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**An Examination Of Domestic Subsidies
And The Standard For Imposing
Countervailing Duties**

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I. INTRODUCTION

Since the enactment of the Trade Agreements Act of 1979,¹ the courts have had only a handful of opportunities to address the question of whether a particular domestic development program of a foreign government is a countervailable subsidy under the U.S. countervailing duty (CVD) law. This article analyzes four of those decisions. It argues that the Court of International Trade has in at least one instance given the CVD law far too broad a sweep, bringing within its prohibitory ambit development programs of foreign governments which Congress did not intend to be countervailed and which, in the interests of international comity, are better left not countervailed. On careful inspection the decisions of the Court of International Trade in this area cannot be reconciled.

We begin with a background discussion of the countervailing duty law.

II. BACKGROUND

The original countervailing duty law,² the Tariff Act of 1890, was

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1. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at scattered sections of titles 5, 13, 19, and 26, U.S.C.).

2. Tariff Act of 1890, ch. 1244, 26 Stat. 567 (1890). See deKieffer, *When, Why, and*

little more than special interest legislation for the domestic sugar industry.³ Because tariffs were set by Congress at a level judged to be sufficient to provide the desired protection to targeted industries, foreign subsidies were viewed as attempts to breach the tariff wall erected by Congress. In essence, the offending foreign subsidies effectively nullified the protection accorded the U.S. sugar producers. Consequently, countervailing duties were designed to offset the exact amount of the foreign subsidy and thereby maintain the integrity of the tariff protection.⁴ While, in 1890, the CVD law was limited in scope to the domestic sugar industry, by 1897 all imports were subject to the CVD law.⁵

Prior to 1922, the CVD law only extended to subsidies given on the exportation of merchandise,⁶ not on the manufacture or production of merchandise. The Tariff Act of 1922⁷ for the first time imposed countervailing duties not only against subsidies on the exportation of merchandise to the United States, but also on the manufacture and production of such merchandise.⁸ The countervailing duty law was not substantially amended again until 1974.⁹

From 1922 to 1974 the Department of the Treasury—the agency responsible during this period for administering the CVD law—consistently countervailed against export subsidies.¹⁰ Most of these took

How to Bring a Countervailing Duty Proceeding: A Complainant's Perspective, 6 N.C.J. INT'L L. & COM. REG. 363, 364 (1981).

3. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 451 (1978); *Downs v. United States*, 187 U.S. 496 (1903); *ASG Indus., Inc. v. United States*, 467 F. Supp. 1200, 1208 (Cust. Ct. 1979).

4. Because the amount of the tariff was assumed to be necessary to provide the desired protection, any subsidized import was presumed to cause injury to the competing American industry. Therefore, no injury test was required prior to the Trade Agreements Act of 1979. By the same token, merchandise entering the United States duty free was deemed by Congress not to be in competition with comparable merchandise produced by the U.S. industry. Accordingly, since U.S. producers needed no tariff protection, they likewise did not require protection through the countervailing duty law. The countervailing duty law was first applied to non-dutiable merchandise in 1974 with passage of the Trade Act of 1974.

5. Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205 (1897).

6. *Id.* See *ASG Indus., Inc. v. United States*, 467 F. Supp. 1200, 1208 (Cust. Ct. 1979) (“the first countervailing duty law of general application was enacted as section 5 of the Tariff Act of 1897 [footnote omitted]”).

7. Ch. 356, 42 Stat. 858, 935 (1922).

8. *Id.* at 944. Countervailing duties were also imposed on subsidies given by a “person, partnership, cartel, or corporation,” not just by governments. *Id.*

9. See Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2011 (codified in scattered sections of title 19, U.S.C.).

10. The term “export subsidy” is defined as “a subsidy conditioned on export of the product or on export performance.” Barcelo, *Subsidies, Countervailing Duties and Antidump-*

the form of bounties awarded to exporters.¹¹ In 1923 the first countervailing duty was imposed on steel products from Australia to offset a domestic subsidy.¹² Although there was no apparent intent to increase exports of steel products, the production subsidy was nonetheless offset without regard to any intent to or effect of increasing exports.¹³

The end of World War II marked a dramatic shift in U.S. international trade policy from one of protectionism—the highwater mark of which being the Smoot-Hawley Tariff in 1930¹⁴—to one of trade liberalism.¹⁵ This shift toward internationalism was evidenced by the Truman administration's strong support for the General Agreement on Tariffs and Trade (GATT).¹⁶ This shift in international economic policy was best reflected in the Treasury Department's administration of the CVD law. Administrative delay was the primary instrument to achieve this policy,¹⁷ since prior to 1974 no statutory deadlines existed for disposing of countervailing duty petitions filed by adversely affected domestic industries.¹⁸ The Treasury allowed dust to gather on

ing After the Tokyo Round, 13 CORNELL INT'L L.J. 257, 261 (1980) [hereinafter Barcelo I]. A "domestic subsidy" (sometimes referred to as a "production subsidy") is one "granted without respect to output destination." *Id.* at 261. See also J. JACKSON, WORLD TRADE AND THE LAW OF GATT 365-99 (1969) [hereinafter Jackson I]; Low, *A Definition of "Export Subsidies" in GATT*, 16 J. WORLD TRADE L. 375 (1972).

11. See Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of Countervailing Duty Law*, 1 L. & POL'Y INT'L BUS. 17 (1969), where the author identifies a host of export subsidies—direct subsidy payments, excessive tax rebates, preferred income tax treatment, government price support systems, export loss indemnification, subsidies for specific production and distribution costs, currency manipulation plans, and tax remissions—which were countervailed during the period from 1922 to 1974.

12. T.D. 39,722, 11 Treas. Dec. 307 (1923). See T.D. 40,001, 45 Treas. Dec. 129 (1924).

13. See *ASG Indus., Inc. v. United States*, 467 F. Supp. at 1211-13.

14. Tariff Act of 1930, § 303, 46 Stat. 687.

15. See J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 396-97 (1977) [hereinafter Jackson II].

16. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Parts 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948). See Jackson II, *supra* note 15, at 398; Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 334-45 & n.180 (1982) [hereinafter Jackson, Louis & Matsushita]; Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 268, 281-92 (1967). The General Agreement on Tariffs and Trade (GATT) was accepted under authority granted the President by the Reciprocal Trade Agreements Act, 19 U.S.C. §§ 1351-66 (1982).

17. See Comment, *United States Countervailing Duty Law, Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. IND. & COM. L. REV. 832, 841-42 (1976).

18. *Id.*

those petitions.¹⁹ Moreover, it was the Treasury's position in 1964 that a domestic subsidy would not be countervailed absent an export-stimulating effect.²⁰

The Trade Act of 1974²¹ dramatically altered this situation. That Act imposed specific time limits on administrative determinations²² and, for the first time, made judicial review available to domestic manufacturers.²³ In light of these new statutory provisions, the Treasury no longer had unfettered discretion to sidestep and delay knotty and politically sensitive countervailing duty decisions. Nevertheless, even after passage of the Trade Act of 1974, the Treasury still held fast to its export promotion theory in the case of domestic subsidies.²⁴

The countervailing duty law was again substantially overhauled in 1979 with passage of the Trade Agreements Act of 1979.²⁵ That Act reaffirmed the principle that the amount of the countervailing duty is to equal the amount of the benefit to the recipient of the subsidy,²⁶ rather than equal to the cost to the government of furnishing the subsidy.²⁷ While the Trade Agreements Act of 1979 does not provide a bright line definition of the term "subsidy," it does set out illustrative lists of what constitutes export and domestic subsidies.²⁸

19. Before 1967 the Treasury was not required to give public notice of an investigation. *See, e.g.*, 32 Fed. Reg. 13,276 (1967). Prior to 1974, only affirmative determinations were required to be published. S. REP. NO. 1298, 93d Cong., 2d Sess. 183-85 (1974); Jackson, Louis & Matsushita, *supra* note 16, at 355-58.

20. *See* Memorandum to file from Deputy Assistant Secretary of the Treasury Hendricks (May 28, 1964), *quoted in* ASG Indus., Inc. v. United States, 467 F. Supp. at 1218. *See also* 38 Fed. Reg. 1018, T.D. 73-10, 7 Treas. Dec. 24 (1973).

21. Pub. L. No. 93-618, 88 Stat. 1978 (1975)(codified at 19 U.S.C. §§ 2101-2487 (1982)).

22. 19 U.S.C. § 1303 (a), (d), (e) (Supp. V 1982).

23. *Id. Compare* United States v. Hammond Lead Products, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971).

24. *See, e.g.*, Float Glass Cases, 40 Fed. Reg. 27,499 (1975); 41 Fed. Reg. 1300 (1976); 41 Fed. Reg. 1299 (1976); 42 Fed. Reg. 13,016 (1976). These decisions eventually reached the Customs Court (the predecessor court to the Court of International Trade) where, in two instances, the Treasury's determinations were upheld by the Customs Court. *See* ASG Indus., Inc. v. United States, 467 F. Supp. 1187 (Cust. Ct.) *rev'd*, 610 F.2d 770 (C.C.P.A. 1979), and ASG Indus., Inc. v. United States, 467 F. Supp. 1195 (Cust. Ct.), *rev'd*, 610 F.2d 785 (C.C.P.A. 1979). In the third instance, however, the Treasury's determination was reversed. ASG Indus., Inc. v. United States, 467 F. Supp. 1200 (Cust. Ct. 1979).

25. *Supra* note 1.

26. *See* H.R. REP. NO. 317, 96th Cong., 1st Sess. 74-75 (1979); S. REP. NO. 249, 1st Sess. 84-85 (1979) [hereinafter S. REP. NO. 249].

27. *See* Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,316, 39,328 (1982).

28. Section 771(5) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1677(5) (1982). That section provides the following definition of "subsidy":

These illustrative lists may be expanded administratively, "consistent with the basic definition"²⁹ of a subsidy.³⁰

In the context of domestic subsidies under the Trade Agreements Act of 1979, issues of whether government equity infusions are countervailable have arisen,³¹ whether certain government loans and loan guarantees are countervailable,³² and whether certain forms of government procurement constitute an illegal subsidy.³³ This article's special focus is whether domestic subsidies must be industry specific before they may be countervailed, an issue which the Court of International Trade has considered on four occasions under the Trade Agreements Act of 1979.

III. SUBSIDY SPECIFICITY

Section 771(5) of the Tariff Act of 1930, as amended by the

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

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class 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.

The reference to "Annex A to the Agreement" is to the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT, Basic Instruments 56 (26th Supp. 1980), commonly known as the "Subsidies Code." The detailed illustrative list at the Annex to the Subsidies Code identifies as prohibited export subsidies the provision by governments of direct subsidies to a firm contingent upon export performance, and currency retention schemes which involve a bonus on exports. *Id.*

29. S. REP. NO. 249, *supra* note 26, at 84-85.

30. The responsibility for administering the countervailing duty law was transferred from the Treasury Department to the Commerce Department effective January 2, 1980, by Executive Order No. 12,188, 45 Fed. Reg. 989 (1980), and Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979).

31. See Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,316, 39,318-19 (1982); Certain Steel Products from Belgium, 47 Fed. Reg. 26,300, 26,308 (1982); 19 U.S.C. § 1677(5)(B)(i) (1982).

32. See Certain Steel Products from Italy, 47 Fed. Reg. 39,356, 39,358 (1982); Carbon Steel Plate from Brazil, 48 Fed. Reg. 2,568, 2,576 (1983); Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,305 (1982).

33. See Industrial Nitrocellulose from France, 48 Fed. Reg. 11,971, 11,972 (1983).

Trade Agreements Act of 1979,³⁴ broadly defines a subsidy as one "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries."³⁵ This language indicates that any domestic subsidy must be industry specific in order for it to come within the prohibitions of the CVD law. The introductory paragraph of section 771(5) provides, however, that the term "subsidy" "includes, but is not limited to" the list of export and domestic subsidies contained in the succeeding two subsections of section 771(5). The question which the Court of International Trade has wrestled with is whether subsidy specificity is a necessary precondition in finding the existence of an unlawful subsidy or may certain generally available domestic subsidies nevertheless be countervailed.

The administrative practice of the Treasury Department prior to enactment of the Trade Agreements Act of 1979 was to find government programs made "universally available to qualified firms"³⁶ as not countervailable.³⁷ This practice has continued under the Commerce Department's administration of the CVD law.³⁸ Commerce has adopted a two-step inquiry in analyzing whether a given government program is industry specific and, therefore, countervailable. First, the law creating the program and any implementing regulations are examined to determine if they expressly restrict benefits to a specific industry or group of industries.³⁹ If this determination is affirmative, the benefits are countervailed as an unlawful subsidy. If this determination is negative, however, Commerce then examines whether the benefits of the program are *de facto* limited.⁴⁰ If they are, the program is deemed a countervailable subsidy.⁴¹

34. 19 U.S.C. § 1677(5) (1982).

35. *Id.* This language mirrors the proscription contained in Article 11:3 of the Subsidies Code against "subsidies granted with the aim of giving an advantage to certain enterprises." See *supra* note 28.

36. Certain Textiles and Textile Products from Pakistan, 44 Fed. Reg. 2,746, 40,884 (1979). See also Certain Textiles and Textile Products from Singapore, 44 Fed. Reg. 2,748, 35,334 (1979); Certain Textiles and Textile Products from Malaysia, 44 Fed. Reg. 41,001 (1979). For a critique of these determinations, see *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237, 1244-45 (Ct. Int'l Trade 1984).

37. *Id.*

38. See, e.g., Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522, 28,523-24 (1983); Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,171-72 (1983); Certain Steel Products from France, 47 Fed. Reg. 39,332, 39,338 (1982).

39. See, e.g., Certain Steel Products from the Netherlands, 47 Fed. Reg. 39,372, 39,373-74 (1982); Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345, 39,349 (1982).

40. See *supra* note 39.

41. Compare Certain Steel Products from the Netherlands, 47 Fed. Reg. 39,372, 39,373-

The Court of International Trade (CIT) has reached divergent conclusions regarding the specificity question. In a case of first impression, *Carlisle Tire & Rubber Co. v. United States*,⁴² the CIT considered whether two accelerated depreciation tax programs in the Republic of Korea were countervailable.⁴³ The CIT concluded that because the accelerated depreciation tax benefits were available to all manufacturers and producers within Korea,⁴⁴ those benefits were not countervailable.⁴⁵ The court reached this conclusion based in part on its definition of "subsidy" as a "special advantage" "conferred upon a class of persons."⁴⁶ The court found additional support for its conclusion by noting that if *Carlisle's* contention was taken to its logical extreme, public highways and bridges would be included as types of countervailable benefits.⁴⁷ In the CIT's view, "[t]o suggest, as *Carlisle* implicitly does here, that almost every import entering the stream of American commerce be countervailed simply defies reason."⁴⁸

74 (1982) (Dutch program on its face available to all industries, *de facto* beneficial to steel industry), and Certain Steel Products from France, 47 Fed. Reg. 39,332 (1982) (information flowing from research not made publicly available), with Certain Steel Products from the Federal Republic of Germany, 47 Fed. Reg. 39,345, 39,349 (1982) (research and development program generally available *de facto* and *de jure*), and Fresh Cut Roses from Israel, 45 Fed. Reg. 58,516, 58,519 (1980) (research information publicly available, even to competing American industry).

42. 564 F. Supp. 834, 837 & n.5 (Ct. Int'l Trade 1983).

43. *Id.* at 835-36. Because the administrative determination was governed by the CVD law in effect prior to the Trade Agreements Act of 1979, the applicable statute was section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1976). *Carlisle Tire & Rubber Co.*, 564 F. Supp. at 835 n.1. However, since Congress has given the term "bounty or grant" used in section 303 the same meaning as the term "subsidy" found in the Trade Agreements Act of 1979, 19 U.S.C. § 1677(5) (1982), the CIT's decision in *Carlisle*, although an "old law" case, nevertheless has great bearing on section 771(5) "new law" cases. See *Carlisle Tire & Rubber Co.*, 564 F. Supp. at 839; *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985). See also S. Rep. No. 249, *supra* note 26, at 84 ("The definition of 'subsidy' is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term 'bounty or grant' under section 303 of the Tariff Act of 1930 . . .").

44. 564 F. Supp. at 836-37.

45. *Id.* at 837-39.

46. *Id.* at 838 (quoting *Nicholas & Co. v. United States*, 7 Ct. Cust. App. 97, 107 (1916), *aff'd*, 249 U.S. 34 (1919), and *Downs v. United States*, 113 F. 114, 147 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903)).

47. *Carlisle Tire & Rubber Co.*, 564 F. Supp. at 838. The CIT also noted the practical difficulty of quantifying such benefits:

[H]ow could the benefit to industry in general accruing from construction of a public highway be fairly calculated? What would be the dollar value to the private sector of governmental research and development programs? Not only would accurate calculation of such benefits be difficult in the extreme, doing so in a reasoned and even-handed manner would be next to impossible.

Id.

48. *Id.*

The next case after *Carlisle* to consider the subsidy specificity question was *Bethlehem Steel Corp. v. United States*.⁴⁹ There, the question presented was whether an income tax deduction allowed by the South African government for the expenses of employee training programs was a countervailable subsidy.⁵⁰ South African companies were allowed to deduct 200 percent of the expenses of the training program from their taxable income.⁵¹ The Commerce Department found that this tax deduction was not a countervailable subsidy because it was a generally available tax benefit.⁵² The CIT affirmed the agency's determination, but on the narrow ground that "the practice in question was a tax law, and tax laws are not subsidies to the taxpayer if their terms are generally available."⁵³

In *Bethlehem Steel*, the CIT expressly rejected any broad exception for government practices or benefits which are generally available,⁵⁴ concluding that any such exception would be "contrary to the fundamental purpose of the law."⁵⁵ Tax laws are not subsidies, the court stated, unless they are selective by their terms or in their application.⁵⁶ In a departure from its earlier statements in the *Carlisle* decision,⁵⁷ the CIT took issue with the argument that in order to be a countervailable domestic subsidy the benefit must be to some discrete portion of the production or manufacturing sector of the economy.⁵⁸ As the court understood the Commerce Department's argument, in order to be a subsidy, "the government action must select a single enterprise or industry, or a specific group of enterprises or industries from out of the larger mass of enterprises or industries that make up the entire productive sector."⁵⁹ The CIT found this position untenable.

49. 590 F. Supp. 1237 (Ct. Int'l Trade 1984).

50. *Id.* at 1238-39.

51. *Id.* at 1239.

52. *Id.*; 47 Fed. Reg. 39,379, 39,381-82 (1982).

53. 590 F. Supp. at 1239.

54. *Id.*

55. *Id.*

56. *Id.* at 1241.

57. *Id.* Although the court stated that its decision in *Bethlehem Steel* was in harmony with its *Carlisle* opinion, the court heavily criticized the *Carlisle* opinion for purportedly being too sweeping and general. *Bethlehem Steel*, 590 F. Supp. at 1246.

58. There has been some speculation that the unstated reason for the CIT's outright rejection of the so-called "general availability" test in *Bethlehem Steel* was that one of the pending issues in that case was whether the system of apartheid in South Africa constituted a countervailable subsidy. By rejecting the subsidy specificity test, the possibility of finding apartheid to be a subsidy was left open.

59. *Id.* The Commerce Department's argument was based on the language of section 771(5)(B) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19

ble. First, the court found that the text of that statute indicated “an overwhelming comprehensiveness in the scope of the coverage. This context alone dissolves the plausibility of . . . a momentous exception for ‘generally available’ benefits.”⁶⁰ Second, the CIT stated that Congress intended to cover the entire spectrum of subsidization possibilities, “up to and including the entire productive sector.”⁶¹ The court could find no logical basis for concluding that a particular benefit could not be extended without limitation to all sectors of the economy.⁶² Third, the CIT found no convincing past administrative practice evidencing a “generally available” exception to the CVD law.⁶³

Notwithstanding its dissatisfaction with and disapproval of the “generally available” principle, the court nevertheless concluded that tax laws conferred no countervailable subsidy or benefit absent some selectivity in the reduction or elimination of the tax.⁶⁴ In essence, the CIT found tax laws to be *sui generis* because they represented decisions to impose certain economically adverse effects or to reduce or eliminate those adverse effects.⁶⁵ Tax laws, in the court’s view, are distinguishable from other types of government action which are donative in nature,⁶⁶ the latter being positive bestowals of government largesse, as opposed to tax laws which are adverse in their effect.⁶⁷ Accordingly, the CIT carved out what it termed a “limited” exception within the CVD law for tax laws, affirming the Commerce Department’s determination on that narrow basis.⁶⁸

The next occasion in which the CIT was presented with the subsidy specificity question was *Agrexco v. United States*.⁶⁹ At issue there was a research and development program provided by the government of Israel to its commercial rose growers.⁷⁰ The Commerce Department found no subsidy because the results of the research and development program were available to the general public, including

U.S.C. § 1677(5)(B), which refers to prohibited domestic subsidies as those provided “to a specific enterprise or industry, or group of enterprises or industries” *Id.* at 1241.

60. *Id.* at 1241-42. The court also noted that the words “generally available” were nowhere to be found in the law. *Id.* at 1242.

61. *Id.*

62. *Id.*

63. *Id.* at 1244-45.

64. *Id.* at 1245.

65. *Id.*

66. *Id.*

67. *Id.* at 1246.

68. *Id.* at 1245-46.

69. 604 F. Supp. 1238, 1241 (Ct. Int’l Trade 1985).

70. *Id.* at 1241.

the American commercial rose growers.⁷¹ The CIT rejected this conclusion, stating that the question was not whether the information was generally available, but rather "whether the research and development is targeted to assist a particular, rather than a general industry."⁷² Since the program was targeted to the production of roses, it was a subsidy, in the CIT's view.⁷³ This portion of the case was accordingly remanded to the Commerce Department for a determination of the value of the subsidy.⁷⁴

The most recent treatment by the CIT of the subsidy specificity question is in *Cabot Corp. v. United States*.⁷⁵ The issue presented in that case was "whether benefits that are available on a nonpreferential basis . . . [are] countervailable."⁷⁶ The court found unacceptable a generally available test dependent upon the nominal availability of benefits.⁷⁷ The court instead focused on whether a benefit was actually conferred upon a specific enterprise or industry, or group of enterprises or industries,⁷⁸ thus adopting a *de facto* general availability standard.⁷⁹ If a particular program in fact bestows a competitive advantage or benefit on a specific class of producers to the exclusion of others, that program would be seen as countervailable.⁸⁰ The CIT in *Cabot Corp.* thus struck a middle ground, not rejecting outright the subsidy specificity standard, but conditioning such specificity with a requirement of *de facto*, as opposed to nominal, availability to a specific industry or group of industries.

These four decisions appear to be diametrically opposed. At one extreme is the CIT's *Carlisle* decision informing foreign governments that their development programs are not countervailable so long as those programs are generally available to the production and manufacturing sectors of the economy.⁸¹ In the middle of the spectrum is the *Cabot Corp.* decision informing a foreign government that a pro-

71. *Id.*

72. *Id.* at 1241-42.

73. *Id.* at 1242.

74. *Id.*

75. 620 F. Supp. 722 (Ct. Int'l Trade 1985).

76. *Id.* at 730-31. Under the government program in issue, the Mexican government had set prices for carbon black feedstock and natural gas which were purchased by carbon black producers at prices below world market levels.

77. *Id.* at 730.

78. *Id.* at 732.

79. *Id.* at 730-32.

80. *Id.* at 732.

81. 564 F. Supp. at 837-39.

gram is not a subsidy provided it is *de facto* generally available to the production and manufacturing sectors of the economy.⁸² At the far end of the spectrum is the CIT's decision in *Bethlehem Steel*, stating in dictum that general availability is simply not a relevant consideration⁸³ and will not place a government program beyond the reach of the U.S. CVD law on that basis alone.⁸⁴

While the uncertainty created by this judicial patchwork is troubling, it is not surprising considering the inability of the GATT negotiating parties at the Tokyo Round to draft a well-defined domestic subsidies provision.⁸⁵ At bottom, under any of these decisions, the determination of countervailability involves the mechanical application of a specificity/availability test. None of these decisions consider, explicitly at least, the trade distortive effects of a government program alleged to be an illegal domestic subsidy.

It has been proposed elsewhere⁸⁶ that domestic subsidies be allowed so long as they are not trade distorting on a world level.⁸⁷ Certain subsidies may create a misallocation of market resources which would otherwise not occur.⁸⁸ Subsidies which tamper with market forces are considered anathema to a world system of free trade and should be eliminated.⁸⁹ Those that do not should be tolerated. This liberal attitude—one reflected in the Subsidies Code⁹⁰—also high-

82. 620 F. Supp. at 732.

83. 590 F. Supp. at 1240-41.

84. *Id.* at 1241.

85. Article 11 of the Subsidies Code begins with a recognition that "subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and [the signatories] do not intend to restrict the right of signatories to achieve these and other important policy objectives . . ." Subsidies Code, *supra* note 28, art. 11, para. 1. After listing some illustrations of prohibited domestic subsidies, such as government financing, Article 11 goes on to note that "the enumeration of forms of subsidies . . . is illustrative and non-exhaustive . . . [They] should be reviewed periodically and that this should be done, through consultations, in conformity with the spirit of Article XVI:5 of the General Agreement." Subsidies Code, *supra* note 28, art. 11, para. 3. Article 11 closes by providing that "nothing in paragraphs 1-3 [of Article 11] above and in particular the enumeration of forms of subsidies creates, in itself, any basis for action under the General Agreement . . ." Subsidies Code, *supra* note 28, art. 11, para. 4. Thus, the Subsidies Code fails to adequately define prohibited domestic subsidies and, more importantly, makes even the few illustrations essentially non-binding.

86. Barcelo, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 L. & POL'Y INT'L BUS. 779, 785-86, 835-42 (1977) [hereinafter Barcelo II]; Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972).

87. Barcelo II, *supra* note 86, at 838-41; Schwartz & Harper, *supra* note 86, 833-34.

88. *Id.*

89. *See id.*

90. *See supra* note 85.

lights the politically sensitive nature of assessing countervailing duties against the programs of another sovereign nation, a practice which is an open invitation for retaliation.⁹¹ This outlook further recognizes the practical difficulty, as well as the administrative morass,⁹² of calculating the benefits accruing from domestic programs to imports. Under those circumstances virtually every import entering the United States would be subject to countervailing duties.

In the *Carlisle* decision the Court of International Trade recognized the impossibility and absurdity of administering an overly broad countervailing duty law,⁹³ and for that reason adopted a subsidy specificity standard as the test for determining whether a government program should be countervailed.⁹⁴ However, the court's focus should not be only on whether a domestic subsidy is simply specific or general in nature, but also on whether a subsidy causes a distortion⁹⁵ in the allocation of market resources and, thus, a distortion in the pattern of world trade. The following reasons have been given for why distortion ought to be the primary focus, with specificity being a threshold consideration:

Subsidies granted to individual firms, such as those ailing financially, to particular industries, such as aircraft production or shipbuilding, and even to new investment in depressed geographical regions have a more particularized effect on the output of given products. They are likely to have more pronounced effects on trade flows, as well. Should such subsidies be prohibited and countries free to countervail or take other retaliatory action against them?

Arguments for such a general rule face two serious difficulties. First, in a given case such government interventions in the domes-

91. See G. Horlick, *Current Issues in Countervailing Duty Law* 36, reprinted in THE TRADE AGREEMENTS ACT OF 1979—FOUR YEARS LATER (Practicing Law Institute 1983) ("The better rationale for the specificity requirement is the practical one. With a nondiscretionary countervailing duty law, such as that of the U.S., there could be an enormous proliferation of countervailing duty cases as the U.S. and its trading partners battle it out to calculate duties against the benefits of each other's roads, education, tax systems, and so on.").

92. See *Barcelo II*, *supra* note 86, at 836 ("These [domestic] subsidies have such a widespread effect on production that countervailing duties, were they allowed in such cases, could be imposed on almost every product which enters international commerce. Moreover, measurement of the exact extent of the net subsidy falling on any given product line would be unusually difficult. In any given case the amount of offsetting duty levied could be quite arbitrary.") (footnote omitted).

93. *Carlisle Tire & Rubber Co.*, 564 F. Supp. at 838-39.

94. *Id.*

95. For a definition of the term "distort" as used in the context of international trade, see *Barcelo II*, *supra* note 86, at 838 n.248.

tic market, in contrast generally to export subsidies, may be either efficiency enhancing or distorting. A general prohibition cannot be based on the certainty that such [selective] subsidies are always inefficient. Second, even if a given subsidy is clearly inefficient, because it distorts production of ordinary goods and services from the Pareto optimum, governments may pursue such a policy for internal political or socioeconomic objectives This means that a general rule for all selective domestic subsidies cannot be established. Each subsidy must be analyzed individually for its efficiency effects.⁹⁶

Thus, not only do compelling political and practical considerations exist for examining whether a domestic subsidy is specific or general in nature, but strong economic factors likewise exist for examining the trade distorting character of such subsidies.

Notwithstanding these considerations, the courts have rejected any trade distortion test,⁹⁷ finding it either too vague a concept⁹⁸ or at odds with congressional intent.⁹⁹ While plausible arguments may have existed prior to 1979 for rejecting a trade distortion analysis—particularly arguments based on legislative history¹⁰⁰—there is some question whether those arguments are as sound today. The legislative history of the Trade Act of 1974¹⁰¹ is replete with references to the trade distorting nature of subsidies.¹⁰² Arguably, it was Congress' in-

96. *Barcelo II*, *supra* note 86, at 838-39 (footnotes omitted). *Barcelo* recommends that a permanent GATT panel be established to review domestic production subsidies for their efficiency effects. *Id.* at 839. Schwartz and Harper have noted that "the issue is not that of identifying and remedying 'distortions' but rather of determining if a particular measure on balance 'corrects' or 'distorts' the market process, that is, whether it increases or decreases the efficiency with which resources are allocated." Schwartz & Harper, *supra* note 86, at 834.

97. *See, e.g., ASG Indus., Inc. v. United States*, 610 F.2d at 776 ("To permit the Secretary to avoid using his waiver authority . . . by simply finding that . . . there is no bounty or grant through employment of a vague and 'undefined' . . . international trade distortion test would effectively frustrate the Congressional intent to *tighten* administration of the countervailing duty law"); *ASG Indus., Inc. v. United States*, 467 F. Supp. at 1216-17 (the argument "that the countervailing duty law was intended to reach only those bounties or grants which distort trade, i.e., promote exports . . . is without merit").

98. *ASG Indus., Inc. v. United States*, 610 F.2d at 776.

99. *Id.*

100. *Id.*

101. Pub. L. No. 93-618, 88 Stat. 1978 (1975).

102. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7224 ("Nontariff barriers to and distortions of, trade cover a variety of devices which distort trade, including . . . subsidies . . ."). In that same Senate report, it was further observed that "the interests of the United States will be best served by international agreement permanently eliminating the use of governmental subsidies which distort trade patterns." *Id.* at 186, 1974 U.S. CODE CONG. & ADMIN. NEWS 7321.

tent in 1974 that until such time as an international agreement was reached regulating domestic subsidies, the CVD law would not incorporate an "adverse effects" standard.¹⁰³ Today, however, with the Subsidies Code in place, the argument against applying some form of trade distortion test has been substantially weakened. Indeed, a fair reading of the legislative history of the Trade Agreements Act of 1979 indicates that it is Congress' intent to make a trade distortion test an integral part of the CVD law.¹⁰⁴

Even though the Court of International Trade has not expressly applied any form of trade distortion test in its most recent CVD opinions, a rough form of trade distortion test still exists if not in name at least in practice through the guise of the subsidy specificity standard. If domestic subsidies are provided generally to the manufacturing or production sector of an economy, "[t]heir effect, by definition, is not to encourage the production of any one product . . . over alternative output lines . . ." ¹⁰⁵ Conversely, selective domestic subsidies "have a more particularized effect on the output of given products. They are likely to have more pronounced effects on trade flows, as well."¹⁰⁶

While all domestic subsidies should be analyzed individually for their efficiency effects,¹⁰⁷ even if no trade distortion analysis *per se* is utilized by the courts, the subsidy specificity standard closely approximates such an analysis. Yet the CIT in *Bethlehem Steel*¹⁰⁸ rejected any such test, stating that "[t]he simple and direct way to understand the definition of subsidy . . . is to see it as an attempt to cover all possibilities and all situations which fall within the meaning of the term . . ." ¹⁰⁹ This statement is tautological, however, saying nothing more than that everything that is a subsidy should be defined as a

103. See *ASG Indus., Inc. v. United States*, 467 F. Supp. at 1222.

104. The Senate report to the Trade Agreements Act of 1979 stated in this connection: This title [implementing the Subsidies Code] substantially revises longstanding U.S. laws pertaining to countervailing duties. . . . Subsidies and dumping are two of the most pernicious practices which distort international trade to the disadvantage of United States commerce

* * * *

By way of general introduction, the committee emphasizes the potentially important international rules on the use of subsidies incorporated in the agreement relating to subsidies and countervailing measures [T]he agreement acknowledges the potential trade-distortive effects of domestic subsidies

S. REP. NO. 249, *supra* note 26, at 37-38.

105. *Barcelo II*, *supra* note 86, at 836.

106. *Id.* at 837.

107. *Id.* at 838.

108. 590 F. Supp. at 1241-42.

109. *Id.* at 1242.

subsidy. How then is that decision to be reconciled with the congressional desire that only trade distorting domestic subsidies be countervailed¹¹⁰ and with the *Carlisle*, *Agrexco*, and *Cabot Corp.* opinions? Although the court in *Cabot Corp.* purported to cut the Gordian knot with its *de facto* specificity test,¹¹¹ the court actually did little more than add gloss to what was previously stated in the *Carlisle* opinion—that there must be some element of subsidy specificity in order for a purported domestic subsidy to be countervailable.

This *de facto* selectivity analysis by definition encompasses a trade distortion test.¹¹² Under *Bethlehem Steel*, however, given the court's rejection of any general availability/specificity standard, subsidies which are not selective, and thus do not cause an inefficient allocation of resources, nevertheless risk being countervailed. The court was clearly unconcerned with the potential trade distorting nature of a given program, seemingly more preoccupied with its view of what Congress intended. In this regard it noted that "[t]he question is not what is normal in the economy under investigation, but rather what is reconcilable with the standards of commercial fairness envisioned by this countervailing duty law."¹¹³

In the final analysis what seems to be the difference among the CIT's most recent pronouncements on what constitutes a countervailable domestic subsidy is the trade distorting character of those subsidies. The *Carlisle* and *Cabot Corp.* decisions show an implicit concern for distortions within a nation's economy created by sector-specific subsidies. By focusing on the selectivity of a domestic subsidy, these opinions necessarily adopt a standard which takes into account market resource misallocations attributable to specific domestic subsidies. *Bethlehem Steel*, by sharp contrast, brings within its sweep of prohibited subsidies every type of domestic subsidy, without regard to the distorting effect of the subsidy and without regard to the practical administrative or politically sensitive considerations which come into play under such a sweeping standard.

IV. CONCLUSION

Until the Court of International Trade frankly acknowledges

110. See *supra* note 104; *Barcelo II*, *supra* note 86, at 836. See *supra* notes 103-106 and accompanying text.

111. 620 F. Supp. at 731-32.

112. See *supra* note 105.

113. *Bethlehem Steel*, 590 F. Supp. at 1242.

that the reach of the countervailing duty law goes no further than to ban selective domestic subsidies which are trade distorting, the caselaw in this field will remain patchwork and hopelessly irreconcilable. Although it can be argued that the earlier *ASG Industries* decisions¹¹⁴ prevent consideration of the trade distorting effects of domestic subsidies, the Trade Agreements Act of 1979 has in effect reversed those decisions in this connection. Nevertheless, the CIT's decisions in *Carlisle* and *Cabot Corp.* have finessed the *ASG Industries* opinions. Without stating in so many words that the trade effects of domestic subsidies are to be considered in evaluating whether they are countervailable, the court effectively achieves this result. The *Bethlehem Steel* decision stands in stark contrast not only to the other two precedents of the CIT on the subsidy specificity question, but also in comparison to the legislative history of the countervailing duty law since 1974. In the interests of judicial harmony, sound economics, and international comity, the *Bethlehem Steel* decision should be overruled.

114. See *supra* note 97.