSGILL, *CONTEMPORARY ECONOMIC SYSTEMS: A COMPARATIVE VIEW* 208, 232-33 (1974) (comparing NME and market economy systems).

50. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986).

51. *Id.*

52. *Id.* at 1316-17; *see* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2043 (1975) (amending the antidumping law to deal specifically with exports from NMEs without amending the countervailing duty law to do the same) (repealed 1979); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 184 (amending the antidumping law to deal more effectively with NMEs, again without amending the countervailing duty law to do the same) (codified at 19 U.S.C. § 1677b(c) (1982)).

fairly subsidized NME exports.⁵³

Congress approved the subsidies code in the Trade Agreements Act of 1979⁵⁴ to implement GATT. The code provided that signatory countries may regulate imports from NMEs with either the countervailing duty or antidumping legislation.⁵⁵ The court, however, concluded that the signatories advocated these two measures to permit each country to make its own choice with respect to the appropriate remedy. In essence, the court held that the remedies were mutually exclusive — a country must choose one or the other, not both.⁵⁶ In the United States, the court found, Congress chose to use the antidumping law instead of the countervailing duty law.⁵⁷

Third, the court found that a “subsidy” is a distortion of the market and, therefore, if no market exists, no subsidy can exist.⁵⁸ The court held that because this case concerned a NME, no subsidy existed.⁵⁹ The court concluded that the countervailing duty law did not apply to the NME imports in *Georgetown Steel*.⁶⁰

III. CRITIQUE OF THE COURT'S ANALYSIS

The analysis of the court of appeals was flawed. The court's analysis disregarded the plain and manifest meaning of the countervailing duty statute and instead instituted a major exception to the countervailing duty law. Examination of pertinent case law, legislation, and legislative history illustrates that the decision in *Georgetown Steel* was unfounded.

A. CASE PRECEDENT

No prior cases have dealt specifically with the countervailing duty law as applied to NMEs. In analyzing the decision of the court, therefore, it is necessary to examine cases involving economic structures that are similar functionally, if not nominally, to those of NMEs. In two previous cases, the court enforced the countervailing duty law when central governments exercised a degree of control analogous to govern-

53. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

54. Agreement on Subsidies and Countervailing Duties of 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, GATT BISD, 26th Supp. 56 (1980) (codified at 19 U.S.C. § 2503(c)(5) (1982)) [hereinafter Subsidies Code].

55. *Id.* art. 15.

56. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317-18 (Fed. Cir. 1986).

57. *Id.* at 1318.

58. *Id.*

59. *Id.*

60. *Id.*

ment transactions concerning NMEs.⁶¹

In *Downs v. United States*, the Russian government imposed a tax on all sugar produced domestically, but remitted the tax for all sugar exported.⁶² At the time, the Czar governed and regulated the entire industry.⁶³ The United States Supreme Court, notwithstanding the political structure of Russia, held that the tax remittance constituted preferential treatment providing a reward or gratuity to all sugar exporters.⁶⁴

In *British Steel Corp. v. United States*, the court held that although the British government owned 100% of the corporation, the investments of the United Kingdom in the steel corporation constituted "subsidies" requiring the imposition of countervailing duties.⁶⁵ Although these cases did not involve NMEs per se, the economic structures of those countries were similar to the structures of NMEs because the market had a high degree of regulation.⁶⁶ Despite the extensive amount of government regulation, the court still determined that the bounty constituted a countervailable subsidy.

The economic systems, as related to the exported entity of the countries party to *Downs* and *British Steel Corp.*, are similar to that in *Georgetown Steel*. In each of the prior cases, the government completely dominated the respective industry, thereby stifling "true" market forces. Based on *Downs* and *British Steel*, the exporting country is not a determinative factor for establishing the existence of countervailable subsidies. Rather, it is an artificial dichotomy created for administrative ease. Thus, countervailing duty determinations are possible in

61. See *Downs v. United States*, 187 U.S. 496, 516 (1903) (holding that a subsidy conveyed in an economy governed by a czar is countervailable); *British Steel Corp. v. United States*, 605 F. Supp. 286, 297 (Ct. Int'l Trade 1985) (stating that the investments of the United Kingdom government in a British steel corporation that it wholly owned constituted subsidies and were therefore countervailable).

62. *Downs v. United States*, 187 U.S. 496, 511 (1903). After exporting sugar to the United States, the Russian government released the export from payment of an excise tax that it imposed if the exporter had sold the sugar domestically. *Id.* The Russian government also issued to the exporter a certificate, having a substantial market value, certifying that he had exported a quantity of so-called free sugar. *Id.* Sugar manufacturers use these certificates to transfer from their free surplus to their free sugar an amount of sugar equal to the amount exported. *Id.* This method allows them to pay half of the owed tax on the sugar. *Id.*

63. *Id.* at 498.

64. *Id.* at 516.

65. *British Steel Corp. v. United States*, 605 F. Supp. 286, 297 (Ct. Int'l Trade 1985).

66. See *id.* at 289 (stating that direct government payments to British Steel Corporation were essential to the survival of the company); *Downs v. United States*, 187 U.S. 496, 516 (1903) (noting that the Czar regulates the entire sugar industry through limiting output on the domestic market and putting a premium on exportation).

countries with a high degree of regulation and control.

It is apparent from *Downs* and *British Steel Corp.* that the court was unwarranted in concluding that a NME government conferring a subsidy is actually "subsidizing itself."⁶⁷ In both *Downs* and *British Steel Corp.*, the foreign government conveyed subsidies to a company it wholly owned, and yet the court determined that a countervailable subsidy existed. Again, the type of economic system in no way affected this determination.

B. STATUTORY GUIDELINES

1. *Intent of the Countervailing Duty Law*

In addition to overlooking relevant case law, the court of appeals also disregarded the statutory meaning of the countervailing duty law.⁶⁸ The position of the court differs from the plain meaning and purpose of the law.⁶⁹ In addition, it contradicts congressional⁷⁰ and judicial⁷¹ interpretations of the countervailing duty law.

The countervailing duty law distinguishes only types of subsidies, not economies.⁷² The language of the law is clear and its purpose obvious.⁷³ The law states that whenever any country bestows a bounty or grant to a manufacturer, the government shall levy a duty equal to the net amount of such bounty or grant.⁷⁴ The Supreme Court has held that

67. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986) (noting that because the state controls the industry, including when and what the companies will sell, the government cannot subsidize the company as it would, in effect, subsidize itself).

68. See 19 U.S.C. § 1303 (1982) (providing the language of the countervailing duty law); INT'L TRADE COMM'N, ITC ANNUAL REPORT 3 (1979) [hereinafter ITC ANNUAL REPORT] (discussing the statutory meaning of the countervailing duty law); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-57 (1978) (noting that the legislature wanted the countervailing duty law to offset unfair trade).

69. See 19 U.S.C. § 1303 (1982) (providing the language of the countervailing duty law); ITC ANNUAL REPORT, *supra* note 68, at 3 (indicating that the law was enacted to curtail unfair trade).

70. See *generally* ITC ANNUAL REPORT, *supra* note 68, at 3 (stating that Congress created the countervailing duty statutory scheme to prevent foreign nations from engaging in unfair trade practices).

71. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-57 (1978) (noting that the purpose of the act was to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies their governments paid).

72. 19 U.S.C. § 1303 (1982). Section 303 of the Tariff Act of 1930 refers to "any country." Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687 (current version at 19 U.S.C. § 1303 (1982)). There is no qualifying term in the statute that would lead one to conclude that the country must have a market economy.

73. See *supra* notes 69-71 (discussing the purpose of the countervailing duty law).

74. 19 U.S.C. § 1303(a)(1) (1982).

the language of a statute determines its scope.⁷⁵ The Supreme Court has also held that unless legislative history expresses a contrary meaning, the language of the statute is conclusive.⁷⁶ Under this mode of statutory interpretation, the countervailing duty statute unequivocally applies to NMEs because the language of the statute is indifferent to economic structures.⁷⁷

The legislative history indicates that the intent of this statute is to protect domestic industry from unfair import pricing.⁷⁸ Courts have reiterated this position when addressing the purpose of the law.⁷⁹ The presence of a market or NME is thus irrelevant. According to conventional modes of statutory construction, the court incorrectly interpreted the statute.

2. Recent Legislative Actions

The court of appeals also placed great weight on recent legislative actions. The court indicated that under these amendments,⁸⁰ courts should apply the antidumping law to NME exports traded at an unfair price.⁸¹ This finding was also conclusory and lacks support.

75. *North Dakota v. United States*, 460 U.S. 300, 312 (1983).

76. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

77. See *supra* notes 69-71 (discussing the purpose of the countervailing duty law); Sandler, *supra* note 5, at 771 (stating that the countervailing duty statute applies on its face to any country).

78. See ITC ANNUAL REPORT, *supra* note 69, at 3 (stating that the purpose of the statute was to prevent foreign nations from engaging in unfair trade practices); see also Note, *Protecting Steel*, *supra* note 3, at 868 (stating that Congress premised the countervailing duty law on the idea that the United States should permit competition from imports only if the competition is fair).

79. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 444 (1978) (stating that both the statutory language and the legislative history of the Act support the notion that the countervailing duty serves to offset the competitive advantage that foreign producers would otherwise enjoy from export subsidies from their governments); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (noting that the purpose of the law is to protect United States firms from unfair competition); *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 553 (Ct. Int'l Trade 1985) (stating that the only purpose of the countervailing duty law is to extract subsidies from foreign merchandise entering the country to protect domestic industries from their effect), *rev'd sub nom.* *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

80. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316-17 (Fed. Cir. 1986) (discussing the 1974 and 1979 amendments to the antidumping law, the approval of the subsidies code, and the enactment of section 406). The court reviewed the 1974 and 1979 amendments to the trade statutes. *Id.* The statutory changes led the court of appeals to believe that Congress intended only the antidumping statute to apply and not the countervailing duty law. *Id.* at 1318.

81. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

Congress expanded the antidumping law in the Trade Act of 1974⁸² to deal specifically with NMEs. Congress concurrently amended the countervailing duty law,⁸³ but did not distinguish between nonmarket and market economies. According to the court, the silence of Congress represented an unequivocal statement that the countervailing duty law does not apply to exports from NMEs.⁸⁴ This reasoning would allow courts generally to emasculate any statute when the legislature amends a related statute. Because no express language in the amendments specifically addressed the countervailing duty law⁸⁵ and the "true meaning" of the antidumping amendments,⁸⁶ the court should have determined the scope of the statutes through an analysis of the statutory language.⁸⁷

The court also concluded that congressional approval of the Subsidies Code in the Trade Agreements Act of 1979 (Code)⁸⁸ indicated that Congress chose the antidumping law over the countervailing duty law.⁸⁹ The language of this Code, however, provides any signatory country with an option to use either the countervailing duty law or the antidumping law.⁹⁰ In addition, Congress knew that countries with NMEs had participated in the preparation of the Code and that two such countries signed it.⁹¹ Congress, therefore, intended to give United States companies a choice between the two laws. Again, the analysis of the court with respect to this point is arbitrary and not in accordance

82. Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2047-48 (1975) (current version at 19 U.S.C. § 1677b(c) (1982 & Supp. IV 1986)).

83. Trade Act of 1974, Pub. L. No. 93-618, § 331(a), 88 Stat. 1978, 2049-50 (1975) (current version at 19 U.S.C. § 1303(a) (1982)).

84. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

85. See Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2043-49 (1975) (repealed 1979) (current version at 19 U.S.C. § 1673-1677 (1982 & Supp. IV 1986)) (evidencing the omission of any mention of state-controlled economies in the amendments to the countervailing duty statute).

86. See H.R. REP. NO. 1156, 98th Cong., 2d Sess. 191-92, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4910, 5220 (noting that the true meaning of the antidumping statute of section 406 of the Trade Act of 1974 and the Trade and Tariff Act of 1984 is uncertain).

87. See *North Dakota v. United States*, 460 U.S. 300, 312 (1983) (stating that absent a clearly expressed intent to the contrary, the statute itself is controlling).

88. 19 U.S.C. § 2503 (1982).

89. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

90. Subsidies Code, *supra* note 54, art. 15 (providing a signatory country with the choice of using the countervailing duty law or the antidumping law for imports from a country with a state-controlled economy).

91. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 556-57 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

with the law.

The court of appeals gave no valid legal reason why the countervailing duty law should not apply to NMEs. The court struggled with its analysis, finally resolving the issue through judicial fiat. Instead of postulating possible reasons why the law should not apply, the court instead stated that the failure of Congress to address the issue represented a clear indication that the countervailing duty law cannot apply to NMEs.⁹² To assume that "inaction" means "action" is as backward logically as it is semantically. The more logical approach to this situation is to presume that if Congress did not intend for the countervailing duty law to apply to NMEs, it would have so stated.

3. *The Definition of Subsidy*

A serious problem in the analysis of the court of appeals concerns the definition the court gave to the term "subsidy." The court of appeals concluded that a subsidy is a distortion of the market and, therefore, if no market exists, no subsidy can exist.⁹³ The court, however, premised its finding that a country with a NME cannot convey a subsidy on an unfounded and artificial distinction between economic forms.

None of the laws of the United States relating to international trade defines the term "subsidy."⁹⁴ The court could have looked to various practices the Treasury Department sets forth pertaining to subsidies.⁹⁵ The recommendations of the Treasury Department do not refer to a nonmarket/market distinction. It is therefore anomalous that the court

92. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

93. *Id.* at 1316. The court affirmed the administration's definition of subsidy as any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth. *Id.* at 1315. Although the court of appeals does not explicitly state the syllogism stated in the text, it is apparent that the court based its entire rationale on it.

94. See Comment, *Import Relief Options*, *supra* note 1, at 1055-56 (noting the absence of a statutory provision defining subsidy); see also *ASG Indus. v. United States*, 467 F. Supp. 1187, 1192 (Cust. Ct. 1979) (noting that Congress has refrained from defining bounty or grant).

95. See S. REP. NO. 249, 96th Cong., 1st Sess. 84, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 470 [hereinafter 1979 SENATE REPORT] (discussing various activities the Treasury Department has determined to constitute subsidies). Among the practices the Treasury has determined to be a bounty or grant are:

(1) Direct payments to exporters related to the export of merchandise; (2) excessive rebates of indirect taxes on merchandise upon export of the merchandise; (3) export financing at preferential rates; (4) rebates of indirect taxes which are not directly related to the merchandise exported; and (5) the forgiveness of income and social security taxes related to merchandise exported.

Id.

of appeals derived an economy-based definition of subsidy. Furthermore, the alleged subsidies in this case were similar to the subsidies for which the Treasury has set forth guidelines.⁹⁶ The court of appeals, therefore, should have looked to the recommendations of the Treasury Department for guidance rather than deriving its own definition of subsidy.

All documented data supports an "economy neutral" definition of a subsidy.⁹⁷ The court's definition is, thus, incorrect, because it is premised on the notion that only a market economy can provide subsidies.⁹⁸ Without explaining its conclusion the court held that a subsidy cannot exist in a NME.⁹⁹

Furthermore, it is important to note that the court foresaw no problem in determining fair market value¹⁰⁰ under the antidumping law¹⁰¹

96. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1310 (Fed. Cir. 1986) (listing the subsidies about which the petitioner complained). The petitioners alleged that manufacturers received foreign exchange rates on export sales that were higher than the official rates, and direct price equalization payments on exports. *Id.* In the case of the Soviet Union, the petitioners claimed that exporting entities retained a portion of the hard currency earned on foreign sales. *Id.* Such actions are specific examples of what the Treasury deemed subsidies, illustrating the examples listed in section 771(5) of the Trade Agreements Act of 1979. See 19 U.S.C. § 1677(5) (1982) (defining the term "subsidy" in the context of antidumping and countervailing duty investigations). The examples include situations where the government provides capital, loans, or loan guarantees on terms inconsistent with commercial considerations, or provides goods or services at preferential rates, grants funds or forgives debt to cover operating losses a specific industry sustains, or assumes any costs or expenses of manufacture, production, or distributions. *Id.*

97. See 1979 SENATE REPORT, *supra* note 95, at 85, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS at 471 (noting that a government or government entity, subdivision, customs union, private party, or group of private parties, can provide a subsidy). The report of the Senate Finance Committee on the 1974 Act stated, "In the long run, United States interests will be served by an international agreement to eliminate subsidies which distort world trade patterns and discriminate against United States sales both at home and abroad." S. REP. NO. 1298, 93d Cong., 2d Sess. 183, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7321 [hereinafter 1974 SENATE REPORT]; see also Rivers & Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 LAW & POL'Y INT'L BUS. 1447, 1448-49, 1467-82 (1979) (discussing the definition of subsidies as negotiated at the Tokyo Round of Multilateral Trade Negotiations).

98. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1316 (Fed. Cir. 1986). The court stated that "[t]here is no reason to believe that if the Soviet Union or the German Democratic Republic had sold the potash directly rather than through a government instrumentality, the product would have been sold at higher prices." *Id.* One good reason to believe prices would have been higher is that subsidies would not have benefitted the exporting companies and, therefore, they could not have afforded to sell the goods at such a low price. Instead of stating there is "no reason to believe," the court should have stated the reasons to believe.

99. *Id.*

100. See *id.* at 1317 (discussing the provisions under 19 U.S.C. § 1677b(c) for determining the foreign market value of merchandise from NMEs for purposes of the antidumping law).

even though it held that it cannot measure a subsidy in a NME.¹⁰² If the agency can determine fair market value in an economy with no market, it can measure a subsidy within that same country. If the administration does not require a true market system to determine fair market value under the antidumping law, it should not impede the calculation of a subsidy under the countervailing duty law.¹⁰³

In addition, the term "subsidy" as applied to export activities in NMEs does not present any real difficulties of meaning. The subsidized transactions the petitioners alleged in *Georgetown Steel* are not unique to NMEs. Rather, they are easily identifiable government preferences, similar to those existing in other types of economies.¹⁰⁴ To establish the existence of subsidies from NME governments, one need only establish patterns of disproportionate or unfair treatment.¹⁰⁵ Potential difficulties are inevitable;¹⁰⁶ nevertheless, they do not justify the exception to the law that the court sought in this case.

The difficulty inherent in determining the existence of subsidies for NME exports is essentially one of measurement, not meaning.¹⁰⁷ The answer to this determination is not the elimination of the statute's meaning, but a refinement of its application and measurement. The rationale of the court, thus, was flawed and conclusory. The court never addressed the critical issue: protecting United States industry without stifling international trade. Although the issue was a political one with-

101. See *id.* (stating that Congress enacted the antidumping law to protect domestic industries from injury the imports from NMEs caused).

102. *Id.* at 1316.

103. *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 555 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

104. See Horlick & Shuman, *supra* note 5, at 829 (stating that the definition of the term "subsidy" hinges on preferentiality). If the government treats a group to the advantage of the group, the government conveys a subsidy. *Id.* This approach is workable in both market and NMEs. *Id.*; see *Continental Steel Corp. v. United States*, 614 F. Supp. 548, 554 (Ct. Int'l Trade 1985) (establishing the authority and ability of the Commerce Department to detect patterns of regularity and investigate deviations from those patterns regardless of the type of economy), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). All systems have an inherent pattern or structure inherent in the continuation and existence of such systems. *Id.* The Commerce Department, therefore, could detect an unfair event or subsidy in any economic environment. *Id.* It violates common sense to believe that the Commerce Department cannot detect favoritism toward the manufacture, production, or export of the merchandise in a NME. *Id.* at 554-55.

105. See Horlick & Shuman, *supra* note 5, at 818 (stating that, with respect to NMEs, it is generally conceded that home market prices and costs are meaningless as a source of fair value). Prices in NMEs constantly reflect political, economic, or bureaucratic factors rather than the more typical supply and demand forces. *Id.*

106. *Id.* at 817.

107. *Id.*

out a simple resolution, the court should have acknowledged that a serious problem existed and that eliminating the countervailing duty remedy was not the answer.

IV. GEORGETOWN STEEL'S EFFECT ON THE LAW

According to the court in *Georgetown Steel*, the countervailing duty law does not apply to imports from countries with NMEs. Consequently, the antidumping law¹⁰⁸ and section 406 of the Trade Act of 1974¹⁰⁹ will become the operative remedies. Like the countervailing duty statute, these laws also have several shortcomings. In light of the court of appeals decision, however, these laws alone must accomplish the national goal of successful international trade. This section of the note will discuss the problems inherent in various alternatives and evaluate their probability for success.

A. ANTIDUMPING LAW

The Department of Commerce will issue an antidumping duty order if it concludes that a country sells a particular class of imported merchandise in the United States at prices less than "fair value."¹¹⁰ In the 1974 Trade Act, Congress amended the antidumping law to provide a "surrogate country" reference point designed to assist the United States in determining "fair value."¹¹¹ Under the antidumping statute, the ITA constructs the normal costs, expenses, and profit margins of a similar product in a country with a market economy to determine the foreign market value of goods NMEs export.¹¹² For example, to determine the price of an import from the Soviet Union, the ITA might construct the value of a similar product in West Germany.

Although this method of handling imports has received support in the international legal community,¹¹³ academics in the United States

108. 19 U.S.C. §§ 1673-1675 (1982 & Supp. IV 1986).

109. Trade Act of 1974, § 406, 19 U.S.C. § 2436 (1982).

110. See *supra* note 7 (describing the details of the antidumping statute).

111. 19 U.S.C. §§ 1673, 1675 (1982 & Supp. IV 1986). In the 1974 Act, Congress amended the antidumping statute to address specifically imports from NMEs. Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978, 2047 (current version at 19 U.S.C. §§ 1673-1673g (1982 & Supp. IV 1986)). Congress reasoned that the United States could not rely only on the prices of the goods imported from NMEs because the normal supply and demand forces do not exist. 1974 SENATE REPORT, *supra* note 97, at 174, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 7311. In 1979, Congress reenacted the surrogate country amendment it had authorized in the 1974 Act. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 186 (codified as amended at 19 U.S.C. § 1677b(c) (1982)).

112. 19 U.S.C. §§ 1671a-1671f (1982 & Supp. IV 1986).

113. See generally Horlick & Shuman, *supra* note 5, at 814 (discussing how other

have criticized the approach for being too difficult and unpredictable in its application.¹¹⁴ Several factors contribute to the unpredictable nature of the law. First, the administering agent has the exclusive authority to choose the surrogate country. Thus, domestic as well as foreign producers cannot look reliably to one country as a reference point. This lack of reliability results in a high degree of uncertainty and confusion¹¹⁵ and ultimately might create a chilling effect on foreign trade.¹¹⁶

Second, problems in predicting the fair value further inhibit effective administration of the law.¹¹⁷ Although the statute does not define the

countries address the dumping of NME imports). In the European Community (EC), the normal value of the product is based on:

- (a) the price at which the like product of a market economy third country is actually sold:
 - (i) for consumption on the domestic market of that country or
 - (ii) to other countries, including the community; or
- (b) the constructed value of the like product in a market economy third country; or
- (c) if neither [(a) or (b)] provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

Id.

Canada, like the EC, has a flexible approach to handling imports from NMEs. *Id.* at 816. Canada has proposed new legislation to implement the 1979 GATT Antidumping Code. *Id.* The Canadian legislation is virtually identical to that of the EC. *Id.*

In Australia, authorities have more discretion in determining normal value. *Id.* at 812. The Minister of Finance, however, must attempt to use prices of similar goods sold in a market country where the costs of production are similar to those in the NME. *Id.*

114. See Caine, *A Case For Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681, 684 (1981) (criticizing the antidumping law as too complex and uncertain in application). See generally Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1369-77 (1979) [hereinafter *Can Will Should*] (stating the time periods for decision making and the complexity of cases will inhibit efficient administration of the law); Horlick & Shuman, *supra* note 5, at 817 (discussing the implementation problems with the antidumping law); Ehrenhaft, *The Treasury's Proposed Approach to Imports From State-Controlled Economic Countries and State-Owned Enterprises Under the Antidumping and Countervailing Duty Laws*, in INTERFACE ONE: CONFERENCE PROCEEDINGS ON THE APPLICATION OF U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS TO IMPORTS FROM STATE CONTROLLED ECONOMIES AND STATE OWNED ENTERPRISES 80-85 (D. Wallale, G. Sping, R. Rawson and B. McGill eds. 1980) [hereinafter Ehrenhaft, *Proposed Approach*] (discussing the severe practical shortcomings in the administration of the antidumping and countervailing duty laws).

115. Horlick & Shuman, *supra* note 5, at 817; Caine, *supra* note 114, at 684.

116. Caine, *supra* note 114, at 698. Antidumping proceedings are unpredictable and inconsistent. *Id.* Many foreign producers and importers thus try to avoid this type of investigation. *Id.* These considerations can have a chilling effect on the pricing of goods. For example, an exporter might opt to increase prices rather than risk a legal proceeding that would require disclosure of confidential information. *Id.* at 698-99.

117. See *id.* at 685 (discussing the problems in calculating fair value).

term "fair value" explicitly,¹¹⁸ a regulation of the Department of Commerce states that fair value is an "estimate of foreign market value."¹¹⁹ The Department of Commerce chooses a country with a market economy at a stage of development analogous to the NME country to determine this estimate. Constructed values of similar goods in the market economy country determine the value of the NME product.¹²⁰ Valuation problems will undoubtedly arise because this estimation involves many variables.¹²¹ Again, this unpredictability is detrimental to both foreign and domestic producers. No producer can reliably coordinate pricing schedules because the producer cannot determine dumping prior to a decision by the Department of Commerce.¹²²

Third, the Department of Commerce has difficulty procuring critical data from surrogate countries.¹²³ To conduct an efficient investigation, the Department of Commerce must find producers, with no vested interest in the case, who are willing to open their books to government investigators of the United States. Many countries are reluctant to assist the Department of Commerce.¹²⁴ The United States, however, can-

118. See 19 U.S.C. § 1303 (1982) (containing no definition of fair value); *id.* §§ 1671a-1671f (1982 & Supp. IV 1986) (containing no definition of fair value).

119. 19 C.F.R. § 353.1 (1986); see also Sandler, *supra* note 5, at 763-64 (explaining how the ITA determines antidumping duties); Horlick & Shuman, *supra* note 5, at 819-21 (providing an overview of how the ITA determines fair value, using a constructed value approach).

120. Horlick & Shuman, *supra* note 5, at 819, 820.

121. See Caine, *supra* note 114, at 685 (stating the serious problems involved in determining fair value); Horlick & Shuman, *supra* note 5, at 819 (discussing the valuation problems attendant with using a surrogate country-constructed value approach). See generally *Can Will Should*, *supra* note 114, at 1366, 1367 (stating that the administering authority generally needs to make myriad adjustments to calculate foreign market value).

122. See Caine, *supra* note 114, at 685 (detailing the complexity in the application of the antidumping law); Horlick & Shuman, *supra* note 5, at 817 (discussing the uncertainty inherent in the antidumping law).

123. Horlick & Shuman, *supra* note 5, at 821; cf. Caine, *supra* note 114, at 698 (discussing the chilling effects of the antidumping law and the difficulty in its application).

124. See *Porcelain on Steel Cooking Ware from the People's Republic of China*, 51 Fed. Reg. 36,419, 36,421 (ITA 1986) (final determination of sales at less than fair value) (illustrating the unwillingness of a third country to comply with Commerce's investigation); *Certain Iron Construction Castings from the People's Republic of China*, 51 Fed. Reg. 9483, 9484 (ITA 1986) (final determinations of sales at less than fair value) (detailing Commerce's inability to obtain necessary information from targeted surrogate countries). In the *Construction Castings* case, the ITA determined that Egypt, India, Indonesia, Morocco, Pakistan, and Thailand were at similar levels of economic development as China. *Id.* at 9484. None responded to the questionnaires the ITA sent these countries. *Id.* at 9485. Because the countries did not cooperate, the ITA had to select the relevant and necessary data from the "basket of countries" that export that specific product. *Id.* The ITA then calculated the foreign market value on the basis of the average F.O.C. values of castings imported into the United States from the

not impose sanctions on the surrogate country for failure to comply. Consequently, the ITA must conduct investigations without specific data, causing inconsistent determinations that are difficult, if not impossible, for foreign countries to anticipate.¹²⁵

Thus far, the ITA has used the hypothetical constructed value approach sparingly.¹²⁶ The approach, therefore, has not been tested.¹²⁷ As a result of the *Georgetown Steel* decision, however, a concomitant increase in the number of petitions filed may occur. Based on the problems associated with surrogate country and fair value analysis, it appears the statute cannot withstand the onslaught of constant application.

Aside from administrative problems, the extreme protectionist nature of the statute is detrimental to the United States economy.¹²⁸ The law is antithetical to United States economic policy as it discourages price competition when it imposes automatic sanctions on foreign imports

"basket of countries." *Id.*; see also *Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China*, 50 Fed. Reg. 52,812, 52,813 (ITA 1985) [hereinafter *Natural Bristle*] (final determination of sales at less than fair value) (providing another example where the Department of Commerce used a weighted average of prices because it could not procure the necessary information directly). In this case, Commerce used the F.A.S. price of all brushes imported into the United States. *Id.* at 52,815.

125. *Natural Bristle*, *supra* note 124, at 52,815.

126. *E.g.*, *Shop Towels of Cotton from the People's Republic of China*, 48 Fed. Reg. 37,055 (ITA 1983) (final determination of below fair value sales); *Unrefined Montan Wax from the German Democratic Republic*, 47 Fed. Reg. 3579 (ITA 1982) (early determination of antidumping duty); *Unrefined Montan Wax from the German Democratic Republic*, 46 Fed. Reg. 38,555 (ITA 1981) (final determination of below fair value sales).

127. See generally *Horlick & Shuman*, *supra* note 5, at 825 (discussing the many problems related to the hypothetical constructed value); *Caine*, *supra* note 114, at 686 (explaining the hypothetical constructive value approach to determining fair value).

128. *Caine*, *supra* note 114, at 702; see *Ehrenhaft*, *Proposed Approach*, *supra* note 114, at 360 (discussing the 1974 and 1979 amendments to the antidumping law and the resulting negative effect on international trade). See generally *Barshefsky, Mattice & Martin*, *Government Equity Participation in State-Owned Enterprises: An Analysis of the Carbon Steel Countervailing Duty Cases*, 14 LAW & POL'Y INT'L BUS. 1101, 1122-23 (1983) (arguing that the Commerce Department should encourage industry restructuring rather than protect domestic industry unnecessarily); *Jackson*, *supra* note 4, at 1572-74 (discussing the elaborate governmental system the United States uses to regulate imports); *Sidak*, *A Framework for Administering the 1916 Antidumping Act: Lessons from Antitrust Economics*, 18 STAN. J. INT'L L. 377, 388-89 (1982) (stating that the antidumping statute is really an antitrust and not a protectionist statute and that the current form of the antidumping statute results in significant social costs); *Tarullo*, *Beyond Normalcy In the Regulation of International Trade*, 100 HARV. L. REV. 546 *passim* (1987) (criticizing current trade laws and governments' excessive involvement in international trade and proposing the elimination of unfair trade laws, i.e., the antidumping statute); Note, *Protecting Steel*, *supra* note 3, at 868-74 (discussing the problems with the antidumping statute and proposing instead a nationalization plan).

that sell below fair value. Because the law requires only a minimal degree of injury to find material injury,¹²⁹ it provides United States companies with a *disincentive* to modernize and become more efficient¹³⁰ and an *incentive* to rely on the antidumping law.

The protectionist nature of the law, thus, negatively affects the United States economy. A cost-benefit analysis of the antidumping law shows that it is inadequate.¹³¹ Because the statute is difficult to implement effectively and could harm the economy,¹³² it is an impractical solution to the current trade crisis.

B. SECTION 406

The second remedy available to deal with injurious NME imports is section 406 of the Trade Act of 1974.¹³³ Congress designed this statute to provide relief for domestic industries that imports from communist countries adversely affect.¹³⁴ Under the statute, the President, the United States Trade Representative, Congress, or specified private entities can petition the ITC to initiate proceedings.¹³⁵ Congress, highlighting the potential need for urgent assistance, authorized the President to take immediate action when necessary, pending a formal investigation and report to the ITC.¹³⁶

After the ITC determines the existence of a market disruption, it reports the findings and recommendations to the President, who has

129. Caine, *supra* note 114, at 703. The requisite degree of injury, material injury, is defined as "harm which is not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677(5) (1982). In the legislative history of the 1974 amendments to the antidumping statute, the committee stated the following with respect to the degree of injury required to impose sanctions automatically: "Obviously, the law will not recognize trifling, immaterial, insignificant or inconsequential injury. Immaterial injury connotes spiritual injury, which may exist inside of persons not industries. Injury must be a harm which is more than frivolous, inconsequential, insignificant, or immaterial." 1974 SENATE REPORT, *supra* note 97, at 180, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 7317.

130. See Caine, *supra* note 114, at 718 (noting that the minimal degree of injury necessary to reach an affirmative determination of material injury bestows windfalls of protection on United States companies).

131. See *id.* at 726 (stating that the costs attendant to the antidumping law outweigh the social benefits).

132. *Id.* at 716-17.

133. Trade Act of 1974, Pub. L. No. 93-618, § 406, 88 Stat. 1978, 2062 (codified at 19 U.S.C. § 2436 (1982)).

134. Recent Development, *Relief from Imports*, *supra* note 19, at 617-18.

135. 19 U.S.C. § 2436(a)(1) (1982). Additionally, the ITC can initiate an investigation on its own. *Id.* The private entities who can petition the ITC to initiate proceedings include "a trade association, firm, certified or recognized union, or group of workers which is representative of an industry." *Id.* § 2251(a)(1).

136. *Id.* § 2436(c).

sixty days to take action.¹³⁷ If the President determines remedial action is necessary, he or she can invoke certain remedies.¹³⁸ If the President does not follow the ITC recommendations, Congress can reinstate the ITC's recommendations by passing a concurrent resolution receiving a majority vote in both houses.¹³⁹

To date, section 406 has not been an effective remedy; no United States petitioner has ever received relief under this provision.¹⁴⁰ In every case where the ITC found the requisite degree of injury,¹⁴¹ the President has refused to grant relief. In the most publicized case, the 1979 investigation involving Russian ammonia,¹⁴² the ITC found the requisite injury. The majority of the ITC recommended that the President impose a three-year quota on Soviet ammonia imports.¹⁴³ The President, however, concluded that the imposition of a quota was not in the best economic interest of the United States.¹⁴⁴ On January 18, 1980, however, the President reversed his previous decision and imposed an emergency one-year quota limiting Soviet ammonia imports.¹⁴⁵ The Soviet invasion of Afghanistan on December 27, 1979 most likely precipitated this change.¹⁴⁶ After the ITC reinstated the case, it concluded that no market disruption had occurred and, thus, dismissed the case.¹⁴⁷

In addition to its political susceptibility, section 406¹⁴⁸ presents

137. *Id.* § 2252(b).

138. *Id.* § 2436(a)(1).

139. *Id.* § 2253(a)(1)-(5).

140. Rosen & Benjamin, *supra* note 19, at 18, col. 1.

141. *See* 19 U.S.C. § 2436(e)(2) (1982) (defining market disruption). Section 2436(e)(2) provides that market disruption exists whenever imports "are increasing rapidly . . . so as to be a significant cause of material injury." *Id.*; *see also* Recent Development, *Relief from Imports*, *supra* note 19, at 638 (discussing the requisite standard of injury for a section 406 proceeding).

142. Anhydrous Ammonia from the U.S.S.R., 45 Fed. Reg. 27,570 (ITC 1980) (report to the President) [hereinafter Anhydrous Ammonia]; *see* Recent Development, *Relief from Imports*, *supra* note 19, at 622-26 (providing an analysis of the *Anhydrous Ammonia* case with regard to section 406 proceedings).

143. Anhydrous Ammonia, *supra* note 142, at 27,570 (stating that in the initial hearing, the majority found that a market disruption existed).

144. *Id.* (stating that the President rejected the ITC's recommendations because such a finding was not in the nation's economic interest: at the time, the United States was seeking detente with the Soviet Union); Memorandum for the Special Representative for Trade Negotiations, 15 WEEKLY COMP. PRES. DOC. 2221 (Dec. 17, 1979).

145. Proclamation No. 4714, 45 Fed. Reg. 3875 (1980).

146. *See* Recent Development, *Relief from Imports*, *supra* note 19, at 625 (noting that the Soviet invasion of Afghanistan, the embargo on grain shipments to the Soviet Union, and the Soviet Union trade boycott of the International Longshoremen's Association may have caused the United States to reverse its position).

147. Proclamation No. 4714, 45 Fed. Reg. 3875 (1980).

148. *See* Recent Development, *Relief from Imports*, *supra* note 19, at 625 (discussing the *Anhydrous Ammonia* case and the attendant political ramifications).

problems with its statutory provisions.¹⁴⁹ In particular, the ITC has considerable difficulty in defining and determining (1) rapidly increasing imports, (2) material injury, (3) threat of material injury, and (4) causation.¹⁵⁰ Inconsistent ITC statutory interpretations¹⁵¹ and a lack of legislative assistance¹⁵² have undermined the intended purpose of section 406.¹⁵³

The ITC must apply the statute consistently and establish explicit guidelines to enable domestic industries to determine the availability of relief under section 406. In addition, NME producers need these measures so they will know in advance the parameters of nondisruptive or noninjurious importation.¹⁵⁴ To date, section 406 remains an elusive and inconsistent alternative to remedying market disruption. Unlike the antidumping statute, however, this statute may eventually become an efficient trade remedy if Congress provides the necessary assistance.¹⁵⁵

V. PROPOSAL

Although many individuals debate the issues concerning trade with NMEs, few believe the current alternatives are optimal.¹⁵⁶ Finding the most efficient solution, however, is difficult because the variables involved are numerous and complicated. For any proposed alternative or modification to succeed, the ITC must apply the solution in a straightforward manner and must not infringe on underlying policy goals of stimulating international trade and protecting United States industry from unfair imports. The law must be strict enough to protect domestic companies, yet flexible enough to promote international trade. With these goals in mind, the most desirable solution is to modify section 406 and repeal the antidumping law.

149. See Canned Mushrooms from the People's Republic of China, 47 Fed. Reg. 55,336, 55,337-38 (ITA 1982) (discussing the statutory interpretation of material injury within section 406 and the distinction between "contributing cause" under the antidumping statute and "significant cause" of section 406).

150. Recent Development, *Relief from Imports*, *supra* note 19, at 629.

151. See *id.* at 630 (illustrating the ITC's inconsistent interpretation of section 406).

152. See *id.* (discussing the lack of legislative guidance in applying the statutory criteria of section 406).

153. See Horlick & Shuman, *supra* note 5, at 827 (discussing the purpose of section 406); Sandler, *supra* note 5, at 785 (stating that Congress directed section 406 at market disruption imports from communist countries); Recent Development, *Relief from Imports*, *supra* note 19, at 617 (stating that Congress enacted section 406 because increasing imports from NMEs potentially cause market disruption).

154. Recent Development, *Relief from Imports*, *supra* note 19, at 659.

155. See *id.* (discussing the potential effectiveness of section 406).

156. Horlick & Shuman, *supra* note 5, at 830.

Section 406 avoids the complexities and uncertainties of the antidumping law.¹⁵⁷ With the proper amendments and changes, this statute can better accomplish the stated objectives of NME import legislation.¹⁵⁸ This section (1) discusses why section 406 is preferable to the antidumping law and concludes that Congress should repeal the latter in favor of the former, and (2) proposes modifications to the current version of section 406 that will improve its effectiveness.

A. REPEAL THE ANTIDUMPING LAW AND MODIFY SECTION 406

Section 406 contains a more effective remedy than the antidumping law for companies injured by NME imports that receive subsidies. Section 406 does not involve complex price comparisons with foreign countries: it focuses solely on domestic data.¹⁵⁹ Thus, unlike the antidump-

157. See Caine, *supra* note 114, at 684 (discussing the unfair and uncertain nature of the antidumping law); Tarullo, *supra* note 128, at 558 (criticizing current trade laws); Horlick & Shuman, *supra* note 5, at 817-18 (stating that the antidumping law is unpredictable, unfair to trading partners, unreliable, and subject to abuse).

158. See Tarullo, *supra* note 128, at 549 (noting that Congress successfully amended the trade laws to broaden their scope); *Can Will Should*, *supra* note 114, at 1362 (discussing the principles and objectives associated with the antidumping and countervailing duty law).

159. Compare 19 U.S.C. § 2436(a) (1982) (outlining the criteria for determining the existence of market disruption) and 19 U.S.C. § 2436(e)(2) (defining market disruption) with 19 U.S.C. § 2251(b) (1982) (setting out the standard for assessing injury to domestic industry caused by increased imports from market economies). The section 406 material injury standard requires a lower level of injury than section 201 serious injury. Anhydrous Ammonia, *supra* note 142, at 27,575; see *infra* notes 199-201 and accompanying text (discussing the material injury standard of section 406). Nonetheless, the ITC, in section 406 proceedings, looks to the same type of data it uses in section 201 inquiries. Clothespins from the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, USITC Pub. No. 902, Inv. No. TA-406-2, TA-406-3, TA-406-4, at 7-9 (ITC 1978) [hereinafter Clothespins]; see Recent Development, *Relief from Imports*, *supra* note 19, at 636-40 (citing the ITC's practice of using the economic data provided in section 201 for section 406 proceedings).

Section 201 of the Trade Act of 1974 is the provision under which entities, as defined in 19 U.S.C. § 2251(a)(1), can apply for relief from fairly-priced imports from market economies. Under section 201, the ITC commences an investigation, upon the filing of a petition, to determine whether a foreign country imports an article in such increased quantities that the increased imports are a "substantial cause" of serious injury to domestic industry. 19 U.S.C. § 2251(b)(1). In making its determinations, the ITC considers relevant economic indicators, including:

(A) with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry;

(B) with respect to the threat of serious injury, a decline in sales, a higher and growing inventory, and a downward trend in production, profits, wages or employment (or increasing underemployment) in the domestic industry concerned; and

ing statute, section 406 does not have problems with "fair value" determinations,¹⁶⁰ procurement of data from foreign countries,¹⁶¹ selection of appropriate surrogate countries,¹⁶² and setting prices in an inflationary era where exchange rates fluctuate.¹⁶³

Section 406 is also preferable to the antidumping law because it does not unduly protect domestic industries. Section 406 contains a more stringent causation standard¹⁶⁴ and requires presidential review before the imposition of sanctions. The less protectionist nature of section 406 will benefit the economy because it will indirectly force United States companies to modernize and produce goods at a lower cost.¹⁶⁵

(C) with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

Id. § 2251(b)(2). *But see id.* § 1673 (1982) (stating the procedure implemented when the administering authority determines that a country is selling foreign merchandise in the United States at less than its fair value and a United States industry is materially injured or threatened with material injury). In making its determination under the antidumping statute, the ITC uses a surrogate foreign country to construct the value of the relevant imported product. *Id.* § 1677b(c).

160. 19 U.S.C. § 2436(e)(2) (1982). Section 406 employs a material injury standard, which does not involve a fair value determination. *Id.*; *cf. id.* § 1673 (requiring a fair value determination under the antidumping law).

161. *See* Horlick & Shuman, *supra* note 5, at 819-26 (providing a detailed discussion of the problems and uncertainties involved in procuring data in trade cases).

162. *See id.* at 819-26 (providing a detailed discussion of the problems and uncertainties involved with selecting a surrogate country under the antidumping statute).

163. *See* Caine, *supra* note 114, at 695 (explaining the problems involved when there is a movement in exchange rates in the international currency market). Because section 406 involves domestic data, and not foreign prices, this complexity does not arise under section 406. *See supra* note 159 (discussing the economic criteria used in a section 406 proceeding); *see also* Caine, *supra* note 114, at 721-24 (discussing the preferability of the escape clause over the antidumping law).

164. 1974 SENATE REPORT, *supra* note 97, at 119, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 7263; *see* Recent Development, *Relief from Imports*, *supra* note 19, at 653 (defining the causation standard required under section 406). To find market disruption, the ITC must find "material injury or threat thereof" and that imports under investigation are a "significant cause" of the injury. *Id.* *But see* Caine, *supra* note 114, at 707 (concluding that the causation requirement under the antidumping law is minimal). Under the antidumping law, imports sold at a price less than fair value determine material injury. 19 U.S.C. § 1673 (1982 & Supp. IV 1986). The language of the statute, however, does not require that the imports cause or principally cause the injury. *Id.* Rather, the imports must mainly "contribute" to the injury. *Id.* Thus, an industry can be struggling for a variety of reasons, all except *one* unrelated to the import trade investigation, and still be injured "by reason of" the imports. Caine, *supra* note 114, at 707; *see also* Tarullo, *supra* note 128, at 611 (stating that the current causality requirement of the antidumping law is weak).

165. *See* Note, *Protecting Steel*, *supra* note 3, at 866 (noting the negative impact that foreign imports have on the steel industry). This article discusses alternatives for the steel industry. *Id.* at 884-85. The two alternatives presented are (1) to allow the market to slim down the industry and force out inefficient companies, and (2) to create a nationalized policy that would shift resources away from the steel industry. *Id.*; *see also* Tarullo, *supra* note 128, at 557-58 (concluding that a market correction approach

In addition, section 406 is more judicially economical than the antidumping law. Section 406 provides limited judicial review of presidential decisions.¹⁶⁶ Thus, under section 406, a considerable reduction in litigation of trade conflicts will result.

Finally, section 406 is preferable from a foreign policy standpoint because the President will consider international consequences prior to the imposition of sanctions.¹⁶⁷ The President's oversight will provide assurance that domestic relief will remain compatible with international objectives.¹⁶⁸ This compatibility is particularly significant because United States trade decisions have a significant impact on the entire international market.¹⁶⁹ In light of the foregoing considerations, section 406 is a preferable remedy for the injury that NME imports cause. Consequently, Congress should repeal the antidumping law and modify section 406 to resolve all disputes.

B. PROPOSED MODIFICATIONS OF SECTION 406

Although section 406 is preferable to the antidumping law, it still requires substantial modification to become an effective remedy.¹⁷⁰ Currently, the congressional guidelines pertaining to the statutory criteria are too uncertain, causing the ITC to interpret the statute inconsistently.¹⁷¹ To transform section 406 into an effective remedy, both

is inconsistent with the efficiency goals of a market model); Barshefsky, Mattice & Martin, *supra* note 128, at 1101 (suggesting that to restructure the steel industry, Congress should not impose countervailing duties on government subsidies directed at remodeling the steel industry).

166. See Recent Development, *Relief from Imports*, *supra* note 19, at 619 n.18 (discussing the limited judicial review available following negative determinations of the President or Congress). To date, no section 406 action has been appealed to the courts. *Id.*

167. See 19 U.S.C. § 2251(c)(5) (1982) (noting that in making his or her decision, the President shall consider international economic interests of the United States).

168. See *supra* notes 146-48 and accompanying text (discussing the political significance of the decision not to impose sanctions at a time when the United States was seeking detente with the Soviet Union); Jackson, *supra* note 4, at 1578-79 (explaining the nonquantifiable costs of the import regulatory system). A system that depends solely on statutory criteria is too inflexible to implement foreign policy effectively. *Id.* at 1579.

169. See *Chicago & S. Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 109-10 (1948) (observing the significance of congressional and executive powers of the United States government in international commerce); *Trade Reform Act of 1973, Part 2: Hearings on H.R. 10710 Before the Senate Comm. on Finance*, 93d Cong., 2d Sess. 451-52 (1974) (noting the influential role of the United States in international trade).

170. See Recent Development, *Relief from Imports*, *supra* note 19, at 659 (concluding that the lack of legislative guidance undermined the effectiveness of section 406).

171. *Id.*

theoretically and practically, Congress should eliminate the increasing rapidly criterion and provide objective indicators and guidelines to assist the ITC in determining material injury and significant cause.¹⁷²

1. *Rapidly Increasing Imports*

To reach an affirmative decision as to market disruption, the ITC must determine that imports from a NME are increasing rapidly.¹⁷³ Although this test is stricter than the increasing imports standard of section 201,¹⁷⁴ the legislative history does not explain the distinction.¹⁷⁵ Also, the current test has created significant problems because Congress has not defined the relevant time period over which to measure import growth.¹⁷⁶

Even if Congress provides practical and effective parameters, it is preferable to eliminate the increasing rapidly standard as a determinative factor in deciding market disruption. Ironically, Congress initially designed section 406 to protect domestic industry from excessive dumping or rapidly increasing imports from NME countries.¹⁷⁷ At its inception, section 406 merely comprised one part of a tripartite system consisting of section 406, the countervailing duty law, and the antidumping law, to remedy injuries that NME imports caused.¹⁷⁸ Because section 406 occupied a unique position within the previous framework, the increasing rapidly standard was acceptable. The *Georgetown Steel* decision, however, eliminated the countervailing duty law as an available means of relief.¹⁷⁹ If Congress eliminated the antidumping law, section 406 would occupy a new role as the sole remedy for relief from the injury that NME imports cause.

Consequently, the "rapidly increasing" standard would be impracti-

172. See *id.* at 637-53 (discussing the confusion involved in applying the statutory requirements of section 406).

173. 19 U.S.C. § 2436(e)(2) (1982); 1974 SENATE REPORT, *supra* note 97, at 111, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS at 7263; see Recent Development, *Relief from Imports*, *supra* note 19, at 629 (analyzing the definition and application of the "increasing rapidly" standard).

174. 19 U.S.C. § 2251(b)(1) (1982).

175. Certain Gloves from the People's Republic of China, USITC Pub. No. 867, Inv. No. TA-406-1, at 5 n.1 (1978) [hereinafter *Certain Gloves*].

176. See Recent Development, *Relief from Imports*, *supra* note 19, at 629 (noting that the "language of section 406 and its legislative history do not indicate the appropriate time period to measure import growth").

177. See *id.* at 617 (explaining the reasons Congress enacted section 406).

178. See Comment, *Import Relief Options*, *supra* note 1, at 1051-52 (stating that the countervailing duty law, the antidumping law, and section 406 sought to remedy injury from NME imports).

179. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

cal and would impede the effectiveness of the law. There are two main shortcomings of the increasing rapidly standard. First, this standard causes difficulty in measurement.¹⁸⁰ Second, the standard prevents imposition of the law in instances when it is otherwise necessary.¹⁸¹

a. *Measurement Problems*

Neither section 406 nor the legislative history definitively indicate the relevant time period used to measure import growth.¹⁸² Measurement problems will result because different reference points will determine whether there is an increase in imports.¹⁸³ In the *Chinese Workgloves* case, the ITC made a comparison based on two discrete time periods.¹⁸⁴ In concluding that imports were not increasing rapidly, the commissioners compounded import levels from 1972 to 1975.¹⁸⁵

In a later case, *Clothespins*,¹⁸⁶ the commissioners first undertook the strategy employed in *Chinese Workgloves*.¹⁸⁷ Using this method, the ITC found imports to be increasing rapidly as they grew from 281,000 gross in 1973 to 506,000 gross in 1977,¹⁸⁸ an increase of approximately eighty percent. The commissioners, however, then shifted their focus to the time period between 1975 and 1977.¹⁸⁹ Using this time frame, they determined there was a gradual rather than a rapid increase.¹⁹⁰

In addition to determining the relevant time period, the ITC has also encountered problems because it lacks historical data for its cases.¹⁹¹ The Senate Finance Committee report suggests that historic trade level factors may determine whether imports are increasing rapidly.¹⁹² In

180. Recent Development, *Relief from Imports*, *supra* note 19, at 629.

181. See *Certain Gloves*, *supra* note 175, at 1 (holding that imports were not increasing rapidly); *Clothespins* from the People's Republic of China, the Polish People's Republic and the Socialist Republic of Rumania, 43 Fed. Reg. 35,757, 35,757 (ITA 1978) (finding that a market disruption existed with respect to the People's Republic of China, but not with respect to Poland or Romania); see also Recent Development, *Relief from Imports*, *supra* note 19 (analyzing the ITC decisions with regard to the availability of relief from imports under section 406 proceedings).

182. See Recent Development, *Relief from Imports*, *supra* note 19, at 629-33 (discussing the appropriate time period in light of past cases).

183. See *id.* at 632 (illustrating how different results are reached through using different time periods as reference points).

184. *Certain Gloves*, *supra* note 175, at 11-12.

185. *Id.*

186. *Clothespins*, *supra* note 159, at 6-7.

187. *Id.* at 19.

188. *Id.*

189. *Id.*

190. *Id.*

191. See *Anhydrous Ammonia*, *supra* note 142, at 27,571 (noting the lack of historical data with respect to trade levels).

192. 1974 SENATE REPORT, *supra* note 97, at 212, reprinted in 1974 U.S. CODE

three cases where a majority concluded that imports were increasing rapidly, no historical data was available to compare present imports.¹⁹³ In addition, the commissioners remarked about the problems that exist in determining whether imports are increasing rapidly when historical data is unavailable.¹⁹⁴ The ITC has encountered substantial difficulty with this standard. Therefore, to administer import trade legislation effectively, the ITC should eliminate this nebulous requirement.

b. The Increasing Rapidly Standard Can Prevent Invocation of the Law When it Is Otherwise Necessary.

Companies must satisfy the statutory provisions of section 406, which requires imports to be increasing rapidly before companies can request the President to review the situation.¹⁹⁵ For example, in *Chinese Workgloves*, the ITC held that imports were not increasing rapidly, thereby denying the company presidential review.¹⁹⁶ Thus, even if the ITC had found that the domestic industry suffered a material injury and the company satisfied all the other statutory requirements, the statute still would have precluded the company, although injured, from seeking relief.¹⁹⁷

The increasing rapidly standard also does not encompass the possibility of NME manufacturers drastically reducing the price of exports.¹⁹⁸ For example, if producers significantly reduce the price of their goods and still maintain a steady export level, United States companies cannot obtain relief because the imports are not increasing rapidly. Again, although material injury might exist, companies will not obtain relief.

2. *The Material Injury Standard*

The language of section 406 and the legislative history do not help

CONG. & ADMIN. NEWS at 7343.

193. See *Anhydrous Ammonia*, *supra* note 142, at 27,571 (noting the lack of historical data with respect to imports).

194. See *Recent Development, Relief from Imports*, *supra* note 19, at 633 (discussing the absence of historic trade levels in determining whether imports are increasing rapidly, and citing the *Anhydrous Ammonia* and *Clothespins* cases).

195. See *supra* note 140-41 and accompanying text (noting that no companies have received relief from a section 406 proceeding).

196. *Certain Gloves*, *supra* note 175, at 1.

197. See 19 U.S.C. § 2436(e)(2) (1982) (stating that for market disruption to exist, the ITC must find, in addition to material injury, that imports are increasing rapidly).

198. See *generally* *Recent Development, Relief from Imports*, *supra* note 19, at 633 (discussing the problems with the statutory language of section 406).

clarify the term "material injury."¹⁹⁹ Apparently, however, the material injury standard is a lesser guide than the serious injury standard of section 201.²⁰⁰ Unfortunately, this difference is based on the extent of the legislative guidance. Consequently, the ITC encountered considerable difficulty in determining material injury.²⁰¹

Congress should provide objective indicators similar to those under section 201²⁰² to assist the ITC in determining material injury.²⁰³ Section 201 instructs the ITC to consider such factors as the idling of production facilities in the industry and the inability of significant numbers of companies to operate at a reasonable profit level and significant employment within the industry.²⁰⁴ These indicators are helpful, yet they are equivocal and need modification with respect to percentile reference points. For example, a ten percent benchmark percentage rate can apply to unemployment. The quantitative guidelines, although unrigid, might assist the ITC in reaching consistent determinations.

3. Causation

The appropriate causation standard under section 406 is "significant cause."²⁰⁵ Although section 406 does not define the standard,²⁰⁶ it appears that the "significant cause" occupies a middle position between a "substantial cause" standard and "contribute importantly" requirement.²⁰⁷ Once again, the ITC has experienced difficulty in interpreting this statutory requirement.²⁰⁸ To clarify this standard, Congress should

199. H.R. REPORT NO. 93-571, 93d Cong., 1st Sess. at 82 (1973); 1974 SENATE REPORT, *supra* note 97, at 212, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 7343.

200. *Id.*

201. *See* Recent Development, *Relief from Imports*, *supra* note 19, at 639 (discussing the problems the ITC encounters when it determines material injury).

202. Trade Act of 1974 §§ 201-03, 19 U.S.C. §§ 2251-53 (1982). Congress designed the escape clause of section 201 to provide temporary relief for an industry suffering from serious injury or threat thereof from fairly priced imports, so that the industry will have sufficient time to adjust to the freer international competition. 1974 SENATE REPORT, *supra* note 97, at 119, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 7186.

203. 19 U.S.C. § 2251(b)(2) (1982).

204. *Id.* § 2251(b)(2)(A).

205. *Id.* § 2436(e)(2).

206. *Id.*

207. *Id.* § 2251(b)(4). The statute defines "substantial cause" as a cause which is important and not less important than any other cause. *Id.* The statute also defines "contribute importantly" as a cause that is important, but not necessarily more important than any other cause. *Id.* §§ 2272, 2341(c), 2371(c); *see also* Recent Development, *Relief from Imports*, *supra* note 19, at 654 (suggesting that "significant cause" occupies a middle ground between "substantial cause" and "contribute importantly").

208. *See* Certain Gloves, *supra* note 175, at 7 (illustrating the difficulty in applying

explicitly define the phrase "significant cause" and provide guidelines that the ITC could consider in reaching its decision.

In previous cases where the ITC has determined imports caused the injury, the commissioners focused on the decrease in domestic sales as a result of imports, the price of imports vis-à-vis domestic goods, and the market share of foreign goods.²⁰⁹ With respect to material injury, quantitative parameters might provide a helpful reference point for the commissioners. This method is not intended as a rigid mathematical equation; rather, it is intended to assist the commissioners in determining causation consistently.

CONCLUSION

The decision in *Georgetown Steel* disregarded the plain meaning of the countervailing duty statute, relevant legislative history, and case law. The holding of the court eliminated the applicability of the countervailing duty law to imports from NMEs, leaving only the antidumping law and section 406 to protect domestic interests. Currently, neither alternative is effective. The antidumping law is too unpredictable and difficult to administer, while section 406 is unduly vague and ambiguous. Congress should repeal the antidumping law and modify section 406 with statutory guidelines and reference points to resolve efficiently the problem of a remedy for injuries caused by NME imports.

Certainly, the task of formulating United States trade remedies is complex, and the best solution will still contain imperfections. Nevertheless, Congress should create new laws or modify old ones. The current remedies have resulted in confusion and disarray.

the vague statutory criteria of section 406); Recent Development, *Relief from Imports*, *supra* note 19, at 654 (discussing the problems of the causation standard of section 406). *But see* *Clothespins*, *supra* note 159, at 24-25 (noting that other causes contributing to the injury of the industry do not preclude a finding that the imports significantly caused injury).

209. *See* Recent Development, *Relief from Imports*, *supra* note 19, at 659 (discussing the focus of the section 406 investigations by the ITC).