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## Changing the World Economies: A Model for Applying United States Countervailing Duty Law to Exported Products from a Unified Germany, 25 J. Marshall L. Rev. 81 (1991)

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# COMMENTS

## CHANGING WORLD ECONOMIES: A MODEL FOR APPLYING UNITED STATES COUNTERVAILING DUTY LAW<sup>1</sup> TO EXPORTED PRODUCTS FROM A UNIFIED GERMANY

### INTRODUCTION

The unification<sup>2</sup> of East and West Germany<sup>3</sup> was one of the

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1. United States Countervailing Duty ("CVD") law is embodied in § 1303 and § 1671 of Title 19 of the United States Code. Section 1303 states in pertinent part:

#### § 1303 COUNTERVAILING DUTIES

(a)(1) Except in the case of an article or merchandise which is a product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

19 U.S.C. § 1303 (1988).

Section 1671 provides:

#### § 1671 Countervailing Duties imposed

##### (a) General rule

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 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 net subsidy.

19 U.S.C. § 1671(a) (1988).

CVD law protects domestic industries from imported goods when a government has granted a preferential subsidy to a certain industry in that respective foreign country. These subsidies reduce the cost of manufacturing and importing the product. To counteract the governmental benefit granted on the imported product, CVD law adds a countervailing duty equal to the amount of the subsidy bestowed on that product over and above the normal custom import duty. *Id.* This duty is like a tax that is imposed at any United States port by United States Customs on any subsidized product. Unlike original CVD law, which was enacted in 1898 solely to countervail sugar, Section 1303 was enacted in the Tariff Act of 1930 and covered all imports. See Paul W. Jameson, *The Administration of U.S. Countervailing Duty With Regards to Domestic Subsidies: Where Is It, Where It May Go*, 12 SYRACUSE J. INT'L L. & COM. 59, 60-61 (1985) (discussing the history of all CVD law amendments from its 1898 inception through 1984 amendments).

A "bounty or grant" in § 1303 is synonymous with "subsidy" in section 1671. See 19 U.S.C. § 1677(5)(A) (1988). A general definition of a "subsidy" is any government action which causes a firm's or a particular industry's total net private cost of production to fall below the level of costs that it would incur in the course of producing the same level of output in the absence of the government action. INGO WALTER & TRACY MURRAY, *HANDBOOK OF INTERNATIONAL BUSINESS* 7 (2d ed. 1988).

Under CVD law in § 1671, the Department of Commerce ("ITA") makes the subsidy determination and the International Trade Commission ("ITC") determines if a domestic industry has been injured by reason of the subsidized imports. Both the ITA and the ITC make initial preliminary determinations and subsequent final determinations. See 19 U.S.C. § 1671(b), (d) (1988).

Section 1303 only requires a determination by the ITA that the imported product had a bounty or grant bestowed upon it, and no ITC injury determination is required as in § 1671. This is the key distinction between the two sections, since § 1671's additional injury requirement is a major advantage which is only given to those "countries under the Agreement." A country is a "country under the Agreement" if it is a contracting party to the General Agreement on Tariffs and Trade ("GATT") Subsidies Code, is a party to a bilateral agreement with the United States, or has assumed substantially equivalent obligations. PETER B. FELLER, *U.S. CUSTOMS AND INT'L TRADE GUIDE* § 17.04(2) (1990).

Countries under the Agreement are:

GATT Signatories-Subsidies Code

Australia	Finland	Pakistan
Austria	Hong Kong	Philippines
Brazil	India	Sweden
Canada	Indonesia	Switzerland
Chile	Israel	Turkey
Egypt	Japan	United States
EEC Members	New Zealand	Uruguay
	Norway	Yugoslavia

most revolutionary of the current eastern block<sup>4</sup> reforms. This union is advantageous to both countries because each has commodities mutually beneficial to the other.<sup>5</sup> The most significant assist-

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United States Bilateral Agreements

El Salvador	North Yemen
Honduras	Paraguay
Liberia	Venezuela
Nepal	

Assumed Substantially Equivalent Obligations

Mexico	Taiwan
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*Id.* § 17.04. See also 19 C.F.R. § 355, Annex I (1990) for current updating of this list.

In § 1671(b) these countries receive an ITC injury test in addition to the ITA finding of a subsidy. In § 1671 a higher standard is necessary before a countervailing duty is imposed, thereby rewarding those countries that have entered into bilateral trade agreements with the United States. See *infra* notes 72-73 and accompanying text for a discussion of the ITA injury test.

Since nearly every trade law is referred to by a different section number than the current statutory number (i.e. § 1303 as § 303 or § 1671 as § 701), this comment will refer only to the current statutory section numbers to avoid confusion.

2. This comment will refer to the union of the Germanies as unification rather than reunification since the term reunification implies a return to the military state of the Nazis. In order to avoid this implication, people in Germany prefer the use of the term unification. See *Of Cabbages and Kings*, (ABC television broadcast, Aug. 19, 1990) (transcript available from WLS Television by calling (312) 750-7777).

3. The unification of Germany is a social, political, economic and monetary union and will present many multi-faceted problems. This comment addresses the economic and monetary facets of unification, but will at times refer to some collateral social issues which overlap into the economic sector. See generally DEUTSCHE BANK, GERMAN ECONOMIC AND MONETARY UNION ("GEMU") (1990) (copies available by calling Deutsche Bank (212) 474-8000). See also *Treaty Establishing A Monetary, Economic and Social Union*, 29 I.L.M. 1108 (Sept. 1990) (English copy of the treaty unifying the two Germanies entered into force on June 30, 1990). This comment will refer to East Germany as eastern Germany, rather than former East Germany, since that former sovereign state is now merely a region of "Germany." Thus, "East Germany" will generally refer to the former political sovereign.

4. Eastern Europe consists of Bulgaria, Czechoslovakia, East Germany (GDR), Hungary, Poland and Romania. See INTERNATIONAL TRADE COMMISSION (ITC), 65TH Q. REP. TO THE CONGRESS AND TRADE COMM. ON TRADE BETWEEN THE U.S. AND THE NONMARKET ECONOMY COUNTRIES DURING 1990, at 4 n.11 (Apr., 1991) (Publication 2375) [hereinafter ITC] (copies of this report are available from the United States International Trade Commission in Washington, D.C. by calling (202) 252-1809).

5. Western Germany needs the large labor force which is available in eastern Germany. See Jurgen Werner, *East Germany's Economy to Grow 7.5% Yearly*, EUR. TRADE REP., May 30, 1990, at 14. However, eastern Germany's 9 million person work force must become more productive. See Peter Passell, *German Unity: Paying the Bill*, N.Y. TIMES, Aug. 21, 1991, at C2 (discussing fact that eastern Germans are only one-third as productive as their western German counterparts). Nevertheless, some have projected that the eastern German productivity rate will be double that of the western German rate in the next three years. See DEUTSCHE BANK, *supra* note 3, at 53-56. On the other hand, eastern Germany provides western Germany with an untapped market for its goods.

ance that western Germany is giving to eastern Germany consists of massive subsidies<sup>6</sup> needed to modernize its industry, which western Germany is bestowing upon the surviving eastern German companies.<sup>7</sup>

Some experts estimate that these subsidies could reach as high as 600 billion Deutsche Mark ("DM")<sup>8</sup> (\$402 billion dollars) over the next ten years.<sup>9</sup> With the assistance of these subsidies and relatively cheap labor,<sup>10</sup> many industries in the unified Germany will

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*See Business Outlook: Germany*, BUS. EUR., May 3, 1991, at 8 (copies available from Business Eastern Europe/Business International, 40 Duke Street, London W1A, 1DW United Kingdom or by telephone at (+44-71-493-6711)). Western German banks have already opened over 300 branches in the East to service the population. *See New Laws Allow Foreign Investment In East Germany*, INT'L FIN. L. REV., Mar., 1990, at 31 (copies available at Euromoney Publications plc, Nestor House, Playhouse Yard, London EC4V 5EX or by telephone at 01-236 3228).

6. Rich Thomas, *A New Germany*, NEWSWEEK, July 9, 1990, at 32. The German Union informally began with a huge financial subsidy from western to eastern Germany as a result of the highly favorable currency exchange on July 2, 1990. *Id.* This currency exchange permitted eastern Germans to trade their devalued Ostmarks ("OM") for western German Deutsche Mark ("DM") at a 1:1 exchange rate. *Id.* The unofficial rate of exchange was at least 3:1 or 4:1 OM to DM, thereby giving eastern Germans a three- to four-fold increase in value for any capital they held on the exchange date. *See* DEUTSCHE BANK, *supra* note 3, at 13. Western Germany committed over 60 billion dollars to the favorable exchange, which left the average three person eastern German family with an additional \$15,500 in the bank. *See* Thomas, *supra*, at 32. Eastern German companies, on the other hand, received an exchange rate of 2:1. *See* DEUTSCHE BANK, *supra* note 3, at 18. Western Germany and the European Economic Community will give many other large financial subsidies to surviving eastern German companies. *See infra* notes 111-163 and accompanying text for a detailed analysis of these subsidies.

7. Some commentators predict that at least fifty per cent of these eastern German companies will go bankrupt within the first year of unification. *See* Otto Friedrich, *Germany: Toward Unity*, TIME, July 9, 1990, at 78; DEUTSCHE BANK, *supra* note 3, at 18. *See also* *The Business Outlook: GDR*, BUS. E. EUR., Mar. 12, 1990, at 88 (up to seventy-five percent of East German industry not viable); Juliane Langenecker, *Eastern Germany: Truehand's Results*, BUS. E. EUR., May 20, 1991, at 156 (stating that 1000 out of 8000 former GDR companies were privatized by the end of March, 1991).

8. The exchange rate for DM to dollars was DM1.67 = 1 dollar on July 2, 1990 when east Germans traded in their Ostmarks on a 1:1 basis for West German Deutsche Marks ("DM"). *See Foreign Exchange*, J. COM., July 2, 1990, at 3A (copies available by calling the Journal of Commerce at 1-800-221-3777). The actual value of the Ostmark for DM on world currency markets was, at best, 3:1 or 4:1, Ostmarks per DM. *See* DEUTSCHE BANK, *supra* note 3, at 13 (listing the exchange rate on July 2, 1990).

9. *See* Thomas, *supra* note 6, at 38; *Worldgram: Bad News for Chancellor Kohl*, U.S. NEWS & WORLD REP., May 28, 1990, at 43. This estimate appears to be reasonably accurate in light of current information which projects that western Germany will spend DM120 billion (\$71 billion) in 1991 alone. *See The New Germany-Banks Show Rare Optimism on Eastern German Growth*, BUS. E. EUR., April 19, 1991, at 2; *Germans Pay The Price Of Unity: Taxes Soar*, CHI. SUN TIMES, July 1, 1991, at 6.

10. *See* Werner, *supra* note 5, at 14. *See also* *E. German Production Falls: Workers Cut*, J. COM., July 20, 1990, at 10A (700,000 East Germans then unem-

be able to export their products to the United States at much lower prices than pre-unification prices.<sup>11</sup> When this occurs, United States domestic industries will inevitably rush to file countervailing duty ("CVD")<sup>12</sup> petitions<sup>13</sup> to combat these unfair<sup>14</sup> trade practices. This

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ployed and nearly 3 million could face unemployment in the future, thereby lowering labor costs); Alexander Ferguson, *100,000 Eastern Germans Protest Misery*, CHI. SUN TIMES, Mar. 19, 1991, at 31 (listing Eastern German unemployment at 8.9 percent); DEUTSCHE BANK, *THE NEW GERMAN FEDERAL STATES 27* (1990) (presenting statistics of gainfully employed eastern Germans).

11. "Pre-unification price" signifies the price of a product before western Germany gave subsidies, which may reduce eastern German production costs and, consequently, a product's price. See *infra* note 173 and accompanying text for a discussion of pre and post-unification prices.

12. For a detailed discussion of United States CVD law, see *supra* note 1.

13. For United States CVD petition requirements, see 19 U.S.C. § 1671(a) (1988). See also 19 C.F.R. § 355.12 (1990) (listing additional CVD petition requirements). To file a CVD petition a party must be an "interested party." 19 U.S.C. § 1677(9) (1988). Generally, this means a domestic industry or representative group thereof must file the petition or support it. The Court of International Trade ("CIT") has recently held that a single domestic manufacturer did not have standing to file a petition solely on its own behalf because it did not represent the electrical conductor rods industry. See *Suramerica de Aleaciones Laminadas*, No.127164 (Ct. Int'l Trade 1990) (Westlaw ITrade Library, Courts file). See also *Court Challenges Rules on Unfair Trade Cases*, J. COM., Aug. 30, 1990, at 1 (discussing the CIT's reversal of the ITA's allowing a single domestic manufacturer to file a petition). The author of this comment believes that if an industry has sufficient political clout, it may also indirectly urge the ITA to self-initiate a petition, which is permissible under CVD law. Cf. Keith M. Rockwell, *Hills: U.S. to Delay Complaint with GATT against Airbus*, J. COM., Oct. 17, 1990, at 5B (United States waited to file § 301 complaint against EC in GATT due to Boeing Co. and McDonnell Douglas Corp.'s political influence). See also 19 U.S.C. § 1671a(a) (1988) and 19 C.F.R. § 355.25 (1990) (detailing self-initiation procedure). This raises serious questions as to the legitimacy of the self-initiation procedure). Many times when self-initiation occurs, however, the United States reaches a voluntary restraint agreement ("VRA") and the petition is suspended. See *id.* § 1671c (f)(2)(B). A VRA is an agreement wherein an exporting country voluntarily agrees to limit its exports by means of legislation or other manners of enforcement within the exporting country. See Michael M. Djavaherian, Comment, *Voluntary Restraint Agreements: Effects and Implications in Steel and Auto Cases*, 11 N.C. J. INT'L L. & COM. REG. 101, 102 (1986). An orderly market agreement ("OMA") is an agreement between two governments wherein they agree to let the importing country enforce a trade agreement. *Id.*

14. "Unfair" trade practices are practices that foreign countries and producers use in exporting goods to the United States, which undermine the ideal of free trade by failing to comply with the free market standards imposed by the United States. See Ronald A. Cass, *Trade Subsidy Law: Can A Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL'Y INT'L BUS. 609, 627 (1990); Robert F. Hoyt, *Implementation and Policy: Problems in the Application of Countervailing Duty Laws to Nonmarket Economy Countries*, 136 U. PA. L. REV. 1647 (1988).

Theoretically, "unfair trade" is any practice where an exporter is able to lower its product price because of an advantage that has been artificially introduced, such as a government subsidy, market manipulation, or, a temporary lowering of its price to achieve market penetration. Hoyt, *supra*, at 1650. Essentially, this practice does not result from natural competitive advantages; rather, the exporter may fairly possess cheap labor or necessary raw materials. *Id.* In practice, however, "unfair trade" is now much broader. An "unfair trade" prac-

comment will examine how the United States will apply its CVD law to imported products from a unified Germany.

First, this comment will define and discuss "comparative advantage"<sup>15</sup> as it applies to market and nonmarket oriented economy countries (NME's)<sup>16</sup> and how the United States could change its CVD law to encompass NME countries that are making the transition to market economies (transitioning NME's "T-NME's").<sup>17</sup> Next, this comment will analyze the application of United States

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tice now means almost any objectionable trade practice of a foreign industry whose exports might cause injury to a United States industry. See Diane Wood, "Unfair" Trade Injury: A Competitive Based Approach, 41 STAN. L. REV. 1153 (1989) (comparing CVD and Antidumping ("AD") law with antitrust law focusing on the latter's higher level of causation).

One commentator has urged that the ease of filing a CVD petition and the large financial burden it places upon an exporter to defend such a petition constitutes another form of trade barrier. See William P. Alford, *When is China Paraguay? An Examination of the Application of Antidumping and Countervailing Duty Laws of the United States to China and Other "Nonmarket Economy" Nations*, 61 S. CAL. L. REV. 79, 82 n.21 (1987).

15. Comparative advantage refers to the situation where a country has a special ability to provide a product less expensively than other countries as a result of its possession of cheaper raw materials, labor, and more efficient means of production required for that particular product. THE MCGRAW HILL DICTIONARY OF MODERN ECONOMICS 110 (2d ed. 1973).

16. The term "nonmarket economy" will hereinafter be referred to as NME. Other articles refer to NME's as state-controlled enterprises ("SCE's") or centrally-planned economies ("CPE's"). See Hoyt, *supra* note 14, at 1648 n.7; Kenneth R. Button, *Subsidization of State Trading Enterprise of Mineral Products*, 15 N.C.J. INT'L L. & COM. REG. 337, 339 n.12 (1990) (presenting history of state trading enterprises ("STE's")). Currently, 19 U.S.C. § 1202(3)(d) (1990) defines the following countries as NME's: Afghanistan, Albania, Bulgaria, Cambodia, Cuba, Czechoslovakia, East Germany ("GDR"), Estonia, Laos, Latvia, Lithuania, Mongolia, North Korea, and the U.S.S.R. In addition, the ITC treats Hungary, the People's Republic of China, Poland, Romania and Vietnam as NME's. See ITC, *supra* note 4, at 1.

Congress has enacted the following statutory factors that the ITA must utilize in identifying a NME:

- (i) the extent to which the currency of the foreign country is convertible into the currencies of other countries;
  - (ii) the extent to which wages in the foreign country are determined by free bargaining between labor and management,
  - (iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,
  - (iv) the extent of government ownership or control of the means of production,
  - (v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and
  - (vi) such other factors as the administration considers appropriate.
- 19 U.S.C. § 1677(18)(B) (1988).

17. This comment will refer to those countries which have recently started to decentralize their economy and institute modified versions of a market economy as "transitioning nonmarket economies" ("T-NME's"). Such countries include: Hungary, People's Republic of China, Poland, Romania and to a lesser degree Bulgaria, Czechoslovakia, Estonia, Latvia, Lithuania, and the U.S.S.R. The eastern German region is also a T-NME region, which will have similar problems adjusting to market principles.

CVD law to these varying economies and recent refinements in the statutory definition of "subsidy"<sup>18</sup> and the specificity test<sup>19</sup> of the Omnibus Trade & Competitiveness Act of 1988.<sup>20</sup> The next section will identify the categories of countervailable domestic subsidies,<sup>21</sup> give some examples of these subsidies from western to eastern Germany and will detail simplified formulas to calculate the exact subsidy rate involved in the examples. This comment will then calculate the subsidy rate of each product in a three product model, which is composed of three actual eastern German products, in order to show the subsidies possible effect on prices of these exports when imported into the United States. Finally, this comment will propose modifications to United States CVD law which are necessary to facilitate its rational application to T-NME's.

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18. "Subsidy" has been defined in 19 U.S.C. § 1677(5) (1988) as:

(5) Subsidy

(A) In general

The term "subsidy" has the same meaning as the term "bounty or grant" that is used in § 1303 of this title and includes, but is not limited to the following:

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

(B) Special Rule

In applying subparagraph (A), the administering authority, in each investigation shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

§ 1677(5).

19. See *infra* notes 61-104 and accompanying text for a detailed explanation of subsidy and the specificity test.

20. 19 U.S.C. § 2 (1988) (amendments in scattered sections of title 19).

21. The categories for countervailable domestic subsidies are preferential loans, grants, and equity infusions. See *supra* note 18 for the definition of United States domestic subsidies.



I. COMPARATIVE ADVANTAGE, NONMARKET ECONOMIES AND  
TRANSITIONING NONMARKET ECONOMIES: WHEN DOES  
COUNTERVAILING DUTY LAW APPLY?

Based upon the theory of free trade,<sup>22</sup> United States CVD law<sup>23</sup> is designed to offset the unfair trade<sup>24</sup> advantage which a foreign manufacturer would otherwise enjoy as a result of government subsidies.<sup>25</sup> In contrast, a fair comparative advantage results from differences in natural resources and specialization choices.<sup>26</sup> Trade based upon an exporter's comparative advantage,<sup>27</sup> is fair and encouraged.<sup>28</sup> Countries that have a fair, comparative advantage with respect to certain products produce these products more efficiently and at a lower cost in comparison to countries without such advantages. Thus, the comparatively advantaged country should produce more of these products than it needs and export the excess to other countries. The importing country can then more productively allocate its resources to the manufacture of products in which it has a similar comparative advantage.<sup>29</sup> Theoretically, this practice increases world wealth because of the efficient distribution of labor and resources.<sup>30</sup>

Comparative advantage, however, may also cause adverse reactions in the importing country. Comparative advantage assumes that labor and capital are mobile enough to be efficiently redis-

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22. Free trade is unimpeded trade between nations accompanied by an absence of trade barriers, such as numerical restrictions (quotas) and duty imposition; trade barriers artificially raise the product's price to domestic consumers. See William Mock, *Economic Advantage in East-West Trade: Abandoning Market Fictions in Trade With Nonmarket Economies*, 14 N.C. J. INT'L L. & COM. REG. 55, 56 (1989). See also Hoyt, *supra* note 14, at 1647 n.1 (discussing comparative advantage and free trade).

Free trade benefits domestic consumers because they buy the product at the lowest possible price. Free trade may hurt domestic producers of the same or similar products since they may lose market share or have lower profits on the sale of the same item. When this occurs, the United States administration must decide whether to allow the trade to be "free" or to encumber that trade with a trade barrier. Recently, the United States has become very protective of certain domestic industries. See Mock, *supra*, at 56.

23. See *supra* note 1 for a detailed discussion of CVD law.

24. See *supra* note 14 for a definition of "unfair trade."

25. See *supra* note 18 for countervailable governmental subsidies.

26. See Wood, *supra* note 14, at 1167.

27. See *supra* note 15 for the definition of comparative advantage.

28. See Mock, *supra* note 22, at 57.

29. *Id.*

30. By encouraging each country to do what it does the best and the cheapest, every country thus produces as much of a quality product as can be produced anywhere. *Id.* This minimizes waste and maximizes each country's potential. See Michael George Egge, Note, *The Threat of United States Countervailing Duty Liability on the Newly Emerging Market Economies in Eastern Europe: A Snake in The Garden?* 30 VA. J. INT'L L. 941, 952 (1990) (explaining in-depth the market efficiency theory).

tributed from declining import sectors to rising export sectors of the economy.<sup>31</sup> The theory of comparative advantage also underestimates the reactions of politically powerful displaced workers in the importing country who may not be willing to shift to rising industries in which the importing country has a comparative advantage.<sup>32</sup> Finally, some countries may choose to domestically produce a product in which it does not have a comparative advantage at greater expense, for national security reasons.<sup>33</sup>

Most market economies are driven by the forces of free trade and comparative advantage. In a NME, however, a central planning agency orchestrates the entire economic system by dictating output, price, and wages.<sup>34</sup> Therefore, normal market forces which drive free trade in market economies, such as supply and demand, do not exist in NME's.<sup>35</sup> NME's distort free trade by subsidizing certain sectors of its economy.<sup>36</sup> As a result, the NME country can sell its subsidized products to importing countries at a lower price than the price of the same or similar product domestically produced in the importing country.<sup>37</sup> United States domestic industries, which are injured by these imports, label this as unfair trade.<sup>38</sup> Consequently, to offset the unfair advantage that the foreign manufacturer gains from governmental subsidization, the United States has developed trade laws to combat these unfair trade practices and place United States domestically-made products on equal footing.<sup>39</sup>

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31. See Mock, *supra* note 22, at 59.

32. For example, when steel imports began to displace many United States workers in the early 1980's, the steel companies and their labor unions exerted political pressure to get voluntary agreements on steel imports into the United States. See Djavaherian, *supra* note 13, at 109.

33. Many countries, such as the United States, are wary of being overdependent on an unfriendly nation for a product which is necessary for its national defense. See Mock, *supra* note 22, at 59. Such a situation has arisen on several occasions with respect to oil, because Middle East countries have a pure comparative advantage in oil. Thus, United States motivation to subsidize domestic drilling is based upon a national security concern. See 19 U.S.C. § 1862 (§ 232) (1988) (authorizing restraints on articles imported in such quantities as to threaten to impair national security). See also Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235 (1989) (explaining § 232 and its effect on the importation of oil).

34. See Frank D. Whitney, Casenote, *Georgetown Steel Corp. v. U.S.: The Federal Circuit Court Addresses Countervailing Duties Against Nonmarket Economy Imports*, 12 N.C. J. INT'L L. & COM. REG. 303, 307 (1987).

35. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1311 (Fed. Cir. 1986).

36. See Alford, *supra* note 14, at 86-90, 100-02.

37. See Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767, 769 (1989).

38. See *supra* note 14 for the definition of unfair trade.

39. Antidumping law ("AD") protects against the importation of foreign goods which exporters sell in the United States for less than the fair value of that product in the exporting country's home market. 19 U.S.C. §§ 1673-77

Under United States CVD law, a domestic industry may obtain certain tariff<sup>40</sup> protection from such subsidized low-priced imports, depending on whether they are subsidized by a government in a market or nonmarket country.<sup>41</sup> United States CVD law imposes a countervailing duty on the subsidized product which is equal to the subsidy, to counter its effect.<sup>42</sup> This countervailing duty is in addi-

(1988). Illegal dumping occurs when exporters try to "dump" their products on the importing market at a price lower than the domestic company charges for the same product. The importer can then capture a greater market share, and later can raise the prices gradually to the level domestic producers charge. CVD law protects the domestic industry from imported goods that have received a government subsidy which reduces the cost of the exported product. §§ 1303, 1671-72. Section 337 prohibits the importation of products that infringe upon United States patent or copyright laws. § 1337. Section 201 (the escape clause) restricts articles which are imported into the United States in such increased quantities that these products are a substantial cause or threat of serious injury to domestic producers of a like product. § 2251. Section 201 provides for adjustment assistance for up to eight years in order to allow workers in a declining industry to relocate into other industries. §§ 2251-53. Section 406 (Market Disruption) provides for presidential relief when imports from NME's are increasing rapidly and are a significant cause of material injury to a domestic producer of a like product. § 2436. See also Charlene Barshefsky & Nancy B. Zucker, *Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitiveness Act of 1988*, 13 N.C. J. INT'L L. & COM. REG. 251, 251 n.2 (1988) (discussing each United States unfair trade provision cited herein); Christopher F. Corr, *The NME Import Regulation Dilemma: Two Proposals for a New Regulatory Approach*, 12 N.C. J. INT'L L. & COM. REG. 59 (1987) (describing CVD and AD law).

40. A tariff is a customs duty which is added to the price of an imported product. See *infra* note 42 for an explanation of tariff duties and an example of their application.

41. United States CVD law only applies to market economies as a result of the court's holding in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986). Antidumping or Market Disruption are now the unfair trade laws the *Georgetown Steel* court stated should be used to regulate unfair trade by NME's. See *infra* notes 49-50 and accompanying text for a description of these laws and their flaws.

42. 19 U.S.C. § 1671(e)(a)(1) (1988). This additional duty is added to the normal customs duty of the imported product. Every imported product falls into a Harmonized Tariff Schedule ("HTS") product classification which applies two customs duty rates, a Column I rate or a Column II rate. Feller, *supra* note 1, at § 6.02. The Column I rate applies to Most Favored Nation ("MFN") countries. The higher Column II duty rate applies to non-MFN countries which usually are NME's. *Id.* See also *infra* note 44 for an explanation of MFN status.

Once Customs determines the correct heading and subheading for classification of the imported product, a duty rate stated in *ad valorem* (percentage of value per item) (*ad val.*) under either Column I or II is selected. 19 U.S.C. § 1671 (e)(a)(1) (1988). A schematic of a HTS classification reads:

Heading	Article Description	Qty.	Rates of Duty	
			1	2
8443.19	Offset Printing Machinery		Gen. Spec.	
			8% <i>ad val.</i>	20% <i>ad val.</i>

Customs then multiplies the value of the product by its *ad val.* percentage to determine the normal customs duty rate for the import. § 7.03(2). For example,

tion to any normal duty which the United States imposes. Import law requires that Customs impose a normal import duty on most imported products.<sup>43</sup> All countries who have most favored nation ("MFN")<sup>44</sup> status with the United States receive a lower duty rate (Column I) while non-MFN countries pay a higher duty rate (Column II) on their exported products to the United States. In addition, some products enter the United States duty free and there is no import duty at all. The United States, therefore, imposes a countervailing duty in addition to the normal Column I or II duty, if any, before the subsidized product enters a United States port.

Before the Commerce Department ("ITA")<sup>45</sup> imposes a countervailing duty on a product, however, it must be able to measure the alleged subsidy. In *Georgetown Steel Corp. v. United States*,<sup>46</sup> the Federal Circuit Court held that CVD law did not apply to NME's.<sup>47</sup> The court found that it was impossible to identify and quantify subsidies in NME's with any accuracy because an NME, by its very nature, is not driven by market forces.<sup>48</sup> The court also stated that these allegedly subsidized imports from NME countries, such as East Germany and the U.S.S.R., should be addressed by other United States unfair trade laws such as antidumping<sup>49</sup> and

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a product with a value of \$10.00 will have a Column I duty of \$.80 ( $\$10.00 \times 8\%$ ) while a Column II item will have a \$2.00 duty ( $\$10.00 \times 20\%$ ). The importer must pay this duty to import the product and will add it to the import product's price. Thus, if this product were imported from East Germany (non-MFN), it would fall into Column II and would cost United States consumers \$12.00, while the same imported product from West Germany (MFN) would cost only \$10.80. As a result of unification, eastern Germany, therefore, has a substantial foreign trade advantage over all other non-MFN countries and most other NME's. Finally, some products are permitted to enter the United States duty free and no import customs duty calculation is necessary. See 19 U.S.C. § 1202 (1988).

43. See 19 U.S.C. § 1202 (1988) for the normal import duty required by product.

44. MFN status arises from treaty provisions that obligate contracting parties to extend all trade concessions made by any party to another contracting party. See Paul Lansing & Eric C. Rose, *Granting and Suspending of MFN Status for Non-Market Economy States: Policy and Consequences*, 25 HARV. INT'L L. J. 329, 331-32 (1984). All members of the General Agreement on Tariffs and Trade ("GATT") share mutual MFN status. *Id.* at 335-36.

45. The Department of Commerce is also referred to as "DOC", International Trade Administration ("ITA") or simply Commerce. This comment will hereinafter refer to this body as the ITA.

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

47. *Id.* at 1317. See also Egge, *supra* note 30, at 953-55 (presenting the history of applying United States CVD law to NME's).

48. *Georgetown Steel Corp.*, 801 F.2d at 1317. See also Hoyt, *supra* note 14, at 1649 & 1651; Whitney, *supra* note 34, at 310 n.67 (stating arguments made by the domestic industry and opposing arguments by importers made in their *Georgetown Steel* briefs).

49. 19 U.S.C. §§ 1673-77 (1988). Antidumping law addresses the situation in which a foreign importer is exporting goods into the United States at less than the fair value in its home market. See *supra* note 39 discussing AD law. When the fair market value ("FMV") in the home market is not measurable, AD law

market disruption<sup>50</sup> laws, since CVD law was not applicable. Neither of these trade laws, however, directly address subsidized imports.<sup>51</sup> Thus, only CVD law counters the unfair advantage gained through subsidization.

Recent events in eastern Europe and around the world present the United States administration with another problem related to CVD law and NME's. As eastern Germany quickly progresses toward a market economy and other eastern European countries slowly do the same, one must ask at what point does a T-NME become enough of a market economy so that United States CVD law applies to their goods exported into the United States?<sup>52</sup>

A solution to this problem is to use a sector analysis,<sup>53</sup> under

mandates the use of the FMV of that product in a surrogate country which produces that product in similar quantities and which has an economy similar to the exporter's. See § 1677b(c)(4). A surrogate is used when the FMV in the home market is unascertainable or when it does not reflect the accurate FMV of the home market. It has been urged that the surrogate country methodology is inaccurate and invalid. See Alford, *supra* note 14, at 89-91. Nevertheless, AD law does not address whether a subsidy has lowered the product's price but only if its import price is lower than the price in the exporter's country.

Some commentators argue this surrogate country approach could also be used to figure a NME subsidy in CVD law. See Hoyt, *supra* note 14, at 1649 n.14 and accompanying text (citing several articles and cases which support such a procedure); Randall B. Marcus, Comment, *An Argument for Freer Trade: The Nonmarket Economy Problem Under U.S. Countervailing Duty Law*, 17 INT'L L. & POL'Y 427 (1985) (same). Others, however, criticize such an approach, since the use of a surrogate country in CVD law constitutes a comparison of dissimilar economies in order to derive the subsidy amount. See Alford, *supra* note 14, at 98-127.

50. 19 U.S.C. § 2436 (1988). Market Disruption or § 406 allows the United States Trade Representative ("USTR") to provide import relief when a NME's imports increase so rapidly that they become a significant cause of material injury. See *id.* Thus, if a product is subsidized and its price is lower than the United States domestic price, but there is not a rapid increase in imports, a § 406 petition would fail. In addition, § 406 elements are much more difficult to prove than a subsidy under CVD law. See Corr, *supra* note 39, at 77. For this reason, relief under § 406 has never been granted and only ten cases have ever been filed. *Id.*

51. AD law only addresses imported products whose price is lower than the price of the same product at home. 19 U.S.C. § 1673 (1988). Market disruption only addresses imported products whose importation is rapidly increasing and thereby injures domestic industries. § 2436. Neither of these unfair trade laws address the situation where an imported product is gradually imported into the United States at a price higher than the home price, yet still undercuts the United States domestic price as a result of governmental subsidies. See generally 19 U.S.C. § 1673 (1988) (antidumping law); 19 U.S.C. § 2436 (1988) (market disruption). But see Egge, *supra* note 30, at 957 (stating that AD law in that author's opinion adequately addresses NME subsidies). Thus, the *Grainetown Steel* court's argument that AD law and Market Disruption are adequate to redress NME subsidies is without merit.

52. See Egge, *supra* note 30, at 959, 963-65, for a discussion of this issue.

53. This comment asserts that Congress must develop a new approach. A possible new procedure would be to require a United States industry to allege as one of the petition requisites that a *sector* of a NME or T-NME country importing the subsidized product in question is operating under market principles, so

which the ITA would determine in its preliminary investigation whether the market sector of the exporting country is actually operating under market principles and free of NME distortions.<sup>54</sup> Such a determination would be based upon the exporting sector's adherence to certain market factors, such as supply and demand, lack of governmental control on quantity of production, and an absence of product price regulation.<sup>55</sup> Based upon the presence or lack of these market factors, the ITA could then accept or reject the domestic industry's CVD petition.

Since eastern Germany is a part of "Germany,"<sup>56</sup> the majority of which already operates on market principles, it seems logical that United States CVD law will apply to all of the recently unified Germany.<sup>57</sup> Presumably, Congress will have to amend the current CVD statute,<sup>58</sup> or the ITA will have to publish guidelines<sup>59</sup> to delin-

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that the ITA could measure the subsidy and impose a countervailing duty. See Lydia L. Brashear, *Factors or Prices? An Evaluation of Antidumping Laws as Applied to Companies Existing in Nonmarket Economies*, 5 AM. U. J. INT'L L. & POL'Y 893, 919-20 (1990); David A. Gantz, U.S. Trade Law & Policy Implications of Expanding Trade with Eastern Europe and The Soviet Union 11 (Apr. 27, 1990) (unpublished memorandum, on file at *The John Marshall Law Review*). Based on all available data, the ITA could accept or reject the CVD petition based upon whether it finds the foreign exporter in a NME or T-NME is in a sector of that country which is operating under market principles. Cf. Alford, *supra* note 14, at 86-90 (ITA avoided sector analysis in Antidumping case, Menthol From Japan and People's Republic of China, 46 Fed. Reg. 3258 (1981) (Final)). The ITA could dismiss the CVD petition or proceed with its subsidy determination based upon a finding of sector applicability to CVD law.

54. See *supra* note 34-36 and accompanying text for a discussion of these distortions.

55. See Alford, *supra* note 14, at 101-02. (discussing the rejection of a sector analysis in the *Chinese Menthol* case). Other factors the ITA could use in sector analysis are: amount of bargaining between labor and management in setting wages, whether such management is the government or is controlled by government, the number of competitive firms in that market sector, the extent to which joint ventures are allowed in that sector and the amount of government control over resources needed in that sector's production. Cf. 19 U.S.C. § 1677 (18)(B) (1988) (giving factors for finding a NME).

56. This union has been subsumed under one political entity, the Federal Republic of Germany. Thus any distinctions between eastern and western Germany are regional geographical references in the same country "Germany." See, e.g., Alexander Ferguson, *100,000 Eastern Germans Protest Misery*, CHL. SUN-TIMES, Mar. 19, 1991, at 31.

57. Since both eastern and western Germany make up "Germany" and West Germany's form of government was adopted by "Germany," United States CVD law will apply to Germany as it has in recent CVD investigations against West Germany. See, e.g., *Certain Sodium Sulfur Chemical Compounds from Federal Republic of Germany*, 55 Fed. Reg. 28,834 (1990) (Preliminary); *Certain Steel Products from the Federal Republic of Germany*, 47 Fed. Reg. 39,345 (1982) (Final).

58. In the Omnibus Trade and Competition Act of 1988, the Senate proposed an amendment to the definition of Nonmarket Economy in § 1677(18)(A) and (B). That proposal read as follows:

c. Eligible Market Economy Country

erate how CVD law will apply to other T-NME's,<sup>60</sup> which will not become market economies in a *de jure* overnight manner similar to that of eastern Germany.

## II. U.S COUNTERVAILING DUTY LAW AND ITS APPLICATION

### A. Overview of CVD Law Structure and Procedure

The purpose of CVD law is to offset the unfair competitive advantage that foreign producers would otherwise enjoy resulting from governmental subsidies.<sup>61</sup> The ITA imposes a countervailing

The Senate Amendment defines the term "eligible market economy country," as any country that is not a nonmarket economy country, where comparable goods are produced and exported, and which Commerce determines is appropriate, taking into account factors including, but not limited to:

- (1) whether comparable goods from that country are subject to an antidumping or countervailing duty order (or agreement suspending any such investigation);
- (2) whether any international agreement affecting the price or quantity of imports is in effect; or,
- (3) whether the level of imports is *de minimis*.

H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 1624-25 (1988).

This proposed definition of market economy was dropped when the Senate receded. *Id.* In the author's opinion, this definition was a poor attempt at defining a market economy. A better approach for Congress to identify a NME or T-NME is to find any economy having none of the NME factors in § 1677(18)(B), which would then be defined as a market economy country. The ITA could also find that any economy with less than half of those six factors is a T-NME, and CVD law would apply. In addition, The ITA could use this approach to identify a sector operating under market principles under a sector analysis. *See supra* notes 53-55 for an explanation of sector analysis. *See also infra* notes 223-25 and accompanying text integrating the T-NME definition with sector analysis.

59. On many occasions the ITA has attached appendixes to its determinations which explain its methodologies or define pertinent terms. *See, e.g.*, Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 18,006, 18,016 (1984) (Final) (Subsidies Appendix); Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,272 (1986) (Preliminary) (Preferentiality Appendix); Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 54 Fed. Reg. 23,366 (Dep't Comm. 1989) [hereinafter Proposed Rulemaking] (these proposed rules were never formally codified in 19 C.F.R. § 355).

60. East Germany became a *de facto* market economy upon unification October 3, 1990. It will be much more difficult, however, to pinpoint when other eastern European countries officially become market economies so that United States CVD law applies to their subsidized imported products. The ITA could use a market sector analysis on T-NME's to determine if the foreign importer is in a market or a nonmarket sector of the T-NME and decide if a subsidy is measurable so that the ITA could impose CVD law. *See supra* notes 53-55 and accompanying text for an explanation of sector analysis.

61. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1973). One commentator refers to this purpose as the "deterrence rationale". *See Diamond, supra* note 37, at 779; *Cass, supra* note 14, at 628-39. That author also argues there is an "entitlement rationale" under which United States firms feel they are entitled to the segment of the domestic market which they would have cap-

duty<sup>62</sup> on the product that is equal to the net subsidy<sup>63</sup> provided by a government.<sup>64</sup>

United States CVD law requires both an ITA determination finding of an illicit subsidy and an International Trade Commission's ("ITC") determination of material injury<sup>65</sup> to a domestic industry before CVD law is applicable. After a representative domestic party files<sup>66</sup> or the ITA initiates<sup>67</sup> a petition,<sup>68</sup> the ITA

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ured if the foreign importers had not received illegal subsidies. Diamond, *supra* note 37, at 781; Cass, *supra* note 14, at 633-39.

62. The amount of the duty depends upon the type of product and whether the importer's country has Most Favored Nation ("MFN") status, thus giving it the lower Column I rate. See *supra* notes 42-44 and accompanying text for an explanation of the normal customs duty and the effect of MFN status on that duty.

63. The ITA offsets the gross subsidy given to the foreign producer by any charges it incurs in obtaining the subsidy. The final subsidy remaining after the subtraction of the offsets is the "net subsidy" upon which the countervailing duty is based. The ITA may only subtract the following items as setoffs to arrive at the net subsidy:

(A) any application, fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,

(B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

19 U.S.C. § 1677(6) (1988).

64. 19 U.S.C. § 1671(a)(2)(B) (1988).

65. If the importer's country is a "country under the Agreement" then the ITA must find a subsidy and the ITC must find an injury to the domestic industry before the ITA imposes a countervailing duty. 19 U.S.C. § 1671(a)(1)(A) (1988). If a country is not a "country under the Agreement," then the ITA must merely find a subsidy before imposing a CVD under § 1303. See *supra* note 1 for an explanation and a list of countries under the Agreement.

66. An "interested party" brings the petition "on behalf of" the domestic industry when it has the support of the majority of the industry. 19 U.S.C. § 1677(9) (1988) (defining interested party). See *Florex v. United States*, 705 F. Supp. 582 (Ct. Int'l Trade 1989) (petition must be with the support of a majority of industry); *Citrusco Paulista, S.A. v. United States*, 704 F. Supp. 1075 (Ct. Int'l Trade 1988) (same); *Fresh Atlantic Groundfish from Canada*, 51 Fed. Reg. 10,041 (1986) (Final) (same). Cf. *Suramerica de Aleaciones Laminadas v. United States*, No. 127164 (Ct. Int'l Trade 1990) (Westlaw ITrade Library, Courts file) (sole manufacturer lacks standing to bring petition on behalf of industry). Petitioners find it advantageous to define the relevant industry narrowly. On the other hand, importers prefer a broader definition of industry because it is more difficult to show a material injury to a broadly defined domestic industry. See *Feller*, *supra* note 1, § 17.04(2).

67. The ITA may initiate an investigation upon its own initiative or upon the filing of a petition by an interested party on behalf of the domestic industry. 19 U.S.C. § 1671a (a)-(b) (1988).

68. A CVD petition must have certain components or the ITA will dismiss it. See 19 C.F.R. §§ 205, 355 (1990) (petition requirements). See also *THOMAS V. VAKERICS ET AL., ANTIDUMPING, COUNTERVAILING DUTY AND OTHER TRADE ACTIONS 201-02* (1987) (explaining petition requirements).

The ITA may terminate a petition based upon a negative subsidy determination, the ITC's negative injury determination, or withdrawal of the petition



must determine if the assistance rendered to the foreign producer is a countervailable subsidy under United States CVD law.<sup>69</sup> While the ITA conducts a subsidy investigation to determine if a subsidy exists, the ITC investigates to determine whether the domestic industry<sup>70</sup> of a like product<sup>71</sup> has been materially injured<sup>72</sup> by reason of<sup>73</sup> the subsidized import.<sup>74</sup> Both the ITA and ITC conduct preliminary and final determinations and if each make its necessary findings of subsidy and material injury, the ITA imposes the countervailing duty.<sup>75</sup>

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by the petitioner or administering authority. 19 U.S.C. § 1671c (a)(1) (1988). The ITA may also terminate a petition as a result of a quantitative restriction agreement, as long as it is made in the public interest. § 1671c (a)(2)(A). These agreements are VRA's. *See supra* note 13 for a description of VRA's. *See also* VAKERICS, *supra*, at 212-14 (explaining this procedure and defining the public interest).

The ITA may suspend CVD investigations on the basis of agreements made between the ITA and either the government of the affected country or the foreign exporter, if either the subsidy or the injury are ameliorated. 19 U.S.C. § 1671c (a)(2)(A) (1988). These agreements are Orderly Market Agreements ("OMA's"). *See supra* note 13 describing OMA's. *See also* VAKERICS, *supra*, at 214-18 (describing how OMA's work).

69. *See supra* note 1 for requirements of CVD law under either 29 U.S.C. § 1303 or § 1671 (1988).

70. The statute governing countervailing duties defines "industry" as American producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. 19 U.S.C. § 1677(4)(A) (1988). *See infra* note 105 for full text of this statutory section. *See also* VAKERICS, *supra* note 68, at 242-43 (varying definitions of "industry" in practice).

71. A "like product" means a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to the investigation. 19 U.S.C. § 1677(10).

72. Material injury means harm which is not inconsequential, immaterial, or unimportant. § 1671(a)(2)(A)-(B). Factors that the ITA utilizes to decide if the injury is material include: the volume of the imports, the effect of the imports on United States prices, and the impact of the imports on United States producers of like products. § 1677(7)(B)-(C). *See also* VAKERICS, *supra* note 68, § 3.4 (explaining material injury and above factors); FELLER, *supra* note 1, § 17.04(2) (same).

73. The phrase "by reason of imports" means that the imports are a cause of material injury. 19 U.S.C. § 1671(a)(2)(B) (1988). Thus, the phrase does not require the ITC to consider whether subsidized imports are the principal, a substantial or a significant cause of material injury. *See Certain Fresh Atlantic Groundfish From Canada*, 51 Fed. Reg. 10,041 (1986) (Final). *See also* VAKERICS, *supra* note 68, at 255-56 (discussing causation in CVD law). This causation test only requires that imports from a particular country contribute to the injury alleged by the domestic industry. *British Steel v. United States*, 593 F. Supp. 405, 413 (Ct. Int'l Trade 1984).

74. 19 U.S.C. §§ 1671(a)(2)(A)-(B) (1988).

75. *See* 19 U.S.C. § 1671(b), (d) (1988) (preliminary and final determination procedures). Actually, once the ITA has made an affirmative preliminary determination of a subsidy, it requests Customs to suspend liquidation of all entries of all merchandise within the scope of the investigation. *See* VAKERICS, *supra* note 68, at 196. When Customs suspends liquidation it will not clear the paperwork so these products can pass through customs. *See* Judith H. Bello et al., *U.S. Trade and Policy Series No. 15 Anticircumvention Measures: Shifting*

Although East Germany was not a country under the General Agreement on Tariffs and Trade ("GATT"),<sup>76</sup> Germany is a member of that agreement.<sup>77</sup> All members of GATT receive the ITA's subsidy test and the ITC's injury test before the ITA imposes a countervailing duty. Non-GATT countries, conversely, receive only the ITA subsidy determination before imposition of the countervailing duty,<sup>78</sup> unless the product is normally duty-free. Consequently, eastern German imports will now enjoy, for the first time, the benefit of an ITC injury test, in addition to an ITA finding of a countervailable subsidy. This comment, however, will focus solely upon whether domestic subsidies from western to eastern Germany will be countervailable and will not address the injury determination required by the ITC.<sup>79</sup>

### B. Subsidy Analysis and the Actual Specificity Test

To determine whether a domestic subsidy is countervailable, a definition of the term subsidy<sup>80</sup> and a delineation of a test for an unfair subsidy are necessary. A subsidy is a bounty or a grant of a special or competitive advantage which a government or private individual confers upon a selective segment of an industry or group of industries in a country.<sup>81</sup>

A general subsidy can either be an export subsidy,<sup>82</sup> which is

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*the Gears of Antidumping and Countervailing Duty Laws*, 24 INT'L LAW. 207, 218 n.43 (1990). The importer must post bond or cash equal to the subsidy rate before the products that are liquidated are allowed to pass through United States Customs. *Id.* This liquidation procedure can be a severe handicap on the small importer, since liquidation lasts until the ITA makes its final determination and informs Customs. *Id.* This process usually takes up to a year even if the ITA finally imposes no countervailing duty. *Id.*

76. To be a country under the agreement in order to qualify for the additional injury test by the ITC, a country must be a member of GATT. *See supra* note 1 for a list of countries that are a "country under the Agreement." East Germany was not such a country until its unification with West Germany, a GATT member. *Id.*

77. General Agreements on Tariffs and Trade ("GATT"), *opened for formal signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

78. A few non-GATT members do qualify for an ITC injury test as a result of bilateral agreements between those countries and the United States. *See supra* note 1 for a list of these countries.

79. *See supra* notes 72-73 for a brief explanation of material injury and causation in CVD law.

80. *See supra* note 18 for the statutory definition of subsidy. *See also* Egge, *supra* note 30, at 945-48 for an additional explanation of subsidy.

81. *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 837 (Ct. Int'l Trade 1983).

82. An export subsidy is a subsidy which requires a firm to export in order to be eligible for benefits under a subsidy program, and the amount of the benefit is tied directly or indirectly to the firm's level of exports. *See* Certain Scissors and Shears from Brazil, 51 Fed. Reg. 45,369 (1986) (Final). United States CVD law refers to GATT's export Subsidies Annex as illustrative of violative export subsidies under United States CVD law. *See* 19 U.S.C. § 1677(5)(A)(i) (1988). *See*

given to the producer solely to promote exportation of its product, or a domestic subsidy,<sup>83</sup> which is given to assist a specific region or industry. An export subsidy is in all cases countervailable.<sup>84</sup> On the other hand, United States CVD law permits domestic subsidies if they are available to that industry in general and are not actually utilized only by a specific industry or group of industries.<sup>85</sup>

This comment will address domestic subsidies that western Germany will give to the small group of eastern German industries which have remained solvent after unification.<sup>86</sup> The central focus here is whether these subsidies violate United States trade law and will be countervailable upon petition by United States industries.

To find a subsidy countervailable, the ITA has used both general availability<sup>87</sup> and specificity tests.<sup>88</sup> The general availability test states that if a domestic subsidy is generally available to all industries in the foreign country, then it is not countervailable.<sup>89</sup> Conversely, the specificity test provides that any domestic subsidy bestowed upon specific enterprises or industries is

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also VAKERICS, *supra* note 68, at 219 (giving GATT's illustrative list of export subsidies).

83. A domestic subsidy is a subsidy which is limited to a specific sector of the economy to the exclusion of others. VAKERICS, *supra* note 68, at 227. Section 1677(5)(A)(ii) gives an illustrative list of domestic subsidies, such as preferential loans, debt forgiveness and equity infusions. 19 U.S.C. § 1677(5)(A)(ii) (1988). Other domestic subsidies that are preferentially given are favorable exchange rates, preferential tax treatment, remissions or drawbacks. See Feller, *supra* note 1, § 17.02. See also *Hercules v. United States*, 673 F. Supp. 454, 460 (Ct. Int'l Trade 1987) (discussing domestic subsidies in context); Jameson, *supra* note 1, at 98-124 (same). The ITA's classification of a subsidy as an export or domestic subsidy is significant since the ITA calculates the duty on an export subsidy by dividing the net subsidy by the *total subsidized imports*. Conversely, the ITA figures the duty on domestic subsidies by dividing the net subsidy by the *total sales* of the company receiving the subsidy. See VAKERICS, *supra* note 68, at 221. The countervailing duties on export subsidies are, therefore, much greater. *Id.* If the ITA finds a subsidy is to be 0.5% or less, it rules the subsidy to be *de minimis*, and no countervailing duty is imposed. See 19 C.F.R. § 355.8 (1990).

84. 19 U.S.C. § 1677(5)(A)(i) (1988). See *supra* note 82 for an explanation of export subsidies.

85. *Cabot Corp. v. United States*, 620 F. Supp. 722, 731 (Ct. Int'l Trade 1985).

86. See *supra* note 6 for a discussion of the possibility that more than 70% of East German companies will go bankrupt as a result of unification. See also *German Unification: EC Assesses the Impact*, BUS. EUR., Feb. 23, 1990, at 4 (same); *Germany for Germans? U.S. Firms Remain on the Sidelines*, BUS. INT'L, June 4, 1990, at 179 (same).

87. The Court of International Trade first stated this general availability test in *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983).

88. See, e.g., *Carbon Black from Mexico*, 48 Fed. Reg. 29,564, 29,565 (1983) (Final). See also *Proposed Rulemaking*, *supra* note 59, at 23,368 (discussing the codification of the specificity test).

89. See *Carlisle Tire & Rubber Co.*, 564 F. Supp. at 838.

countervailable.<sup>90</sup>

In the early 1980's the ITA found obvious subsidies not countervailable in several cases because they were generally available to all industries.<sup>91</sup> In a later case,<sup>92</sup> the Court of International Trade ("CIT")<sup>93</sup> recognized that foreign importers were able to frustrate and circumvent United States CVD law by arguing that the benefits bestowed were generally available, even though only a small group of industries actually used the subsidy.<sup>94</sup> In *Cabot Corp. v. United States*,<sup>95</sup> the CIT held that the ITA had misapplied the general availability test.<sup>96</sup> The court held that the correct standard was whether a competitive advantage had actually been conferred upon a specific industry.<sup>97</sup> The *Cabot* Court stated that this test required a case-by-case analysis and that the ITA must focus on the effect of the benefits rather than their nominal general availability.<sup>98</sup>

The *Cabot* standard focused the ITA's examination on where the subsidy actually went, rather than on whether the industry in general could have obtained the benefit.<sup>99</sup> In *PPG Indus. v. United States*,<sup>100</sup> the CIT clarified *Cabot's* focus on the subsidy's effect. *PPG* held that a nominally available subsidy is not countervailable if it is, in fact, widely used.<sup>101</sup> Shortly after *Cabot*, the ITA released

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90. James D. Southwick, Comment, *The Lingering Problem With the Specificity Test in United States Countervailing Duty Law*, 72 MINN. L. REV. 1159, 1163 (1988).

91. See, e.g., Unprocessed Float Glass from Mexico, 49 Fed. Reg. 23,097 (1984) (Final); Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 43,063 (1983) (Final); Carbon Black from Mexico, 48 Fed. Reg. 29,564 (1983) (Final); Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522 (1983) (Final); Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (1983) (Final).

92. *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985).

93. The Court of International Trade ("CIT") hears international trade cases after the ITA and ITC make their respective preliminary and final determinations. 19 U.S.C.A § 1, at xxxv-xxxvii (introductory notes). A party may then appeal to the Federal District Court and the United States Supreme Court. *Id.* The CIT can reverse and/or remand cases to the ITA and ITC for further administrative investigations or rehearings when necessary. *Id.*

94. *Cabot Corp. v. United States*, 620 F. Supp. 722, 731-32 (Ct. Int'l Trade 1985).

95. *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985).

96. *Id.* at 731.

97. *Id.* at 732.

98. *Id.* Nominal general availability refers to a subsidy that is theoretically generally available but in practice only a small group of industries utilize the benefits. *Id.* at 731.

99. *Cabot Corp. v. United States*, 620 F. Supp. 722, 731 (Ct. Int'l Trade 1985).

100. *PPG Indus. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991).

101. *Id.* at 264-65. See also Southwick, *supra* note 90, at 1172 (explaining nominal availability).

specificity factors<sup>102</sup> to aid in the determination of whether a specific group of industries actually utilized a generally available benefit, thus making the subsidy countervailable. Other cases have utilized these specificity factors.<sup>103</sup>

Thus, to determine if a subsidy is countervailable one must answer two questions: (1) Is the subsidy generally available? If not, it is countervailable if it is not actually widely used; and (2) If the subsidy is generally available, is it actually used by a specific industry or group of industries? If it is, then it is countervailable.<sup>104</sup> This is the standard the ITA will use to determine whether subsidies from western Germany to eastern Germany are countervailable.

Ultimately, this comment concludes that the domestic subsidies which western Germany is giving to the eastern German region are countervailable. Several theories will support the ITA's imposition of CVD law on eastern German products exported into the United States. United States industry will argue that western German subsidies are countervailable under a specific industry theory, a group of industries theory, or a regional grant argument.

Although these western German subsidies will be generally available to eastern German companies, the government will actually bestow these subsidies upon a specific industry or group of industries: the small percentage of eastern German industries surviving unification which will actually qualify to receive them. Thus, any subsidized goods that eastern Germany's surviving industries export to the United States will be countervailable.

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102. The ITA published several specificity factors after *Cabot* in 1986. See Certain Softwood Lumber Products from Canada (Softwood II), 51 Fed. Reg. 37,453, 37,456 (1986) (Preliminary). Therein the ITA stated that the specificity test could not be reduced to a mathematical formula. *Id.* Certain practices are, however, identifiable as countervailable based upon:

- (1) The extent to which a foreign government acts to limit the availability of the program;
- (2) the number of enterprises, industries or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and
- (3) the extent to which the government exercises discretion in making the program available.

*Id.*; Proposed Rulemaking, *supra* note 59, at 23,368 (same).

103. See, e.g., *Roses, Inc. v. United States*, No. 84-5-00632, 1990 WL 94210 (Ct. Int'l Trade 1990) (Westlaw ITrade Library, Courts file); Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,060-61 (1986) (Final); Carbon Steel Wire Rod from Saudi Arabia, 51 Fed. Reg. 4206, 4210 (1986) (Final).

104. The subsidy determination ends here for grants and equity infusions, since they are by their terms preferential. See Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,272 (1986) (Preliminary) (Preferentiality Appendix). Loans and energy subsidies, however, require an additional query: whether the terms of the loan or energy subsidies are inconsistent with normal commercial considerations (preferential). *Id.*

Although the CVD statute defines "industry,"<sup>105</sup> it does not define the term "group of industries."<sup>106</sup> To bring the eastern German companies under CVD law, domestic petitioners will also urge that these remaining eastern German industries are a countervailable "group of industries."<sup>107</sup> Alternatively, domestic industries may argue that subsidies to eastern German industries are "regional development grants,"<sup>108</sup> which, by their very nature, are

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105. 19 U.S.C. § 1677(4)(A) (1988). The definition of industry reads:

(4) Industry

(A) In general

The term "industry" means the domestic producers as a whole of a like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product . . . .

*Id.* See also *supra* note 70 for a discussion of the term "industry".

106. Jameson, *supra* note 1, at 85. Thus, the question of whether a group is a "group of enterprises or industries" is left to the ITA's discretion. See *Can-Am. Corp. v. United States*, 664 F. Supp. 1444, 1449 (Ct. Int'l Trade 1987). The ITA makes this determination on a case-by-case basis. Jameson, *supra* note 1, at 85. Thus far, high technology has been considered a group of industries. See *Certain Steel Products from the Netherlands*, 47 Fed. Reg. 39,372, 39,373 (1982) (Final). Agriculture has also been considered a group of industries. See *Roses, Inc., v. United States*, No. 94210 (Ct. Int'l Trade 1990) (Westlaw ITrade Library, Courts file); *Lamb Meat from New Zealand*, 50 Fed. Reg. 26,236, 26,239 (1985).

In addition, Congress has recently enacted a section that imposes CVD law on international consortia. That section reads in pertinent part:

(d)(1) Treatment of International Consortia

. . . [I]f the members of an international consortia that is engaged in the production of a class or kind merchandise subject to a countervailing investigation receive subsidies from their respective home countries . . . then the administering authority shall cumulate all such subsidies . . . in determining and countervailing duty upon such merchandise.

19 U.S.C. § 1671(d)(1) (1988).

107. One commentator has supported this manner of defining "group of industries" by stating that if "a government singles out and specifies twenty-five industries as qualifying for benefits, those industries are thereby a group of industries regardless of their different functions and aggregate size." Jameson, *supra* note 1, at 86. In a recent case, the CIT upheld the ITA's imposition of countervailing duties for grants specifically designated for enterprises or industries in France. See *Hercules, Inc. v. United States*, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987). The ITA looks for evidence of "targeting" of benefits and has "consistently held that benefits provided on a regional basis are, by their very nature, provided to a specific group of enterprises or industries." *Comeau Seafoods Ltd. v. United States*, 724 F. Supp. 1407, 1414 n.10 (Ct. Int'l Trade 1989). This interpretation of "group of industries" supports imposing countervailing duties on all subsidized products from East German industries that survive unification.

108. "Grant" implies the conferring by a sovereign power of some valuable privilege, franchise or other right of like character upon a corporation or class of persons. *Downs v. United States*, 113 F.2d 144, 147 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903). A grant is usually the giving of money or other form of assistance without any real expectation of repayment for the value of the money or assistance. Jameson, *supra* note 1, at 100. Thus, a regional development grant is a conferral of a valuable privilege, such as money or goods, upon a group of industries in a particular region of a country without any expectation of reimbursement. See *id.*, *supra* note 1, at 81-82.

countervailable.<sup>109</sup> Therefore, if petitioners do not meet the specific industry standard, the ITA could impose CVD law on eastern German imports based upon a group of industries standard or regional grant theory.<sup>110</sup>

### III. POSSIBLE SUBSIDIES FROM WESTERN TO EASTERN GERMANY

United States CVD law has codified examples of violative domestic subsidies.<sup>111</sup> This comment will divide these domestic subsidy categories into loans,<sup>112</sup> grants,<sup>113</sup> equity infusions,<sup>114</sup> and energy subsidies.<sup>115</sup> Each of these categories will have a subsection containing the subsidies likely to be found in the unification of Germany.

#### A. LOANS<sup>116</sup>

Countervailable loans are money loaned to companies at pref-

109. *Carlisle Tire and Rubber v. United States*, 564 F. Supp. 834, 838 n.6 (Ct. Int'l Trade 1983). The *Carlisle* Court stated that regional development programs are countervailable since by their very nature they favor a class or group of enterprises over those outside the region. *Id.* In this case, the grants will favor eastern Germany over other regions of Germany. *Id.*

110. Under either theory, petitioners will argue that domestic subsidies are countervailable based upon the ITA's own specificity factors. See *supra* note 102 for a list of these factors. Western Germany has acted to: 1) limit the availability of all of the unification programs to solely eastern Germany; and 2) exercised governmental discretion in making these unification programs available to the eastern German region. *Id.* See also *supra* note 83 for a citation of cases discussing government discretion as a specificity factor.

111. See *supra* note 18 for the text of § 1677(B)(i-iv) which codifies countervailable domestic subsidies.

112. See *infra* notes 116-120 for an explanation of types of loans and their implications in CVD law.

113. See *infra* notes 138-141 for types of grants and their implications in CVD law.

114. See *infra* note 150 for an explanation of equity infusions.

115. See *infra* note 156 for an explanation of energy subsidies.

116. A loan is money received by an industry or group of industries on terms that are inconsistent with commercial considerations. See *Jameson*, *supra* note 1, at 110. In CVD law, these loans are viewed from the perspective of the recipient of the loan. *Id.* Thus, a subsidy arises when the recipient receives money from a lender for less than it would normally have to pay. *Id.* at 111. There have been many recent cases discussing whether to impose a countervailing duty as a result of government loans. See, e.g., *Roses, Inc. v. United States*, No. 94210 (Ct. Int'l Trade 1990) (Westlaw ITrade Library, Courts file); *Comeau Seafoods Ltd. v. United States*, 724 F. Supp. 1407, 1416-17 (Ct. Int'l Trade 1989); *RSI (India) PVT., Ltd., v. United States*, 687 F. Supp. 605 (Ct. Int'l Trade 1988); *Fabricas El Carmen, S.A. de C.V. v. United States*, 672 F. Supp. 1465, 1468-69 (Ct. Int'l Trade 1987); *PPG Indus. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991); *Al Tech Specialty Steel Corp. v. United States*, 661 F. Supp. 1206, 1211-13 (Ct. Int'l Trade 1987); *Cabot Corp. v. United States*, 620 F. Supp. 722, 726 (Ct. Int'l Trade 1985). For the ITA's formulas which it uses to calculate various loan subsidies, see *infra* notes 118-20.

erential rates.<sup>117</sup> There are three types of countervailable loans: short-term loans,<sup>118</sup> long-term creditworthy loans,<sup>119</sup> and long-term uncreditworthy loans.<sup>120</sup> Most of the loans given to eastern German companies will be long-term uncreditworthy loans because most eastern German companies could not receive these loans

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117. 19 U.S.C. § 1677(5)(A)(i)(I) (1988).

118. A short-term loan is one given for one year or less. See Subsidies Appendix, *supra* note 59, at 18,020. The ITA computes the subsidy of a short-term loan by comparing what a company would pay an average commercial lender in principal, interest and other charges in a one-year period with what the company actually pays for the preferential loan in that one year. *Id.* at 18,018. To determine what the company would pay a commercial lender, the ITA constructs a "benchmark" price that is based upon the interest rate the company would have paid to a commercial lender in that country for a short-term loan. *Id.* at 18,019. This benchmark is subtracted from the preferential loan rate to derive the subsidy. *Id.* For example, if a \$1,000,000 short-term loan was commercially available at eight percent plus \$5000 in charges, the total loan cost for one year would be \$1,085,000. If a company got the same loan in a preferential government loan program at a two percent interest rate, the cost would be \$1,020,000, and the subsidy would be \$65,000 if no setoffs were incurred. See 19 U.S.C. § 1677(6) (1988) (exclusive list of net subsidy setoffs). If the company had sales of \$3,750,000 that year, the *ad valorem* net subsidy would be 2.0%. See Jameson, *supra* note 1, at 112.

119. A long-term creditworthy loan is money loaned to a company for longer than one year on preferential terms to a company that would be otherwise able to secure a loan from another lender, but at higher rates. See Subsidies Appendix, *supra* note 59, at 18,018-19. The ITA does not use the benchmark method for determining long-term loans but, rather, uses a company-specific rate, if the company has comparable loan experience. *Id.* at 18,018. If such a rate is not available, the ITA uses the benchmark rate. See *supra* note 118 for explanation of the benchmark rate. The amount of the benchmark or company-specific loan is subtracted from the preferential loan and is allocated over the duration of the loan to determine the subsidy. Thus, under the \$1,000,000 loan example described in note 118, the 6% difference in rate is multiplied by the remaining principal in each of the five years of the loan. See Jameson, *supra* note 1, at 112 (describing this method in detail).

120. A long-term uncreditworthy loan is a long-term preferential loan given to a company that has a history of deep and continuing losses, and diminishing access to private lenders. See Subsidies Appendix, *supra* note 59, at 18,019. The ITA calculates the subsidy on this type of loan by first figuring the subsidy on a normal long-term loan and then adding a risk premium. *Id.*

A risk premium is the amount above the highest commonly available commercial interest rate a creditworthy borrower would have to pay to receive a loan. *Id.* This risk premium is first calculated by ascertaining the difference between the interest rate associated with the most creditworthy United States bond ratings (Moody's Aaa) and the least creditworthy bond (Moody's Baa) for that amount of principal. *Id.* at 18,020. The percentage is added to the highest long-term commercial rate commonly available to companies in the country concerned to derive the risk premium. *Id.* at 18,020. Thus, if Moody's Aaa bond is 6% and Moody's Baa bond is 3%, that 3% difference is added to the long-term rate of the country involved. *Id.* If that highest commercially available interest rate was 9%, then the value of the government loan to the uncreditworthy company would be 12%. See Jameson, *supra* note 1, at 115. It is clear that a 12% risk premium would greatly increase the *ad valorem* duty to a foreign exported product. This is especially relevant since a majority of the surviving eastern German companies will probably be classified as uncreditworthy.



under normal commercial considerations.<sup>121</sup>

Eastern German companies will receive preferential loans from several western German sources. The National Unity Fund ("NUF") will loan money to former state-controlled eastern German companies.<sup>122</sup> This fund will loan DM7 billion (\$5.5 billion) in 1990 and DM10 billion (\$8 billion) in 1991 to eastern German companies at preferential rates.<sup>123</sup> The German arm of the European Recovery Program ("ERP")<sup>124</sup> will loan eastern German companies up to DM6 billion (\$4.8 billion) at an interest rate of 7.5% for capital investments.<sup>125</sup> Finally, the German Bank for Reconstruction and Development will offer DM.5 billion (\$4 billion) to subsidize interest on loans for start-up entrepreneurs.<sup>126</sup>

In addition to the several loan programs will offer western Germany, the European Economic Community ("EC")<sup>127</sup> will also offer loans to eastern German companies. The European Bank for Re-

121. Banks, under normal commercial considerations, will not loan money to a business which has severe liquidity and cash flow problems. Companies with liquidity problems present a much higher risk of default. Almost all surviving eastern German companies do or will face severe liquidity problems. See DEUTSCHE BANK, *supra* note 3, at 43. Therefore, loans to most surviving eastern German companies will not be on terms that are consistent with ordinary commercial considerations.

122. DEUTSCHE BANK, *supra* note 3, at 42. See *infra* note 154 and accompanying text for an explanation of why this "loan" program may actually be a disguised equity infusion program.

123. DEUTSCHE BANK, *supra* note 3, at 42. These loans will be "repaid from the proceeds of privatization and are secured by guarantees of the East German government." *Id.* As of May 1991, the revenues from the sales of former East German state-owned companies was DM5.6 billion (\$3.19 billion). See Langenecker, *supra* note 7, at 156.

124. Western Germany formed the European Recovery Program to provide financial assistance to eastern German industries, in the form of low interest loans, to assist that region in its transition to a market economy. DEUTSCHE BANK, *supra* note 3, at 42.

125. *Id.*

126. *Id.*

127. The European Economic Community ("EC") is a group organized under the Treaty of Paris in 1851 to facilitate European economic and trade cooperation. See Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,325 (1982) (Final). On October 3, 1990, East Germany became a *de facto* member of the EC. 1992 *The European Community Roundup*, J. COM., Sept. 19, 1990, at 5A. Eastern Germany is now eligible for all EC loans and grants, which amounts to approximately \$2.6 billion per year between 1991 and 1993. *Id.* These loans and grants have been countervailed in the past, and may now be countervailed with respect to eastern Germany. See, e.g., Sugar From the European Community, 55 Fed. Reg. 28,799 (July 13, 1990) (Preliminary) (countervailing duty imposed on EC sugar subsidies); Certain Steel Products from the Federal Republic Of Germany, 47 Fed. Reg. 39,345 (1982) (Final) (countervailable European Coal and Steel Community (ECSC) loan guarantees, ECSC loans, ECSC interest rebates, and ECSC research and development grants). European subsidies amounted to 2% to 3.5% of the value of all European industrial output, while the United States only had subsidies totaling 0.05% of United States industrial output. See *From the Sublime to the Subsidy*, THE ECONOMIST, Feb. 24, 1990, at 71. When a portion of these massive subsidies shift to eastern Germany, they will be coun-

construction and Development ("EBRD"),<sup>128</sup> a creation of the EC, will offer an abundant amount of loans to eastern block countries.<sup>129</sup> In addition, there are several other sources which will grant loans to eastern German industry, including the European Investment Bank ("EIB"),<sup>130</sup> the European Coal and Steel Community ("ECSC"),<sup>131</sup> and the European Regional Development Fund ("ERDF")<sup>132</sup> programs. Any of these loans given at an interest rate lower than commercially available rates will be countervailable.<sup>133</sup>

Finally, the United States will offer loans under the Support for East Europe Democracy ("SEED") Act<sup>134</sup> to several eastern bloc

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tervailed, since they are primarily industry and regionally specific and will go to uncreditworthy companies under German government guarantee. *Id.*

128. The Organization of Economic Cooperation and Development ("OECD") created the European Bank for Reconstruction and Development ("EBRD") to fund economic development in Eastern Europe. See *New East European Development Bank Formally Launched with Paris Signing*, THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, June 1, 1990, at 1, 8 (copies available from Buraff Publications, 1350 Connecticut Avenue, Suite 1000 Washington, D.C. 20036). See also *Agreement Establishing the European Bank for Reconstruction and Development*, 29 I.L.M. 1077, 1083-1107 (1990) (text of EBRD treaty). The European Bank for Reconstruction and Development (EBRD) will use three currencies: European Currency Units ("ECU's"), United States dollars and Japanese yen. *Id.* See also Claire MacNamara, *EC Economic and Financial Cooperation in Eastern Europe*, THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION, May 4, 1990, at 13-16 (in-depth discussion of the EBRD and its functions). The EBRD began its actual operations Apr. 15, 1991. See Rene Gatlting, *Focus on Financing*, BUS. E. EUR., Apr. 8, 1991, at 112. See also *Trade Relations of EC-Central and Eastern Europe*, 1991 WL 11715 § 4.2.3 (Aug. 22, 1991) (available in Westlaw International Library, EurUpdate file) for a recent summary of the EBRD activities, which is updated quarterly.

129. See *supra* note 4 for a list of Eastern Europe countries.

130. The Treaty of Rome created the European Investment Bank ("EIB") for the purpose of funding regional projects in the EC. See *Certain Steel Products from Belgium*, 47 Fed. Reg. 39,304, 39,325 (1982) (Final) (description of EC loans and grants and ITA methodology for determining if such loans and grants are countervailable). As of May 1991, the EIB had loaned Germany DM1.074 billion (\$0.8 billion) of which two-thirds was used in eastern German regions. See *Germany EIB Energy Loan*, INT'L FIN. L. REV., June 1, 1991, at 5; *Regional Policy*, 1991 WL 11722 § 7 (Mar. 17, 1991) (Westlaw Int'l Database, EurUpdate file) (detailing EC plan for EIB).

131. The Treaty of Paris of 1851 created the European Coal and Steel Community (ECSC) to modernize and improve the production of coal and steel in the European Communities. *EC Loans and Grants*, 1991 WL 11675 § 7.3 (Mar. 17, 1991) (Westlaw Int'l Database, EurUpdate file) (discussing recent ECSC lending practices).

132. The EC established the European Regional Development Fund ("ERDF") to provide low-interest loans to correct regional imbalances within the EC. *Certain Steel Products from Belgium*, 47 Fed. Reg. at 39,325. *Regional Policy*, *supra* note 130, at § 3. These loans will be countervailable if they are given on terms that are inconsistent with commercial considerations. See *supra* notes 108-110 for an explanation of regional preference theory.

133. *Certain Steel Products from Belgium*, 47 Fed. Reg. at 39,325.

134. 22 U.S.C. § 5401 (1989). Congress enacted the SEED Act in 1989 to assist Poland and Hungary's transition to market economies. See INTERNATIONAL TRADE COMMISSION (ITC), 61ST QUARTERLY REPORT TO THE CONGRESS AND

countries, including the eastern German region, which curiously enough, will be countervailable.<sup>135</sup> The SEED Act provides Enterprise Funds,<sup>136</sup> and United States Export-Import Bank ("Eximbank")<sup>137</sup> loans. Since the United States will give these SEED loans on terms inconsistent with commercial considerations, they will be countervailable, especially since many of the companies in the eastern German region will not be creditworthy.

### B. Grants<sup>138</sup>

Eastern Germany will also receive several types of grants that

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THE TRADE POLICY COMMITTEE ON TRADE BETWEEN THE UNITED STATES AND THE NON MARKET ECONOMY COUNTRIES IN 1989, at 17-18. The SEED Act authorized \$938 million in aid and assistance for, *inter alia*, private sector development, trade and business development, agricultural and environmental assistance. *Id.* The SEED Act explicitly gives special tax treatment for below-market loans, thereby implying that these loans will be preferential and, consequently, countervailable. *See generally* 22 U.S.C. § 5401 *et seq.* (1989).

135. Congress is in the process of amending the SEED Act, and its amendment proposal, SEED II, will include aid to Bulgaria, Czechoslovakia, East Germany and Romania, in addition to continuing aid to Poland and Hungary. *See* ITC, *supra* note 134, at 18 n.50. SEED II will include \$1.3 billion for programs in several areas. *See supra* note 134 for areas where aid will be targeted. However, it is unclear whether SEED monies will be available to former eastern Germany because it is now a region of "Germany." If the United States gives these grants and loans to the eastern German region, the monies would be regional development grants and the ITA would have to later decide if these loans and grants were countervailable since any preferential loans from a government are countervailable. *See* 19 U.S.C. § 1677(5)(ii) (1988) (loans given with terms inconsistent with commercial considerations if provided by government action are countervailable domestic subsidies). Congress should include a clause in subsequent SEED legislation to the effect that such loans and grants are not countervailable. Thus, the ITA would not have to decide whether to impose a CVD on eastern German or other eastern block exports as a result of SEED aid.

136. ITC, *supra* note 4, at 16. These funds will promote the development of small businesses, the agricultural sector, and joint ventures. *Id.*

137. The Eximbank will guarantee, insure, finance and extend credit in connection with the purchase of products covered in the SEED Act. *Id.* at 15

138. *See supra* note 108 for a definition of a grant. The ITA's methodology for determining the value of the grant is consistent for all types of grants. The ITA takes the face value of the grant and adjusts that figure upwards for the time value of money. *See* Subsidies Appendix, *supra* note 59, at 18,018 (complex formula for the "discount rate" which represents the time value of money). The ITA then adds a risk premium to that face value of the grant. *See* Certain Steel Products from Mexico, 49 Fed. Reg. 5142, 5149 (1984). *See also* Jameson, *supra* note 1, at 106-07 (explaining the application of the above formulas and citing examples); *IPSCO Inc. v. United States*, 687 F. Supp. 614, 622-23 (Ct. Int'l Trade 1988) (same). The ITA then determines the appropriate time period to allocate that amount and figures an *ad valorem* countervailing duty rate. The ITA previously used 15 years as the useful life of the physical assets purchased with said grants. Jameson, *supra* note 1, at 104. However, the CIT later held that the time period over which to allocate the grant should be a reasonable period and the ITA should decide that time period on a case-by-case basis. *See IPSCO Inc. v. United States*, 687 F. Supp. 614, 626 (Ct. Int'l Trade 1988), *rev'd on other*

are regionally preferential<sup>139</sup> and industry preferential,<sup>140</sup> as well as research and development grants.<sup>141</sup> All grants to eastern Germany will be countervailable as regional development grants because they are the result of economic targeting,<sup>142</sup> since the eastern German region will receive these grants over other areas of Germany. Many of the loans discussed above will be regional grants if any of them are given interest free.<sup>143</sup> In addition, the Laender program<sup>144</sup> will offer the eastern German region DM3 billion (\$1.8) in

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*grounds*, 899 F.2d 1198 (Fed. Cir. 1990) (ITA's determination of 21-year period reasonable and within its discretion).

Several recent cases have discussed government grants. *See, e.g.,* Comeau Seafoods Ltd. v. United States, 724 F. Supp. 1407, 1413-16 (Ct. Int'l Trade 1989); IPSCO Inc. v. United States, 687 F. Supp. 614, 622, 631 (Ct. Int'l Trade 1988), *rev'd on other grounds*, 899 F.2d 1192 (Fed. Cir. 1990); Hercules Inc. v. United States, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987); Alberta Pork Producer's v. United States, 669 F. Supp. 445, 450-53 (Ct. Int'l Trade 1987); PPG Indus. v. United States, 662 F. Supp. 258, 270-72 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991); Cabot Corp. v. United States, 620 F. Supp. 722, 726 (Ct. Int'l Trade 1985).

139. To stimulate economic activity in certain regions, preferential grants are usually given to economically depressed areas of a country. In addition to the grants cited in the text of this section, the 2:1 exchange rate (2 OM:1DM) given to East German companies for their devalued Ostmark currency may also be considered a grant since any company holding capital would have the value of that capital more than doubled by some estimates. *See supra* note 6 for an explanation of these exchange rates. This favorable exchange rate is a grant of money with no expectation of repayment. *Compare* Jameson, *supra* note 1, at 100 *with* PPG Indus. v. United States, 662 F. Supp. 258 (Ct. Int'l Trade 1988), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991) (Mexico's dual pricing system natural gas sales not countervailable); *Fabricas del Carmen v. United States*, 672 F. Supp. 1465, 1467-68 (Ct. Int'l Trade 1987) (same); *Hirsh v. United States*, 737 F. Supp. 1186, 1888 n.2 (D. Kan. 1990) (technical dumping in Antidumping case was not a result of currency fluctuations in Peoples Republic of China).

140. Industry preferential grants are grants that are given on the basis of a company's particular product or industry, such as being in agriculture or the steel industry. *See, e.g., infra* notes 146-149 describing selected EC industry grants.

141. Research and Development (R&D) grants provided funds to companies to research and develop new products and technologies. *See* Jameson, *supra* note 1, at 98-99. The ITA has two tests for deciding if R&D grants are countervailable: 1) Whether the R&D grants are generally available; or 2) Whether the results of the R&D are publicly available. *Id.* at 98. The ITA has held if the results of the R&D are published, the R&D grants will not be countervailed. *Certain Fresh Cut Roses from Israel*, 45 Fed. Reg. 58,516 (1980). The CIT subsequently rejected the ITA's publicly available test in *Agrexco v. United States*, 604 F. Supp. 1238 (Ct. Int'l Trade 1985) but the ITA has applied the test subsequent to that decision. *See Certain Carbon Steel Products from Sweden*, 55 Fed. Reg. 33,375, 33,379 (1985). Any R&D grants to eastern Germany will, therefore, be countervailable as regional R&D grants if the study results are not made publicly available.

142. *See* Comeau Seafoods Ltd., v. United States, 724 F. Supp. 1407, 1414 n.10 (Ct. Int'l Trade 1989) (discussing "targeting" criterion of ITA and other cases which used that criterion).

143. *See supra* notes 116-121 and accompanying text for a discussion of these loan programs.

144. *See* DEUTSCHE BANK, *supra* note 3, at 42.

regional development grants over the next five years and private-sector investment credits of up to 33% retroactive to July 1, 1990.<sup>145</sup>

Eastern Germany will also receive industry grants from the EC. These EC grants will be primarily for agriculture,<sup>146</sup> and could amount up to \$5.5 billion in grants in 1990 and \$10 billion in 1991,<sup>147</sup> as well as grants for plant modernization in steel.<sup>148</sup> Eastern Germany will also receive grants in other areas from the EC at the request of western Germany.<sup>149</sup> All of these grants will be countervailable because they are regionally preferential.

### C. Equity Infusions<sup>150</sup>

The western German government will fund former state-controlled eastern German companies by infusing capital into these

145. See *Business International Country Monitor*, BUS. INT'L, Sept. 10, 1990, at 303 (copies available from Business International Corporation, 215 Park Ave. South, New York, N.Y. 10003). See also DEUTSCHE BANK, *supra* note 3, at 42 (describes private-sector subsidies of 12% through 1991 and 8% through mid-1992).

146. See *East Germany Maps Farm Aid Package*, J. COM., July 19, 1990, at 3; *East German Agriculture Struggles With Change to Free Market*, J. COM., July 26, 1990, at 7.

147. *East Germany Maps Farm Aid Package*, J. COM., July 19, 1990, at 3.

148. DEUTSCHE BANK, *supra* note 3, at 46. The CIT recently held similar regional grants for plant modernization countervailable. See *Comeau Seafoods Ltd. v. United States*, 724 F. Supp. 1407, 1413 n.9 (Ct. Int'l Trade 1989). The grants in *Comeau* are remarkably similar to the proposed grants to eastern Germany. See, e.g., DEUTSCHE BANK, *supra* note 3, at 42.

149. See DEUTSCHE BANK, *supra* note 3, at 42.

150. Equity infusions are government purchases of a company's stock, or the conversion of debt to stock, on terms that are inconsistent with commercial considerations. See *Jameson*, *supra* note 1, at 118; *Companhia Siderurgica Paulista, S.A. v. United States*, 700 F. Supp. 38 (Ct. Int'l Trade 1988) (discussing commercial considerations test). See also *Edge*, *supra* note 30, at 965-73 (an in-depth analysis of equity infusion theory and valuation). If the government buys previously issued shares on the market and not directly from the company, there is no subsidy. See *Jameson*, *supra* note 1, at 119. If the government buys the shares from the company at higher than prevailing prices, however, the equity infusion is a countervailable subsidy. See *Certain Steel Products from Belgium*, 47 Fed. Reg. 39,304, 39,319 (1982); *Subsidies Appendix*, *supra* note 59, at 18,020; *Proposed Rulemaking*, *supra* note 59, at 23,371. If the government infuses equity into the company and the rate of return is less than the average rate of return on equity investment in that country, its equity infusion is then a countervailable subsidy. See *Subsidies Appendix*, *supra* note 59, at 18,020.

The ITA uses an "equityworthy" test which states that to be equityworthy, a company must show its ability to generate a reasonable rate of return within a reasonable period of time. See *Hercules Inc. v. United States*, 673 F. Supp. 454, 468 (Ct. Int'l Trade 1987). The ITA decides if the equityworthy test is met and then calculates the countervailable benefit by finding the difference between the company's rate of return on equity and the national average. *Hercules*, 673 F. Supp. at 468. It then multiplies the difference by the total amount of equity purchases. *Id.* Recent cases have discussed countervailing duties and equity infusions. See, e.g., *Comeau Seafoods Ltd. v. United States*, 724 F. Supp. 1407, 1417-19 (Ct. Int'l Trade 1989); *Companhia Siderurgica Paulista, S.A. v. United States*, 700 F. Supp. 38 (Ct. Int'l Trade 1988); *Saudi Iron & Steel Co. v. United*

companies through the National Unity Fund.<sup>151</sup> The countervailing duty will be substantial on these equity infusions, especially if the national rate of return<sup>152</sup> used to determine these company purchases is the average rate of return in "Germany."<sup>153</sup>

The NUF, for example, will "loan"<sup>154</sup> up to DM7 billion in 1990 and DM10 billion to restructure former state-owned eastern German companies. This program is, in essence, a disguised equity infusion program because the only method of future repayment will be through shares of stock in these cash strapped companies.<sup>155</sup> Undoubtedly, there will be other programs introduced in the future that will qualify as countervailable equity infusions.

#### D. Energy Subsidies<sup>156</sup>

Eastern Germany will also receive energy subsidies in several forms to assist in the cleaning up of the polluted factories in eastern

States, 698 F. Supp. 912, 914-15 (Ct. Int'l Trade 1988); *Hercules Inc. v. United States*, 673 F. Supp. 454, 467, 472 (Ct. Int'l Trade 1987); *Al Tech Specialty v. United States*, 661 F. Supp. 1206, 1213-14 (Ct. Int'l Trade 1987).

151. See *DEUTSCHE BANK*, *supra* note 3, at 42.

152. This national average rate of return is the cost of the equity or the rate of the return on equity. See *IPSCO Inc. v. United States*, 687 F. Supp. 614, 622 n.8 (Ct. Int'l Trade 1988).

153. The actual rate of return on equity in eastern Germany will probably be extremely low, so that any comparison with the "German" national average return on equity will be countervailable unless the ITA devises a method to avoid this aberration.

154. The author believes the National Unity Fund program is not a true loan because there is no actual expectation of repayment. The author also believes that the government may receive shares in the company if it is ultimately successful. One source indirectly supports these conclusions by stating that "these loans are to be repaid from the proceeds of privatization." *DEUTSCHE BANK*, *supra* note 3, at 42. This implies that the government may only be repaid when these former state-controlled companies have the capital reserves to do so. *Id.* However, most eastern German companies will have serious liquidity problems in the foreseeable future. *Id.* at 43. Thus, the only manner in which these "loans" may be repaid will be by paying with company stock.

155. *Id.* See also note 122 for an explanation of the liquidity problems facing eastern German companies.

156. Energy subsidies are subsidies which involve the preferential sale of government goods to an industry or group of industries at prices that are inconsistent with commercial considerations. 19 U.S.C. § 1677 (5)(A)(ii) (1988). The ITA has stated that the sale of energy at prices lower than the market price is a countervailable subsidy. See *Carbon Black from Mexico*, 51 Fed. Reg. 13,269, 13,272 (1986) (Preliminary) (Preferentiality Appendix). The ITA utilizes two tests to determine if the sale of energy is preferential: first, the ITA determines whether the price is lower than the price the same seller charges others for a similar or related good. *Id.* If that data is not available, then the ITA tests whether the price is lower than prices charged by other sellers within the jurisdiction for an identical good. *Id.*

More recently the ITA has employed an "arms-length" test. See *Hercules, Inc. v. United States*, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987). This test states that benefits bestowed upon the manufacturer of an input do not flow down to the purchaser of that input if the sale is transacted at arms length, in which case

Germany.<sup>157</sup> At the same time, however, these energy subsidies will make these companies more fuel efficient, thereby reducing their costs of production.<sup>158</sup>

Under the beginning of a power sharing program between eastern and western Germany, western Germany will begin to divert some of its excess electricity to eastern Germany.<sup>159</sup> Western Germany will also pump 2 billion cubic meters of natural gas annually into eastern Germany to replace the polluting brown coal which many eastern German industries presently use.<sup>160</sup> Also, Germany has formulated an environmental program with DM670 million in subsidies for alternative energy programs in the East<sup>161</sup> and the German Environmental Foundation will provide DM2.5 billion in other energy aid.<sup>162</sup> Finally, eastern Germany will be eligible for EC "green" energy assistance,<sup>163</sup> which will also reduce eastern German companies costs of production.

#### IV. THREE PRODUCT SUBSIDIZATION MODEL

This subsidization model will analyze three eastern German products: chemical fertilizers,<sup>164</sup> offset printing presses,<sup>165</sup> and ta-

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the seller charges as high a price as the market will bear. *Id.* Several recent cases have evaluated energy subsidies. *See, e.g.,* Hercules Inc. v. United States, 673 F. Supp. 454, 477 (Ct. Int'l Trade 1987) (natural gas and electricity); Can-Am Corp. v. United States, 664 F. Supp. 1444, 1447-49 (Ct. Int'l Trade 1987) (fuel oil); PPG Indus. v. United States, 662 F. Supp. 258, 270-72 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991) (natural gas); Cabot Corp. v. United States, 620 F. Supp. 722, 726 (Ct. Int'l Trade 1985) (natural gas and electricity). *See also* Stephen J. Powell and John D. McInerney, *International Energy Trade and The U.S. Unfair Trade Laws*, 11 U. PA. J. INT'L BUS. L. 339 (1989) (in-depth discussion of AD and CVD law application to trade in energy).

157. *See Germany Heads for Green Union*, BUS. EUR., May 11, 1990, at 1; *Pass the Candle*, THE ECONOMIST, June 23, 1990, at 72.

158. *See Pass the Candle*, *supra* note 157; *Research and Technology*, 1991 WL 11726 § 9.5.6 (July 5, 1991) (Westlaw Int'l Database, EurUpdate file) (detailing the EC's new Thermie energy assistance program to eastern Germany).

159. *See Pass the Candle*, *supra* note 157.

160. *Id.*; *Germany: EIB Loan*, *supra* note 130, at 5 (EIB loans to finance eastern German gas pipeline).

161. *Germany Heads for Green Union*, *supra* note 157, at 2.

162. Funds from the privatization of Salgitter, the giant East German steel and mechanical engineering company, will provide the capital for these environmental programs. *Id.* at 2.

163. *Id.* The EC will require eastern Germany to raise the environmental standards at its factories and, in turn, the EC will offer this "green" aid to assist this environmental clean-up effort.

164. Urea and potassium chloride are fertilizers which constituted over 18 million dollars in East German exports in 1989 and over 12 million in 1990. *See* ITC, *supra* note 4, at 77 (figure for only nine months in 1990, since statistics on East Germany were no longer separately kept by Commerce after Sept., 1990). Urea is classified under the Harmonized Tariff Schedule ("HTS") number 3102.80 and potassium chloride is classified under 3104.20. *Id.* The HTS system went into effect January 1, 1989. *Id.* at 2. The Tariff Schedule of the United States ("TSUSA") was the previous system. *Id.* Thus, to research case history

ble glassware.<sup>166</sup> These three products were the leading products exported from eastern Germany into the United States in 1989.<sup>167</sup> Each product evaluation begins with basic assumptions<sup>168</sup> required to perform the subsidy analysis. This comment will apply the types of subsidies discussed above<sup>169</sup> to each of these three products. Finally, each product's *ad valorem*<sup>170</sup> duty, or percentage of value per item, will be multiplied by the products' import cost, taking into account eastern Germany's newly acquired MFN status.<sup>171</sup> A final overall subsidy rate in percent and gross dollars<sup>172</sup> will demonstrate the price difference between pre and post-unification exports from eastern Germany to the United States.<sup>173</sup>

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of a given product it is helpful to have the TSUSA number as well (urea=480.3000, potassium chloride=480.5000). Some of the categories, however, were consolidated and new ones were added under HTS. There is no cross-reference chart between products under the old and new system and it is, therefore, difficult to locate some products. See *supra* note 42 for detailed discussion of custom duty analysis and the HTS.

165. Offset printing machinery and parts accounted for over \$10.5 million of East German exports in 1989 and \$9 million in 1990. See ITC, *supra* note 4, at 77 (1990 figure for only nine months). Their HTS numbers are 8443.19 and 8443.90, respectively, while their former TSUSA numbers were 668.2100 and 668.5060. *Id.*

166. Glassware (of a kind used for tables) accounted for \$2.68 million of East German exports in 1989 and \$2.53 million of exports in 1990. ITC, *supra* note 4, at 77 (1990 figure only for nine months). Glassware's HTS numbers are 7013.31 and 7013.91, with 7013.91 being broader than 7013.31 but similar in that both are glassware for tables, toilets etc. *Id.* No specific TSUSA category was available for glassware tables, but 544.3100 was the closest category to use. 19 U.S.C. § 1202, Pt. 3B (1988).

167. See ITC, *supra* note 4, at 77.

168. These assumptions have been purposefully simplified to enable the reader to follow the product examples. However, realistic figures and data are used where appropriate.

169. See *supra* section III, "Possible Subsidies from Western to Eastern Germany."

170. *Ad valorem* is percentage of value per item used to figure the import duty on a product. 19 U.S.C.A. § 1 at xxv-xxviii (1991)(introductory notes) [hereinafter *ad val*]. See *supra* note 42 for a detailed explanation and an example of the import duty analysis.

171. East Germany received *de facto* MFN status upon unification with West Germany October 3, 1990. Rosalind Rachid, *Customs Clarifies Tariffs for East European Nations*, J. COM., Sept. 13, 1990, at 3A; ITC, *supra* note 4, at 1 n.2. See *supra* notes 42 and 44 which explain and illustrate MFN status and its effect on the normal United States customs duty rate.

172. All the product subsidy valuations will use dollars to simplify the mathematical calculations in this section.

173. To show the price difference between pre-unification and post-unification prices, multiply the pre-unification price by the duty percent and add to the pre-unification price to get the post-unification price. See *supra* note 42 for explanations of the computations. For example, if the product's price is \$4,000 and the duty percent is 50%, the total importer's price is \$6000. The post-unification price will show the effect of all subsidies on the product's price. The post-unification subsidized price will be subtracted from the original pre-unification price to show the effect of the subsidy on the bottom line price of the product. The normal duty percent will then be multiplied by the post-unification price. The



*Product 1: Chemical Fertilizers*<sup>174</sup>

Chemstaat AG<sup>175</sup> had \$10 million in sales of chemical fertilizers in 1990 and will receive a \$100,000 National Unity Fund ("NUF")<sup>176</sup> "loan" which is actually an equity infusion.<sup>177</sup> Chemstaat will also receive a \$100,000 loan under the SEED Act<sup>178</sup> to change from a coal to a gas-powered plant in the next two years,<sup>179</sup> and a one-year \$200,000 grant from the EC<sup>180</sup> European Regional Development Fund ("ERDF"),<sup>181</sup> which it will also use to finance the factory's conversion to gas. Finally, Chemstaat has little capital resources,<sup>182</sup> is unequityworthy,<sup>183</sup> and will export duty free<sup>184</sup> fertilizer at a pre-

product of this multiplication will be added to the post-unification price to ascertain the importer's new total price. For example, a \$4000 price would be multiplied by 10% in subsidies and then subtracted from that price to derive a \$3600 pre-import price. Since the normal customs duty will decrease from 50% to 11% as a result of East Germany going from column II to I, the new importer's price would be \$4036, or nearly \$2000 less than before unification. (Pre-unification import price =  $\$4000 \times 50\% = \$2000$  + original  $\$4000 = \$6000$ . Post-unification import price =  $\$3600 \times 11\% = \$396$  + original  $\$3600 = \$3996$ . The difference is  $\$6000 - \$3996 = \$2004$ .)

174. See generally Urea from East Germany, Romania and the U.S.S.R., 52 Fed. Reg. 19,557 (1987) (dumping determination giving minutely specific product information on Urea and other chemical fertilizers produced in East Germany). Much of the assumptions, costs and figures for this section are based upon this final Antidumping determination.

175. AG represents Aktiengesellschaften. See Werner Blau and Peter Rawert, *East Germany: Legal Steps Toward a Market Economy*, INT'L BUS. L., July-Aug., 1990, at 308 (copies available at International Business Lawyer, c/o Mercury Airfreight International, Ltd., Inc., 2323 Randolph Avenue, Raritan, NJ 07001). An AG is a stock corporation which sells shares that are held by a government trust institution (Truhandanstalt). *Id.*; Dr. Hinrich Thime & Dr. Volmar Jesch, *Restitution and Investment in The New German Laender*, INT'L CORP. L. REV., June, 1991, at 13. This trust was formed to sell off all government owned companies, and the capital will be used to finance unification. Blau & Rawert, *supra*, at 308. Thus, this company would, for the first time, have shares and possibly could have some measurement for an equity infusion. *Id.* It is also interesting to note that the shares are held by a government trust, thereby leaving one to wonder how market orientated this system really is.

176. See *supra* notes 122-23 for a description of the National Unity Fund.

177. See *supra* note 154 for an explanation of the NUF and why it appears to be an equity infusion program rather than a loan program. See also *supra* note 150 for a discussion of equity infusion methodology.

178. See *supra* note 134 for a description of the SEED Act.

179. See *supra* note 134 and accompanying text.

180. See *supra* note 127 for a description of the EC.

181. See *supra* note 132 for a description of the ERDF loans.

182. Since Chemstaat has little capital reserves, it did not receive any subsidy from the favorable exchange rate from Ostmark to Deutsche Marks on July 2, 1990. See *supra* note 6 explaining exchange rates.

183. See *supra* note 150 for the definition and test for equityworthiness.

184. Some products are scarce and the United States permits them to enter duty free, whether they are exported from a Column I or II country. See *supra* note 42 and accompanying text explaining Column I and II and their duty calculations. Chemical fertilizers are permitted to enter into the United States duty free since United States farmers need vast amounts to fertilize their crops.

unification price of \$90 a short ton in 1000 ton lots (\$90,000 per lot). Since chemical fertilizer is duty free, the normal import duty is not a factor in the import price.

First, the NUF \$100,000 equity infusion will result in a 1% *ad val.* subsidy for its fertilizer, since Chemstaat is unequityworthy and there will be no return on equity.<sup>185</sup> The SEED Act loan will bestow a .25% *ad val.* subsidy.<sup>186</sup> The ERDF grant will provide a 2% *ad val.* subsidy.<sup>187</sup> The total subsidy of the chemical fertilizer is 3.25% *ad val.* subsidy, or \$2925 per \$90,000 lot.

The United States domestic industry had been selling the same or similar fertilizers at \$88 per short ton (\$88,000 per lot).<sup>188</sup> While Chemstaat had been apparently been selling its fertilizer for slightly above the United States domestic price, its actual cost after subsidies was substantially less.<sup>189</sup> The ITA will impose a countervailing duty equal to \$2925 per lot to offset the subsidies bestowed upon the imported product.

### *Product 2: Offset Printing Machinery*<sup>190</sup>

Printerstaat GmbH<sup>191</sup> had \$1 million in sales of printing machinery and will receive a five-year grant under the German Laender program for regional development. Printerstaat will also

185. This equity infusion will be treated similar to a grant since there will be no return on equity. *See supra* note 150 explaining equity infusions and their calculations. Chemstaat received the \$100,000 infusion in one year and has sales of \$10 million. Thus, the *ad val.* subsidy is 1%. ( $\$100,000 \div \$10,000,000 = 1\%$ ).

186. The benchmark rate is 10% and the actual rate is 5%. Therefore, the preferential rate is 5%. The \$100,000 loan must be divided by the two years to get a per year subsidy, which is \$50,000. Next, \$50,000 is multiplied by the 5% preferential rate for a total of \$2500. \$2500 is then divided by the total sales of \$10,000,000 and the subsidy is .25%. ( $\$100,000 \div \text{two years} = \$50,000 \times 5\% = \$2500 \div \$10,000,000 = .25\%$ ). *See supra* note 116 explaining the ITA's loan methodology.

187. The grant is \$200,000 which will be given over one year. Thus, the \$200,000 amount is divided by total sales of \$10,000,000 for a 2% *ad val.* subsidy. ( $\$200,000 \div \$10,000,000 = 2\%$ ). *See supra* note 138 for grant methodology.

188. This price is based upon the author's assumption that domestic companies will price their products competitively with imported like products.

189. Chemstaat's actual cost was \$87,075 per lot or \$925 per lot less than its import price.

190. The only case dealing with East German printing presses is *Ashedown v. United States*, No. 83-5-00742, 5 Int'l Trade Rptr. 1313 (1989). This case, however, dealt with an importation through West Germany to the United States nine years after the machine's original sale there. *Id.* Recent cases deal with high tech phototypesetting and imagesetting machines. *See, e.g., Phototypesetting and Imagesetting Machines and Subassemblies Thereof from The Federal Republic of Germany*, 55 Fed. Reg. 20,315 (1990).

191. GmbH represents *Gesellschaften mit beschränkter*, which is a limited liability corporation whose shares are held in government trust. Blau and Rawert, *supra* note 175, at 308.

receive a \$100,000 short-term loan<sup>192</sup> under the ERP<sup>193</sup> and a two-year loan of \$100,000<sup>194</sup> from the EBRD.<sup>195</sup> Printerstaat will use both of these loans to modernize its two aging plants in Leipzig. Finally, Printerstaat had \$50,000 worth of Ostmarks<sup>196</sup> on July 2, 1990, which it exchanged at a 3:1 rate for Deutsche Marks.<sup>197</sup> Each of Printerstaat's printing machines sold for a pre-unification price of \$15,000 per unit, which was sent in one shipment.

The Laender program grant will provide Printerstaat with a 2% *ad val.* subsidy on its cost to manufacture the printing machine.<sup>198</sup> The short-term ERP loan will bestow a 5% *ad val.* subsidy<sup>199</sup> and the two-year EBRD loan will give Printerstaat a .35% *ad val.* subsidy.<sup>200</sup> In addition, the favorable currency exchange, which is also a type of subsidy,<sup>201</sup> will bestow a 10% *ad val.* subsidy.<sup>202</sup> The total *ad val.* subsidy on Printerstaat's product is 12.85% or \$1927 per unit. While Printerstaat's import price on the printing machine was \$15,000, the company's actual cost was much less as a result of the subsidies.<sup>203</sup> The countervailing duty will be \$1927 per machine, which the ITA will impose before allowing importation.

192. See *supra* note 118 for a definition and the ITA's methodology for calculating short-term loans.

193. See *supra* note 124 for a description of the ERP.

194. Any loan for a term of longer than one year is a long-term loan. For an explanation of long-term creditworthy loan, see *supra* note 119.

195. See *supra* note 128 for an explanation of the EBRD program.

196. Ostmarks are the former East German currency which was exchanged for more valuable West German Deutsche Marks July 2, 1990. See *supra* note 6 explaining this currency exchange.

197. *Id.*

198. The \$100,000 five-year grant will bestow \$20,000 worth of subsidy per year. This \$20,000 is divided by the \$1,000,000 in annual sales to derive a 2% *ad val.* subsidy. (\$100,000 divided by 5 years = \$20,000 divided by \$1,000,000 = 2%). See *supra* note 138 for grant methodology.

199. This one-year \$100,000 loan had a benchmark rate of 10% and an actual rate of 5%. Thus, the \$100,000 is multiplied by the 5% preference for a total of \$5000. The \$5000 is divided by the \$1,000,000 in total sales for an *ad val.* subsidy of .5%. ( $\$100,000 \times 5\% = \$5000$ , divided by \$1,000,000 = .5%).

200. This two year, \$100,000 EBRD loan had a company-specific rate of 12% and an actual rate of 5%. The loan was \$50,000 per year and should be multiplied by the preferential rate of 7% to derive a benefit of \$3500. This \$3500 is divided by \$1,000,000 in total sales for a .35% subsidy rate (\$100,000 divided by 2 = \$50,000  $\times$  .07 = \$3,500 divided by \$1,000,000 = .35%). See *supra* note 115 for loan methodology.

201. See *supra* note 139 explaining why the favorable currency exchange will be a grant to the remaining eastern German industries.

202. The 3:1 exchange rate increased the value of the capital from \$50,000 to \$150,000 or a \$100,000 increase. This amount was given in one year and is divided by total sales of \$1,000,000 for a 10% subsidy. (\$100,000 divided by \$1,000,000 = 10%). This also follows a grant methodology.

203. The pre-unification price was \$15,000 from which is subtracted the total subsidy amount of \$1927, equaling \$13,073, which was Printerstaat's actual cost to produce the printing machine. (\$15,000 - \$1927 = \$13,073).

The normal import duty for East German printing presses was 25% under Column II rates, while the lower Column I rate for the GATT member eastern Germany is now only 6%.<sup>204</sup> Thus, the non-subsidized<sup>205</sup> \$15,000 machine previously cost \$18,750 to import into the United States.<sup>206</sup> The importation of the subsidized machine will have a post unification price of \$15,900.<sup>207</sup> The United States printing press industry, which was selling their presses at \$18,000 per machine prior to unification, will now be undersold by \$2,100.<sup>208</sup>

### *Product 3: Table Glassware*<sup>209</sup>

Glastaat AG<sup>210</sup> had \$1 million in sales in 1990 and will receive a \$150,000 short-term loan<sup>211</sup> from the European Investment Bank (EIB)<sup>212</sup> which it will use for plant repairs.<sup>213</sup> Glastaat has little capital reserves and did not receive a benefit from the July 2, 1990 currency exchange. Each package of glassware is exported at a pre-unification price of \$40 a package and is sold in 100 package lots (\$4000 per lot).

The sole subsidy Glastaat will receive is a .75% *ad val.* subsidy on its glassware from the EIB loan.<sup>214</sup> This subsidy will only

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204. Column I rates are lower and are for GATT members only, while Column II rates are higher and are charged to all non-GATT countries. See *supra* notes 42-44 and accompanying text explaining MFN and Column I and II duty rates.

205. East Germany subsidized their products heavily but this theoretically could not be measured so as to assess a CVD. See DEUTSCHE BANK, *supra* note 3, at 13 for amounts of East German subsidies. See also *supra* note 46 and accompanying text discussing the *Georgetown Steel* case. Thus, while the products were subsidized, the ITA could not measure the subsidies to impose a countervailing duty.

206. This figure is derived by multiplying \$15,000 times 25% and adding the \$3,750 to \$15,000 to arrive at a total of \$18,750 ( $\$15,000 \times .25 = \$3,750 + \text{original } \$15,000 = \$18,750$ ).

207. This figure is derived by multiplying the price of \$15,000 times 6% and adding it to that initial figure ( $15,000 \times .06 = 900 + 15,000 = 15,900$ ).

208. This product example demonstrates the tremendous impact a highly subsidized imported product can have on the United States domestic industry, especially when combined with a much more favorable duty rate. This amount also does not show the actual cost to make the product resulting from the subsidies. See *supra* note 203 for this calculation.

209. Most of the import litigation is over small drinking glasses, and there has not been any litigation concerning table glassware to date.

210. See *supra* note 175 for an explanation of AG or the unlimited liability corporation.

211. See *supra* note 118 for an explanation of short-term loans, which are loans of one year or less.

212. See *supra* note 130 for a description of EIB loans.

213. Many of eastern Germany's factories are in a serious state of disrepair and most of the loans will be used to repair these existing structures. See DEUTSCHE BANK, *supra* note 3, at 43.

214. This one-year, \$150,000 loan had a benchmark of 10% and an actual rate of 5%. Thus, the \$150,000 is multiplied by the preferential rate of 5% for benefit

slightly lower Glastaat's actual cost of production as compared to its \$4000 per lot import price.<sup>215</sup> Since the .75% rate is slightly above *de minimis*,<sup>216</sup> it will be countervailable in and of itself. The ITA will impose countervailing duty of \$30 per lot before importation.

The normal duty rate on East German table glassware was 50% at Column II rates, but now the eastern German region will export this product into the United States at a 11% Column I duty rate.<sup>217</sup> Thus, the import price will decline from a pre-unification price of \$6000 per lot to a post-unification price of \$4440 per lot.<sup>218</sup> United States domestic table glass industries sold comparable lots at a price of \$5500 and will be undersold by \$1060 per lot.<sup>219</sup>

The significant difficulty which arises upon unification is that eastern German products will receive these subsidies and will be able to unfairly undercut United States domestically-made product prices, but it is unclear whether United States CVD law will apply to these products because eastern Germany is a T-NME. In the past the CIT has refused to apply CVD law to NME's,<sup>220</sup> and may decline to do so to T-NME's.<sup>221</sup> United States domestic industries will, therefore, be unable to combat these unfair trade practices because only countervailing duties adequately compensate for the unfair trade advantages which eastern German products will gain through these subsidies.<sup>222</sup>

of \$7500. The \$7500 is divided by the \$1,000,000 of total sales for a .75% *ad val.* subsidy. ( $\$150,000 \times .05 = \$7500$  divided by  $\$1,000,000 = .75\%$ ).

215. Chemstaat's actual cost of production as a result of the subsidy was \$3,970 per lot or \$30 less per unit.

216. See *supra* note 83 for an explanation of the *de minimis* standard. In a recent case the ITA found such a minimal subsidy of .72% and imposed a CVD. See *IPSCO Inc. v. United States*, 687 F. Supp. 614, 622 n.8 (Ct. Int'l Trade 1988).

217. See 19 U.S.C. § 1202, Pt. 3b (1988).

218. The previous import price was \$6000 ( $\$4000 \times 50\% = \$2000 +$  original  $\$4000 = \$6000$ ). The new import price is the \$4000 price times the 11% duty or \$4440 post-import price ( $\$4000 \times 11\% = \$440 +$  original  $\$4000 = \$4440$ ).

219. This product example demonstrates how a minuscule subsidy, when combined with a substantially reduced import duty, results in a large post-import price reduction.

220. See *supra* notes 46-51 and accompanying text for an explanation why CVD law is not applicable to NME's.

221. The ITA refused to perform a sector analysis in an antidumping case and presumably would decline to do so in a CVD investigation without Congress' legislative guidance. Cf. *Menthol From Japan and the People's Republic of China*, 46 Fed. Reg. 3258, 3259 (1981) (Final). See also Alford, *supra* note 14, at 86-87 (stating the ITA could have applied a sector analysis but avoided the issue).

222. See *supra* notes 51 and accompanying text for a discussion of why only CVD law adequately redresses governmental subsidization of exported products.

## V. RECOMMENDATIONS AND CONCLUSIONS

As a result of the ramifications of the unification of Germany and the rapid changes in the economies of Eastern European countries, several recommendations for amending CVD law are appropriate. First, Congress should develop statutory definitions of T-NME countries,<sup>223</sup> T-NME regions,<sup>224</sup> and "group of industries."<sup>225</sup> Once these groups are defined, the ITA should apply CVD law to T-NME's and the eastern German regional group of industries under a statutorily proscribed sector analysis.<sup>226</sup> These statutory amendments would permit United States CVD law to be expressly applied to the eastern German group of industries and T-NME's in general.

To alleviate the potential harshness of these amendments, Congress could temporarily expressly exempt certain subsidies or programs<sup>227</sup> from CVD law's coverage. Further, CVD law could provisionally be amended to include T-NME's as countries who will receive an ITC injury/causation test. Without this amendment, T-NME's will face certain countervailing duties since most T-NME's do not receive § 1671's injury and causation test because they are not "countries under the agreement."<sup>228</sup> The ITA will likely find countervailable subsidies in every CVD petition filed against a T-

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223. See *supra* notes 17 and 58 for a discussion of T-NMEs and possible manners to define them.

224. T-NME regions are eastern Germany, and the Baltic states of Latvia, Estonia and Lithuania. These regions are not sovereign countries but are regions that are transitioning to market principles.

225. A "group of industries" definition might be similar to the general definition of "Industry." See *supra* note 105 for the statutory definition of industry and note 105 for a discussion of group of industries. However, this definition could be drafted broader to include eastern Germany and other T-NME's and could possibly include a provision for a group of industries or an international consortia in several proximitus countries, rather than those only in a single country. See *supra* note 106 for the statutory definition of international consortia.

226. See *supra* notes 53-55 and accompanying text for an explanation of a sector analysis.

227. Certain programs, such as the United States SEED program, could be expressly exempted from CVD law. See *supra* notes 134-35 for a description of the SEED Act. Also, certain low-interest loans could be exempted for a period of three years from CVD law since loans provide less of a subsidy as long as they are to creditworthy companies. See *supra* notes 116-20 and accompanying text for a discussion of the different kinds of loans. For example, the GATT granted the EC a continuing waiver of their trade regulations for East German products. See *EC Seeks Waiver for German Trade*, J. COM., Oct. 9, 1990, at 12A. The United States could give a similar temporary waiver of CVD law to T-NMEs.

228. See *supra* note 1 for a list of "countries under the agreement." Currently, Yugoslavia and eastern Germany as a part of Germany are "countries under the Agreement" (GATT) and, therefore, they will receive an injury and causation determination by the ITC. See *supra* notes 1, 72-73 and accompanying text for a discussion of the injury and causation analysis. Other non-Gatt countries will only receive an ITA subsidy ruling. See Gantz, *supra* note 53, at 11-12 and note 1, distinguishing CVD law under §§ 1303 and 1671.

NME, since large subsidies are the only effective means to revitalize industry in a T-NME which is transitioning to a market economy. Thus, without an injury causation test,<sup>229</sup> the ITA will have to impose countervailing duties on all T-NME's, at a time when T-NME's are trying desperately to break into the United States market.

Currently, United States CVD law requires a finding that the subsidized imports are a cause of material injury. Congress could temporarily give T-NME's a causation test to ameliorate the harshness of applying CVD law during this transitional period. Any discussion of such an altering of the causation standard is, however, outside the scope of this comment. This comment has merely sought to point out several dilemmas on the horizon in United States trade law relative to T-NME's, and serious solutions must be addressed in subsequent articles.

In conclusion, by extending the scope of United States CVD law to T-NME's, the United States can protect its domestic industries from highly subsidized products originating from T-NME countries and regions, while permitting T-NME's to receive developmental assistance to export their products into the United States under relaxed CVD standards. In doing so, the United States could simultaneously protect its domestic industry and assist in the transition of T-NME's to market economies. To achieve this balance, Congress should amend CVD law to give the ITA guidance in deciding when United States CVD law should apply to imported products from eastern Germany and other T-NME's.

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229. See *supra* note 73 for a brief discussion on causation in CVD law.

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