The Natural Resources Subsidy Bills: Should They be Adopted

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INTRODUCTION

A number of United States industries that are dependent upon natural resources for the production of their goods have been severely injured by the practices of foreign governments. These foreign governments use a two-tiered pricing scheme to subsidize domestic purchases of natural resources. The foreign governments provide natural resources to their own domestic industries at one price while making the resources available (if at all) to foreign industries at a higher price. Mexico's subsidization of carbon black is an example of this two-tiered pricing scheme. In 1982, the Mexican government used PEMEX (a controlled oil monopoly) to sell carbon black feedstock to Mexican producers of carbon black for less than $2.00 per barrel while U.S. producers paid the world price of $26.00 per barrel. Such subsidization makes United States industries less competitive at home and abroad than foreign industries that receive government subsidies. In response to this problem, Congress has introduced several bills designed to protect United States domestic manufacturers. These bills apply countervailing duties to goods receiving the benefit of natural resource subsidies in other countries.

Section one of this Note will introduce and discuss the existing countervailing duty and trade retaliatory laws of the United States. The Note will then analyze the natural resource bills pending in Congress. Section two will consider whether existing United States trade remedies and countervailing duty law can adequately remedy the problems posed by natural resource subsidies. Section two will then discuss how the natural resource bills deviate from and improve

1. The domestic industries injured by foreign natural resource subsidies include virtually all industries dependent upon natural resources for the production of their products. These industries include those involved in the production or refinement of nitrogen, cement, timber and other forest products, various building materials, petroleum and gasoline, tile, and various chemical agricultural products. Proposed Amendments to the Countervailing Duty Law: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means, 99th Cong., 1st Sess. (1985).

2. A subsidy is "a bounty or grant (usually provided by a government) that confers a financial benefit on the production, manufacture, or distribution of goods or services." Twenty-Sixth Annual Report of the President of the United States on the Trade Agreements Program 1981-82, at 62 (1982). Subsidies have traditionally been broken down into two categories: 1) domestic subsidies; and 2) export subsidies. Export subsidies are specifically designed to improve export performance (export contingent) whereas domestic subsidies are granted without regard to export performance. Id. Subsidies granted on natural resources are a form of domestic subsidy.

3. Proposed Amendments to the Countervailing Duty Law, supra note 1, at 28-31 (statement of Samuel B. Coco, Jr., Executive Vice President, Cabot Corp.).

4. For a discussion of legislative bills proposing the application of countervailing duties to natural resource subsidies, see infra notes 53-66 and accompanying text.
existing countervailing duty law. The Note will next consider whether
the natural resource bills are contrary to the letter or spirit of the Gen-
eral Agreement on Tariffs and Trade (GATT)\(^5\) and the Subsidies
Code.\(^6\) Finally the Note will consider the dangers of trade retaliation
and mirror legislation by United States trade partners that could result
if the natural resource bills are enacted.

This Note argues that the current legislation: 1) is necessary to
remedy the problems caused by foreign natural resource subsidies; 2)
departs from, and improves, existing countervailing duty law; 3) does
not violate existing United States international trade obligations in let-
ter or spirit; and 4) possesses advantages that outweigh the dangers of
foreign trade retaliation and mirror legislation.

I. BACKGROUND

A. UNITED STATES COUNTERVAILING DUTY AND
   TRADE RELIEF LAW

The basic United States countervailing duty and trade relief laws
consist of: 1) the Countervailing Duty Law of the Tariff Act of 1930
as amended by the Trade Agreements Act of 1979; 2) Section 201 of
the Trade Act of 1974; and 3) Section 301 of the Trade Act of 1974.
Each of these trade laws will be discussed below.

I. The Tariff Act of 1930 as Amended by the Trade Agreements
   Act of 1979

The basic provision of United States countervailing duty law is
the Tariff Act of 1930\(^7\) as amended by the Trade Agreements Act of
1979 (the TAA).\(^8\) Since the enactment of the TAA,\(^9\) countervailing
duties have been governed under two separate sections of the Tariff
Act of 1930. Section 701 of the TAA applies to a “country under the
Agreement” as defined in the TAA.\(^10\) Section 303 of the Trade Act of

\(^5\) General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61
\(^6\) Agreement on Interpretation and Application of Articles VI, XVI and XXIII of
the General Agreement on Tariffs and Trade, opened for signature Apr. 12, 1979, 31 U.S.T.
513, T.I.A.S. No. 9619 [hereinafter Subsidies Code].
\(^8\) Trade Agreement Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (codified at
\(^9\) The effective date of the TAA is January 1, 1980. The TAA approved and imple-
mented the agreements reached in the Tokyo Round of Multilateral Trade Negotiations,
\(^10\) Section 701(b) of the Tariff Act of 1930, as amended by the TAA, defines a “coun-
ty under the Agreement” as a country
(1) between the United States and which the Agreement on Subsidies and Countervailing Measures applies, as determined under section 2503(b) of this title,
1930 continues to apply to all other countries. Duties imposed under section 303 must generally be imposed in accordance with the provisions of the TAA. Section 303, however, does not require an injury determination on dutiable goods as section 701 does.

Most importantly, the TAA added the "specificity test" to United States countervailing duty law. The TAA states that countervailable subsidies include, "but [are] not limited to . . . domestic subsidies, if provided . . . to a specific enterprise or industry, or group of enterprises or industries . . . ." The Commerce Department has inter-

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(2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement as determined by the President . . .

Tariff Act of 1930, § 701(b) (codified at 19 U.S.C. § 1671(b) (1982 & Supp. III 1985)).


Article VI, para. 5 of GATT requires an injury determination (i.e., that the subsidized imports caused or threatened injury to an established U.S. industry, or materially retarded the establishment of an industry) as a prerequisite to the imposition of a countervailing duty. However, the Protocol of Provisional Application exempts previously existing legislation from compliance with part II of GATT. Article VI is found in part II of GATT. Since § 303 was enacted prior to 1947 (the enactment of GATT), its countervailing duty law does not violate GATT despite its lack of an injury test. Bello & Holmer, Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test, 18 GEO. WASH. J. INT'L L. & ECON. 297, 297 n.1 (1984).

The Trade Act of 1974 amended § 303 of the Tariff Act of 1930 and extended it to duty-free imports that received bounties or grants. Trade Act of 1974, § 331, 19 U.S.C. § 1303(a)(2) (1982); Bello & Holmer, supra, at 298 n.1. Because this change occurred after 1947, the GATT Protocol of Provisional Application requires an injury determination as required by art. VI, para. 5 of the GATT. Thus, the Trade Act of 1974 amended § 303(a)(2) of the Tariff Act of 1930 to authorize the imposition of countervailing duties on duty-free imports benefited by bounties or grants only when the International Trade Commission finds material injury. Such an injury determination must be made only when "required by the international obligations of the United States," including those of the GATT. 19 U.S.C. § 1303(a)(2) (1982). See Bello & Holmer, supra, at 298 n.1.

13. The TAA and § 303 of the Tariff Act of 1930 use the term "subsidy" as opposed to "bounty or grant." The TAA states:

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 loans guaranteed on terms inconsistent with commercial considerations.
interpreted this language to mean that only foreign domestic subsidies provided to a “specific enterprise or industry, or group of enterprises or industries” warrant the application of countervailing duties.14 “Generally available” foreign domestic subsidies do not warrant the application of countervailing duties under the TAA.15 This limitation on the application of countervailing duties is called the specificity test. Commerce has refused United States industry requests for countervailing duties if the subsidy fails the specificity test.16 The current natural resource bills17 were proposed in response to this problem.

2. Section 201 of the Trade Act of 1974—the “Escape Clause”

Section 201 of the Trade Act of 197418 grants discretionary relief where increased quantities of imports are “a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”19 Section 201 is not aimed at dumped or subsidized imports, but provides temporary relief for industries injured by fair import competition. Section 201 allows the affected industry to make the necessary adjustments to such competition.20 The President decides whether or not to grant import relief after the International Trade Commission

(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.

14. See discussion of cases infra note 16.
15. During the Congressional hearings and debates on the legislative bills discussed in this Note, a number of participants referred to the specificity test as the "general availability test." This label is misleading because a "domestic subsidy program in another country need not be generally available to escape U.S. countervailing duties, but need only be provided more widely than to "a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. § 1677(5)(B) (1982).” Bello & Holmer, supra note 12, at 299 n.7 (emphasis in original).
17. See infra notes 58-63 and accompanying text.
19. Id. § 2251(b)(1).
(ITC) conducts an investigation and makes a positive finding.\textsuperscript{21} When the ITC decides that a trade injury exists, it recommends to the President the degree and form of trade restriction needed to remedy the injury.\textsuperscript{22} The President has discretion to accept, reject, or modify the Commission's ruling.\textsuperscript{23} In making this determination, the President considers a number of statutorily mandated factors in addition to any that he considers important.\textsuperscript{24} Relief is granted by imposing duties, tariff-rate quotas, quantitative restrictions on imports, orderly marketing arrangements, or any combination thereof.\textsuperscript{25} Under section 201, relief is only intended to be temporary.\textsuperscript{26}

3. \textit{Section 301 of the Trade Act of 1974}

Section 301 of the Trade Act of 1974\textsuperscript{27} allows the President to take action against any foreign trade practice that is "inconsistent with ... or ... denies benefits to the United States under, any trade agreement or ... is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce ... ."\textsuperscript{28} After receiving a

\begin{itemize}
\item \textsuperscript{21} 19 U.S.C. §§ 2251, 2252 (1982).
\item \textsuperscript{22} \textit{Id.} § 2251(d)(1).
\item \textsuperscript{23} \textit{Id.} § 2252. Prior to Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983) (holding unconstitutional the invalidation of executive acts by a house of Congress), Congress could override presidential action regarding import relief. If the President decided to take action that differed from the action recommended by the ITC, or if he decided not to provide import relief, then Congress could override the President upon enactment of a joint resolution within ninety days of the transmission of the President's report. If such action was taken by Congress, the action recommended by the ITC would take effect. 2 INT'L TRADE REP. (BNA) 58:0106 (1986). However, as a result of Chadha, a legislative veto of presidential action would be unconstitutional.
\item \textsuperscript{24} 19 U.S.C. § 2252(c)(1)-(9) (1982). The statutorily mandated factors include the following: 1) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the nation's economy; 2) the extent to which firms or workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance; 3) the effect of import relief on consumers and on competition in the domestic markets for such articles; 4) the effect of import relief on the international economic interests of the United States; 5) the impact on United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation; 6) the geographic concentration of imported products marketed in the United States; 7) the extent to which the United States market is the focal point for exports of such articles by reason of restraints on exports of such articles to, or on imports of such articles into, third country markets; and 8) the economic and social costs that would be incurred by taxpayers, communities, and workers, if import relief were or were not provided. \textit{Id.}
\item \textsuperscript{25} \textit{Id.} § 2253(a)(1)-(5).
\item \textsuperscript{26} Trade restrictions are limited to five years, and gradual liberalization is encouraged if the restrictions last beyond three years. \textit{Id.} § 2253(h)(1)-(2). One three-year extension period is allowed. \textit{Id.} § 2253(h)(3). Although this extension period would allow for an eight-year period of relief, in practice relief is generally imposed for no more than three years. Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 88.
\item \textsuperscript{28} The relevant portion of § 301 of the Trade Act of 1974 reads as follows:
\end{itemize}
petition for relief, the United States Trade Representative must determine whether to initiate an investigation. After initiating an investigation, the Trade Representative must consult and negotiate with the offending country. If a negotiated settlement is not reached, then the Trade Representative must recommend appropriate retaliatory action to the President. The President has discretion to withdraw trade agreement concessions or benefits or impose duties or other import restrictions.

(a) Determinations requiring action
(1) In general.—If the President determines that action by the United States is appropriate—
   (A) to enforce the rights of the United States under any trade agreement; or
   (B) to respond to any act, policy, or practice of a foreign country or instrumentality that—
      (i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
      (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;
   the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice.
(2) Scope of action.—The President may exercise his authority under this section with respect to any goods or sector—
   (A) on a nondiscriminatory basis or solely against the foreign country or instrumentality involved, and
   (B) without regard to whether or not such goods or sector were involved in the act, policy, or practice identified under paragraph (1).

(b) Other action. Upon making a determination described in subsection (a) of this section, the President, in addition to taking action referred to in such subsection, may—
(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved;
(2) impose duties or other import restrictions on the products of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.


Under the definitions added by the 1984 Amendments "unreasonable" means "any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable." Id. § 2411(e)(3). "Unjustifiable" means "any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States." Id. § 2411(e)(4). "Discriminatory" includes "any act, policy, or practice which denies national or most-favored-nation treatment to the United States goods, services, or investment." Id. § 2411(e)(5).

29. Id. § 2412.

30. Id. § 2413. If the offending country is a GATT signatory, the consultation and investigation will take place within the GATT framework.

31. Id. § 2414.

32. Id. § 2411(a)(2); see supra note 28 and accompanying text. The President has virtually complete discretion in deciding to retaliate under this provision. Any retaliatory measures taken by the President may be removed whenever he considers it appropriate to do so. 1 INT'L TRADE REP. (BNA) 49:0102 (1986).

B. The GATT and Subsidy Code Rules Regarding Domestic Subsidies

1. The GATT

The GATT is a multilateral treaty that attempts to govern the application of subsidies, countervailing duties, and antidumping procedures among its signatories. While the GATT provides remedies and dispute settlement procedures for countries injured by subsidies and dumping, it does not expressly prohibit the use of domestic subsidies. Article XVI of the GATT requires any party maintaining any subsidy to notify the Contracting Parties of the subsidy, and to discuss with the Contracting Parties the possibility of limiting the subsidy if it causes or threatens serious injury to any Contracting Party.34

The GATT allows its members to use countermeasures against domestic subsidies.35 The countervailing duty is the most significant of these countermeasures.36 Article VI provides that no Contracting Party shall levy any countervailing duty unless the effect of the foreign domestic subsidy is to “cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.”37

A second possible countermeasure against foreign subsidies is found in article XIX. Under Article XIX, the suspension of a GATT obligation or the withdrawal or modification of a GATT concession related to the imports of a product is allowed if increased imports of such product causes injury or the threat of injury to domestic manufacturers of like or directly competitive products.38 The article XIX countermeasure is intended to be temporary.39

Article XXIII provides a third possible countermeasure. Article XXIII grants certain rights of consultation to a contracting party whose rights are nullified or impaired by the actions of another contracting party. In extreme cases, article XXIII allows suspension of GATT concessions or obligations as a countermeasure.40

34. GATT, supra note 5, art. XVI(1).
36. Id.
37. GATT, supra note 5, art. VI(5)(a). Art. VI(5) states that the Contracting Parties may waive this prohibition so as to permit a contracting party to levy [a] . . . countervailing duty on the importation of any product for the purpose of offsetting . . . subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.
38. GATT, supra note 5, art. XIX(1)(a); J. JACKSON, supra note 35, at 377-78.
39. GATT, supra note 5, art. XIX(1)(a).
40. Id. art. XXIII; J. JACKSON, supra note 35, at 378. If any contracting party believes any benefit accruing to it under the Agreement is being impeded, such party may make
2. **The Subsidies Code**

The Subsidies Code interprets and elaborates on the GATT provisions dealing with subsidies and countervailing duties.\(^{41}\) Although the Subsidies Code contains no express prohibition on the use of domestic subsidies, it does contain much language on proper use and scope of subsidies.\(^{42}\) However, this language is ambiguous, and it is therefore difficult to draw clear conclusions from its provisions.\(^{43}\)

The Subsidies Code provides two avenues, or "Tracks," of remedial action for Contracting Parties injured by the subsidy practices of other Contracting Parties.\(^{44}\) Track I of the Subsidies Code (articles 1-6) authorizes GATT members to employ their domestic procedures to apply countervailing duties.\(^{45}\) Article 6 of the Subsidies Code states that authorities of the importing country decide whether to impose a countervailing duty.\(^{46}\) Article 3 of the Subsidies Code states that signatories will be afforded a reasonable opportunity to consult with the party initiating a countervailing duty investigation under its domestic machinery.\(^{47}\)

Track II of the Subsidies Code (articles 7-19) provides a government-to-government complaint procedure.\(^{48}\) Under Article 12, when

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\(^{41}\) See supra note 6.

\(^{42}\) See infra note 118.

\(^{43}\) Id.

\(^{44}\) Track I and II are the terms used by the government negotiators of the Code. Barc66, *Subsidies, Countervailing Duties, and Antidumping after the Tokyo Round*, 13 *CORNELL INT'L L.J.* 257, 264 n.29 (1980). Track I is based on article VI of GATT and Track II on article XXIII of GATT.

\(^{45}\) 1979 Act, *supra* note 8, § 1671, and 1974 Act, *supra* note 12, §§ 201, 301 would be the proper domestic machinery through which such countervailing duty actions are initiated. Such measures are only effective as a remedy where U.S. industry has lost a share of the domestic market as a result of foreign subsidies.

\(^{46}\) Subsidies Code, *supra* note 6, art. 4(1). The investigations conducted must follow the procedures set forth in article 2 (domestic procedures and related matters), and article 6 (determination of injury). Generally stated, the Code authorizes the imposition of such countervailing duties after reasonable consultation efforts and a determination is made that the subsidy is causing injury.

\(^{47}\) Id. art. 3.

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a signatory believes that another signatory is granting a subsidy and the subsidy is causing "injury," "nullification or impairment," or "serious prejudice," the affected state may request consultations with the subsidizing signatory. If consultations fail to produce a mutually acceptable solution, any signatory party involved in the consultations may refer the matter to the Committee on Subsidies and Countervailing Measures for conciliation. However, if conciliation fails, the matter will be submitted to a panel for dispute resolution. If no solution is reached, the Committee of Signatories may make recommendations to the parties. The parties must follow the recommendations within a reasonable period or the Committee may authorize appropriate countermeasures.

C. THE PROPOSED LEGISLATION

There are currently a number of legislative proposals pending in Congress that seek to apply countervailing duties to natural resource subsidies. These proposals partially result from dissatisfaction with the Commerce Department's application of the specificity test. The proposals also are based on the belief that other countervailing or trade retaliatory laws cannot adequately handle the natural resource subsidy problem.

I. The Predecessors of the Current "Natural Resource Subsidy" Legislation

The Ninety-Eighth Congress introduced two natural resource subsidy bills—H.R. 4015 (the Moore bill) and H.R. 4784 (the Gibbons bill). The bills were very similar to their successor bills in the

Track II of § 301 is the only available remedy for an American exporter who loses market share abroad because of a foreign subsidy. Track I and the domestic procedures discussed are useful only in remedying the damage caused by subsidized domestic imports. Track II of § 301 can also be utilized in this situation. Id. at 138.

49. Subsidies Code, supra note 6, art. 12(3). The request for consultation must contain proof that the subsidy has adversely affected the signatory's interests.

50. Id. arts. 13, 17. The Committee on Subsidies and Countervailing Measures is authorized by article 16.

51. Id. arts. 13, 18.

52. Id. arts. 13(4), 18(9). Such countermeasures are nullification or impairment rights as described in article XXIII of GATT.


54. H.R. 4784, 98th Cong., 2d Sess. § 771(5)(c), 130 CONG. REC. H7939 (daily ed. July 26, 1984). H.R. 4784 was introduced on February 8, 1984 and subsequently defeated in Congress.

55. The only significant difference between the two bills was the method in which they calculated the amount of subsidy. H.R. 4015 calculated the amount of subsidy as the difference between the domestic price of the natural resource and its fair market value. H.R. 4015, supra note 53. H.R. 4784, however, calculated the amount of subsidy as the difference between the domestic price of the natural resource product and the export price of the
Ninety-Ninth Congress. Although these bills directly addressed the issue of natural resource subsidies, several other bills were introduced during the Ninety-Eighth Congress that indirectly reached natural resource subsidies.

2. The "Natural Resource Subsidy" Bills

The "natural resource subsidy" bills currently under consideration in Congress are H.R. 2345 (the Moore bill) and H.R. 2451 (the product. However, fair market value would have been used instead of export price if: 1) there were no significant exports of that product; or 2) the export price of that product was distorted either up or down because of government manipulation. H.R. 4784, supra note 54.

56. For a discussion of the differences between 4784 and 2451 (the natural resource bill proposed by Gibbons in the Ninety-Ninth Congress), see Barshefsky, Diamond & Ellis, supra note 20, at 51. For a discussion of the differences between 4015 and 2345 (the natural resource bill proposed by Moore in the Ninety-Ninth Congress) see id. at 49.


58. H.R. 2345, 99th Cong., 1st Sess. (1985), reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That paragraph (5) of section 771 (19 U.S.C. § 1677) is amended to read as follows:

(5) SUBSIDY.—

(A) IN GENERAL.—The term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 303 of this Act, 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) Any natural resource subsidy described in subparagraph (B).

(B) NATURAL RESOURCE SUBSIDY.—

(i) IN GENERAL.—A natural resource subsidy exists if a natural resource product is provided or sold within a country (hereinafter referred to as the 'exporting country') by a government-regulated or controlled entity, for use (directly or indirectly) in the manufacture or production of any class or kind of merchandise in the exporting country, at a domestic price that, by reason of such regulation or control—

(I) is lower than the fair market value of the product in the exporting country, and

(II) constitutes a significant portion of the total cost of the manufacture or production of such merchandise.

The existence of a natural resource subsidy may be indicated if the exporting country, as a condition under which the natural resource product is provided by a gov-
Gibbons bill). The bills differ only in a few minor respects. The Gibbons bill is the lead bill. This bill defines a "resource import sub-

(ii) LEVEL OF NATURAL RESOURCE SUBSIDY.— The level of a natural resource subsidy is the difference between the domestic price of the natural resource product and the fair market value of that product. 

(iii) DETERMINATION OF FAIR MARKET VALUE.—For purposes of this subparagraph, the term 'fair market value' means the price that a willing buyer would pay a willing seller for a natural resource product in an arms-length transaction in the absence of government regulation. In determining the fair market value, the administering authority shall take into account—

(I) the prices at which the product is generally available in world markets,
(II) the extent to which a comparative advantage of the exporting country in relation to other sellers exists (for example, any cost savings resulting from such factors as the availability of abundant supplies, lower production costs, or lower transportation costs),
(III) the degree to which the price of the natural resource or byproduct is depressed as a result of government regulation of eligibility to purchase that natural resource or by-product,
(IV) whether a system of dual pricing is maintained through government regulation in the country of export, and
(V) the availability or lack of access to export markets.

59. H.R. 2451, 99th Cong., 1st Sess. (1985). The proposed bill reads as follows:

To amend title VII of the Tariff Act of 1930 in order to apply countervailing duties with respect to resource input subsidies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subtitle D of title VII of the Tariff Act of 1930 (19 U.S.C. 1677 et seq.) is amended—

(1) by adding at the end of section 771(5) the following:

(C) Any resource input subsidy provided for under section 771B; and

(2) by adding after section 771A the following new section:

SECTION 771B. RESOURCE INPUT SUBSIDIES.

(a) GENERAL RULE.—A resource input subsidy exists if—

(1) a product (hereinafter referred to in this section as an 'input product')—

(A) is provided or sold by a government or a government-regulated or controlled entity within a country (hereinafter referred to in this section as 'exporting country'), for input use within that country, at a domestic price that—

(i) is lower than the fair market value of the input product; and

(ii) is not freely available to United States producers for purchase of the input product for export to the United States; and

(B) would, if sold at the fair market value, constitute a significant portion of the total cost of the manufacture or production of the merchandise in or for which the input product is used; or

(2) the right to remove or extract a product (hereinafter in this section referred to as the 'removal right') is provided or sold by a government or a government-regulated or controlled entity within a country and—

(A) that product is for input use within that country;

(B) the removal right is provided or sold at a domestic price that is lower than the fair market value of that right, and

(C) the product to which the removal right applies would, if that right was sold at a fair market value, constitute a significant portion of the
sidy" as an “input product” or “removal right” sold by “a government or government-regulated or controlled entity” to domestic industries

(b) AMOUNT OF RESOURCE INPUT SUBSIDIES.—
(1) IN GENERAL.—The amount of a resource input subsidy is the difference between the domestic price of an input product, or of a removal right, and the fair market value of that product, or right, respectively.
(2) EXCLUSIONS.—For purposes of this section, the term ‘domestic price’ and ‘fair market value’ do not include—
(A) with respect to an input product, the costs incident to transporting and handling required to move the product from its point of production to the respective domestic or foreign destination; and
(B) with respect to a removal right, the cost or value of any activity the recipient of the right must undertake as a condition for receiving that right.

c) DEFINITIONS.—For purposes of this section—
(1) FAIR MARKET VALUE.—The term ‘fair market value’ means—
(A) with respect to an input product, the price that, in the absence of government regulation or control, a willing buyer would pay a willing seller for that product from the exporting country in an arms-length transaction; and
(B) with respect to a removal right—
(i) the price paid for a comparable removal right in a comparable region in the country (other than the country providing or selling the right) which has the largest number of arms-length sales of such rights, or
(ii) if no country sells a comparable removal right at arms-length, the price that a willing buyer would pay a willing seller in an arms-length transaction for the removal right in the country providing or selling the right.

In determining the fair market value of an input product, the administering authority shall take into account—
(i) the export price of the product,
(ii) the prices at which the product is generally available in world markets,
(iii) the current market clearing price at which the product can be sold competitively by the exporting country in the markets of other countries (including the United States) that are non-Statecontrolled-economy-country markets, and
(iv) the availability to the exporting country of markets described in clause (iii).
(2) INPUT USE.—The “term input use” refers to the use (directly or indirectly) of an input product in the manufacture or production of any class or kind of merchandise that is the subject of an investigation under this title.

SECTION 2. INJURY TEST REQUIRED IN ALL CASES IN WHICH RESOURCE INPUT SUBSIDIES ARE ALLEGED

Notwithstanding subsection (b) of section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), sections 703(a) and 705(b) of that Act (relating to injury determinations by the United States International Trade Commission) shall apply to any investigation under that section in which the existence of resource input subsidies under section 771B of that Act is alleged.

SECTION 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to investigations initiated by petition or the administering authority under subtitle A of title VII of the Tariff Act of 1930 on or after the date of the enactment of this Act.
at below fair market value. Two further conditions must be met before such removal rights or input products qualify as resource import subsidies under the Gibbons bill. First, the input product or removal right must not be freely available to U.S. purchasers at the controlled domestic price. Second, the input product or removal right must constitute a "substantial portion" of the production costs of the final, exported product. A resource import subsidy will be countervailable if the United States producer demonstrates that the export of the final product caused material injury. The amount of the subsidy is defined as the difference between the domestic price and the "fair market value" of the resource. Estimation of fair market value includes a number of different factors.

A major concern with the Gibbons bill is whether it violates GATT. This fear was also a major concern with the Gibbons bill's predecessors. However, the current proposed bills are likely to pass because United States manufacturers injured by natural resource subsidies continue to pressure Congress for their passage. Yet, the proposed bills differ in no major respects from their 1983 predecessors.

II. ANALYSIS

A. PRE-EXISTING TRADE LAW REMEDIES CANNOT EFFECTIVELY HANDLE THE NATURAL RESOURCE PROBLEM

Opponents of the natural resource subsidy proposals assert that the legislation is unnecessary because existing United States trade law can adequately address the natural resource subsidy problem. The existing United States trade laws dealing with subsidies are found in section 201 of the Trade Act of 1974, section 301 of the Trade Act of 1974, and GATT and the Subsidies Code. Each of these provisions will be examined below to determine whether the existing trade laws are adequate to counter natural resource subsidy problems.

1. Section 201 of the Trade Act of 1974

Opponents of the natural resource subsidy bills assert that section 201 provides an adequate means of relief for domestic industries against natural resource subsidies. These critics, however, have given
little support for their beliefs other than a basic description of the way section 201 works. Contrary to their assertions, section 201 is ineffective as a means of countering the natural resource subsidy problem for several reasons. First, the burden of proof under the statute is high. Imports must be the "substantial cause" of "serious injury" before any action can be taken under section 201.

Second, the President's decision of whether to accept the finding of the ITC is discretionary. The President may decide not to grant relief even though subsidized goods are the "substantial cause" of "serious injury." In making his determination, the President is statutorily mandated to consider a broad range of factors. Furthermore, a single house of Congress can no longer legislatively veto the President's decision. As a result of these factors and lack of Congressional oversight, the President possesses a large amount of discretion when dealing with natural resource subsidies. Such Presidential discretion may be unfair and destructive to existing domestic industries. Moreover, if the President refuses to take action against natural resource subsidies under section 201, there may be a strong disincentive over time to the development and expansion of domestic industry.

Third, section 201 is ineffective as a means of countering the natural resource subsidy problem because it is intended to provide only temporary relief. Although the statutory limit of relief is as long as eight years, in practice, relief is rarely imposed for more than three. Additionally, because section 201 cases are highly political the petitioner may have little control over his action.

Fourth, section 201 has not proved effective as a source of import relief from natural resource subsidies for domestic industry in the past. During the ten years section 201 has been in effect, the ITC recommended relief in thirty-one cases involving natural resource subsidies. The President provided import relief in the form of increased duties, quotas, or orderly marketing agreements in only eleven cases. In

67. See Bello & Holmer, supra note 12, at 326-27; see also Barshefsky, Diamond & Ellis, supra note 20, at 87-88.
68. See supra note 19 and accompanying text.
69. See supra note 24 for a description of these factors. Numerous circumstances exist where the President would not grant relief regardless of the injury's magnitude.
70. See supra note 23. The unfettered discretion of the President after I.N.S. v. Chadha renders domestic industry's reliance upon § 201 relief even more untenable.
71. Barshefsky, Diamond & Ellis, supra note 20, at 88. If import relief is proclaimed for more than three years, it shall be phased down during the period it is in effect beginning not later than three years after the date it is initiated. 2 INT'L TRADE REP. (BNA) 58:0105 (1986).
72. 2 INT'L TRADE REP. (BNA) 58:0105 (1986).
73. Id. at 58:0106. In addition to the eleven cases in which import relief was granted, the President did grant adjustment assistance in five cases. Whether adjustment assistance presents comparable relief to import relief for a domestic industry injured by the influx of subsidized goods presents a new issue which this Note does not discuss.
fifteen cases, the President rejected relief on the grounds that relief would not be in the national economic interests because of increased costs to consumers, improvements in the industry, probability of foreign retaliation, or adverse impact on United States efforts to obtain international reduction of trade barriers.\textsuperscript{74} Since section 201 has failed in the past to provide relief against natural resource subsidies, it is highly unlikely that it will prove successful in dealing with the problem in the future.

2. \textit{Section 301 of the Trade Act of 1974}

Section 301 of the Trade Act of 1974 is designed to deal with unfair or unreasonable trade practices.\textsuperscript{75} The natural resource subsidy bills' opponents assert that natural resource subsidy problems involve questions of reciprocity and the denial of equivalent access for United States producers to foreign natural resources. According to the opponents of the bills, these questions fall squarely within the language of section 301 covering unfair or unreasonable trade practices.\textsuperscript{76} Those parties favoring the use of section 301 also assert that section 301 is plagued with fewer problems than other trade statutes.\textsuperscript{77} As proof of section 301's utility, the opponents of the natural resource subsidy bills assert that over the last ten years approximately sixty percent of section 301 cases have been successfully resolved.\textsuperscript{78}

Although section 301 does appear to be broad enough to cover natural resource subsidies, it is an unsatisfactory solution to the natural resource subsidies problem for several reasons. The main reason a section 301 action may be ineffective is that it involves numerous domestic and international political considerations.\textsuperscript{79} The President

\begin{footnotesize}
\begin{enumerate}
\item 74. \textit{Id.}
\item 76. Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 90-91; \textit{see also} Proposed Amendments to the Countervailing Duty Law: \textit{Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means}, 99th Cong., 1st Sess. 406 (1985) (testimony of Charlene Barshefsky on behalf of the Coalition to Promote America's Trade). Barshefsky concludes that the 1984 amendments to § 301 "make explicit the ability of the United States to attack the type of practices at issue here." \textit{Id.} at 408. Barshefsky further states that these provisions of § 301 "have as their aim an opening of foreign investment and access opportunities for United States producers—precisely the concerns addressed by the natural resource proposals." \textit{Id.}
\item 77. As ways in which § 301 is plagued with fewer problems than are other trade statutes, Barshefsky, Diamond and Ellis point out that § 301 relief can be long-term, the petitioner's burden of proof is not overwhelming, and the practices of individual countries may be addressed individually. Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 92.
\item 78. \textit{Id.} at 92 (citing Archibald, \textit{Section 301 of the Trade Act of 1974}, \textit{in} GEORGETOWN UNIVERSITY LAW CENTER CONTINUING LEGAL EDUCATION DIVISION, U.S. INTERNATIONAL TRADE LAWS, \textit{at} Appendix C (1985)).
\end{enumerate}
\end{footnotesize}
has virtually complete discretion in deciding whether to bring a section 301 action.\textsuperscript{80} Political considerations may play a significant part in the President's decision; in the past, the United States government has gone to great lengths to avoid taking action against a foreign country subsidizing its goods. Instead, the United States government has preferred to exert pressure on the subsidizing government to get some reduction in the complained of act or policy.\textsuperscript{81}

Section 301 proponents assert that over the last ten years sixty percent of all actions under section 301 have been successfully resolved.\textsuperscript{82} However, it is unclear exactly what "successfully resolved" means in the section 301 context. Most section 301 cases are long and drawn out and involve a great deal of compromise on both sides.\textsuperscript{83} Like section 201, section 301 is an unsatisfactory solution to the natural resource subsidy problem because of its political nature and drawn out dispute settlement procedure.

In both section 201 and 301 proceedings, it is unlikely that the President would authorize the application of countervailing duties against natural resource subsidies if the principle countervailing duty law, the TAA of 1979, would not allow such action. The TAA requires that the specificity test be met before the United States can apply countervailing duties.\textsuperscript{84} Therefore, the President's discretionary decision making is likely to integrate the specificity test under both sections 201 and 301.\textsuperscript{85}

3. \textit{The GATT and Subsidies Code}

The GATT and Subsidies Code provisions that permit signatories to implement domestic trade laws and provide for inter-government complaint procedures ineffectively protect United States industries from natural resource subsidies. The provisions that permit signatories to implement domestic countervailing duty or trade relief procedures function as ineffectively as the previously discussed domestic procedures.\textsuperscript{86} The provisions providing for inter-government complaint procedures have generally failed because they lack effective enforcement procedures.\textsuperscript{87} In addition, government representatives disagree

\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} See supra note 78 and accompanying text.
\textsuperscript{83} Id.
\textsuperscript{84} See supra note 13 and accompanying text.
\textsuperscript{85} Since the TAA is a legislative provision enacted by Congress, the President would have little authority to disregard its requirements by acting under separate provisions.
\textsuperscript{86} See supra notes 67-85 and accompanying text.
on which domestic subsidies deserve retaliatory action.

B. THE NATURAL RESOURCE SUBSIDY PROPOSALS’ OMISSION OF THE “SPECIFICITY TEST” AND THE SIGNIFICANCE FOR U.S. TRADE LAW

Although the natural resource bills do not expressly reject the 1979 TAA’s “specificity test,” they do not include it in their definition of a countervailable subsidy.88 Whether the natural resource subsidy bills contradict or merely supplement the TAA, they clearly adopt a new standard for determining whether natural resource subsidies are countervailable. Under these bills, natural resource subsidies will be countervailed against regardless of their availability.89 Consequently, the “specificity test” will no longer shield foreign natural resource subsidies from the application of countervailing duties.

The “specificity test” as applied by the Department of Commerce does not provide an adequate standard for determining whether countervailing duties should be administered. First, the specificity test is ill-defined. Under the specificity test, it is unclear what constitutes “a specific enterprise or industry or group of enterprises or industries.”90 Neither the Commerce Department nor judicial decisions provide a useful interpretation of the language “to a specific enterprise or industry or group of enterprises or industries.”91 Foreign governments, foreign-controlled entities and United States industries need clear guidelines to accurately identify countervailable subsidies. The natural resource bills will avoid the uncertainties of the specificity test by simply omitting it. Although the natural resource bills present their own problems of calculation,92 existing United States trade laws share these problems.93

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88. See supra notes 58-59.
89. See supra note 58-63.
90. The vagueness of this standard is a result of the difficulty of determining exactly what a “specific enterprise or industry or group of enterprises or industries” is. Compounding the problem is the great variety in the sizes of groups of enterprises or industries. See supra note 13 and accompanying text.
92. See Barshesky, Diamond & Ellis, supra note 20, at 73-74; see also infra note 93.
93. Opponents of the natural resource bills argue that certain terms employed by the bills such as “fair market value” and the various factors listed in the bills used to determine “fair market value” are incapable of precise calculation. See Barshesky, Diamond & Ellis, supra note 20, at 73-74. Although such terms will present certain difficulties in calculation, “fair market value” is a term frequently employed in domestic law. It is unlikely that its calculation, even in an international setting, will be unworkable. Further, the current countervailing duty law suffers from similar difficulties in determining the existence of a government subsidy in the first place. Unlike the natural resource bills, the 1979 TAA does not even employ a standard in determining whether or not a government subsidy exists. The term subsidy is used without any attempt at definition in the 1979 TAA. In enacting the 1979 TAA, Congress provided that the statutory term “subsidy” has the same meaning
Second, the specificity test has not addressed the problem of nominally available foreign subsidies.\textsuperscript{94} Foreign governments frequently make subsidies nominally available to more than a "specific enterprise or industry or groups of enterprises or industries."\textsuperscript{95} Although these resource subsidies are technically available to many or all industries, only a few specific industries actually use these subsidized resources in their production processes.\textsuperscript{96} Thus, foreign governments can completely evade the specificity test by providing subsidies that only a limited number of enterprises or industries actually use. Mexico's subsidization of carbon black feedstock illustrates such an evasion of the specificity test. Although only a "specific enterprise or industry or groups of enterprises or industries" in Mexico use carbon black feedstock, the ITC has ruled that it is not countervailable because of its availability to all domestic purchasers.\textsuperscript{97} The Department of Commerce has inconsistently decided whether nominal general availability of natural resource subsidies avoids countervailability.\textsuperscript{98} The natural resource bills will resolve the problem of nominal availability by eliminating the specificity test.

Third, the specificity test is too weak a standard of countervail-

\textsuperscript{94} For a more thorough discussion of the problem of nominal availability and the specificity test, see Cameron & Berg, The U.S. Countervailing Duty Law and the Principle of General Availability, 19 J. WORLD TRADE L. 497 (1985). The authors derive an alternative formula to the specificity test which focuses on the relative effects of the subsidy on sectors of the economy.

\textsuperscript{95} "The difficulty with the general availability doctrine is where to draw the line to determine when a generally available practice protects a specific sector to such an extent that the benefit becomes more specific than general." Note, supra note 16, at 290.

\textsuperscript{96} Id.

\textsuperscript{97} Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,568 (Dep't Comm. 1983). See Cameron & Berg, supra note 94, at 503. A further example of the failure of the specificity standard to counteract the problem of nominal availability is provided in Certain Softwood Products from Canada, supra note 91. Faced with two Canadian government programs benefiting only timber-related industries, the Department of Commerce decided that one was countervailable and the other was not. The program that the Department of Commerce decided was not countervailable allowed anyone to take advantage of it, but only timber-related industries did so. Id. The countervailable program, however, provided a benefit that would have been attractive to any company in any industry, but was available to only a limited group of industries. Bello & Holmer, supra note 12, at 299.

\textsuperscript{98} Compare Carbon Black from Mexico, supra note 97, and Certain Softwood Products from Canada, supra note 91, where despite nominal availability no countervailable duties were applied with Certain Steel Products from the Netherlands, 47 Fed. Reg. 39,372, 39,373-74 (Dep't Comm. 1982). In Certain Steel Products from the Netherlands, the Department of Commerce found that although a Dutch high-technology program was nominally available to all, the program disproportionately benefited the steel industry. The Department of Commerce therefore applied countervailing duties to the case. G. HORLICK, CURRENT ISSUES IN COUNTERVAILING DUTY LAW, THE TRADE AGREEMENTS ACT OF 1979 — FOUR YEARS LATER 7, 35 (1983).
ability. The natural resource bills will provide for a broader application of countervailing duties by eliminating the specificity test. Under these bills, countervailability requires that a product be sold below its fair market value and constitute a "significant portion" of the total cost of manufacture or production of the countervailable goods. The United States will countervail against goods whenever products sold below fair market value compose a "significant portion" of the total cost of their manufacture or production.

Finally, the specificity test makes a senseless distinction by differentiating between generally available subsidies and government subsidies that are only available to specific industries or enterprises. The general availability of a government subsidy does not alter the fact that it constitutes a significant portion of the total cost of manufacture or production. A "significant" subsidy to an industry should be countervailed against regardless of its general availability. Conversely, an "insignificant" government subsidy does not need to be countervailed against if it is not generally available. Because countervailing duties function to protect domestic industries from foreign governmental subsidization, a distinction between generally available subsidies and specifically available subsidies makes little sense. The "significant portion" test of the natural resource bills more accurately targets those goods that benefit from government subsidies than does the specificity test. The natural resource bills focus on the subsidies' effect or impact, whereas the specificity test concentrates on the formality of governmental action.

Opponents of the natural resource bills argue that elimination of the specificity test would "open up Pandora's box" by permitting the United States to apply countervailing duties to virtually any goods receiving the slightest governmental benefits. The bills' opponents argue that remote governmental services within the accepted scope of government activity—such as public education, welfare, and interstate transportation systems—could be considered subsidies subject to countervailing duties. A closer examination reveals that the natural

99. Irrespective of the Department of Commerce's actual application of the specificity standard, the standard as enacted appears to be too narrow. A subsidy provided to more than a "specific enterprise or industry or group of enterprises or industries" may still be applied to only a very small sector of industry. A review of Commerce decisions reveals that the Department of Commerce has frequently held subsidies to be "generally available" where in fact their application is quite limited.

100. See supra notes 60-63 and accompanying text.

101. For a thorough discussion of the possible reasons behind the application of countervailing duties to domestic subsidies, see Barceló, supra note 48, at 130-35.

102. See G. Horlick, supra note 98, at 63. Horlick is a former ITA Deputy Assistant Secretary for Import Administration; see also Barshefsky, Diamond & Ellis, supra note 20, at 63-66.

103. Barshefsky, Diamond & Ellis, supra note 20, at 70.
resource bills would not lead to this problem. The United States would not counteract a government subsidy unless it constituted a “significant portion” of the total cost of the manufactured good.\textsuperscript{104} Remote government services would not be encompassed by such a standard because they do not constitute a “significant portion” of the total cost of manufactured goods.

C. \textbf{Enactment of the Natural Resource Bills Will Not Violate GATT and the Subsidies Code}

1. \textit{The Specificity Standard Is Not Incorporated into GATT and the Subsidies Code}

Opponents of the natural resource subsidy proposals contend that the specificity standard has universal acceptance as an integral part of GATT and the Subsidies Code.\textsuperscript{105} Therefore, they contend that the failure to include the specificity standard in natural resource subsidy bills violates GATT and the Subsidies Code.\textsuperscript{106} More specifically, the bills’ opponents claim that article 11(3) of the Subsidies Code incorporates the specificity test.\textsuperscript{107} Article 11(3) states that social and economic policy objectives “may be achieved ... by means of subsidies granted with the aim of giving an advantage to certain enterprises ... [which] are normally granted either regionally or by sector.”\textsuperscript{108}

Several responses can be made to the above argument posed by opponents of the natural resource bills. First, the inclusion of the specificity test in United States countervailing duty law does not make it a universally accepted mandatory standard within GATT or the Subsidies Code.

Second, the Subsidies Code does not necessarily incorporate the specificity test merely because article 11(3) states that social and economic policy objectives may be achieved by subsidies that are aimed at giving an advantage to “certain enterprises” and “are normally granted either regionally or by sector.” The proponents of the theory that article 11(3) incorporates the specificity test\textsuperscript{109} presume that arti-

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\textsuperscript{104} Admittedly, the standard of a “significant portion” of the total cost of the manufactured good is not an absolutely clear standard. As evidenced by many United States trade laws, such clear standards are not always attainable. However, the significant portion standard is a clearer standard than the “specificity test” or the standards of §§ 201, 301 of the Trade Act of 1974.

\textsuperscript{105} See \textit{Proposed Amendments to the Countervailing Duty Law}, supra note 1, at 313 (testimony of Michael B. Smith, Deputy United States Trade Representative); see also Barshesky, Diamond & Ellis, \textit{supra} note 20, at 70.

\textsuperscript{106} Barshesky, Diamond & Ellis, \textit{supra} note 20, at 70.

\textsuperscript{107} Id.

\textsuperscript{108} Subsidies Code, \textit{supra} note 6, art. 11(3).

\textsuperscript{109} Barshesky, Diamond & Ellis, \textit{supra} note 20, at 70. In reference to article 11(3), the authors state that “[t]hese references help inform the explicit requirement in United
article 11(3)'s reference to the specificity test mandates its incorporation. Although the quoted language of article 11(3) does refer to the specificity test, it seems probable that if the drafters of the Subsidies Code had intended to incorporate the specificity test, they would have stated their intent more explicitly. The drafters could have stated that the Subsidies Code incorporated the specificity test or used language more indicative of the specificity test.

Third, critics of the natural resource bills have been unable to cite any other provision of GATT or the Subsidies Code that suggests the incorporation of the specificity test. If the Subsidies Code's drafters intended to incorporate a provision as significant as the specificity test, they certainly would have made more than one reference to it.

2. GATT and the Subsidies Code Do Not Expressly or Implicitly Prohibit the Application of Countervailing Duties to Natural Resource Subsidies

The imposition of countervailing duties through Track I of the Subsidies Code merely requires compliance with the provisions of article VI of the GATT and Subsidies Code articles 4, 5, and 6. These sections contain no language suggesting that the imposition of countervailing duties contemplated by the natural resource bills violates GATT or the Subsidies Code.

Opponents of the natural resource bills assert that the legislation exceeds the permissible scope of GATT and the Subsidies Code even though the bills may not expressly violate either. They claim that

States law that only benefits ‘provided ... to a specific enterprise or industry, or group of enterprises or industries’ are countervailable.”

110. Even assuming that the specificity test was incorporated by reference into the Subsidies Code, it can also be argued by negative implication that because section 11(3) condones subsidies granted to specific enterprises or industries when achieving social and economic policy objectives, section 11(3) must not condone them when not for social and economic policy objectives.

111. For instance, the drafters could have said that they were incorporating the specificity test or at least used the language of the specificity test instead of language such as “certain enterprises.”


113. Subsidies Code, supra note 6.

114. Id.

115. Opponents have put forward the argument that the natural resource bills violate GATT and the Subsidies Code because art. 1 of the Subsidies Code essentially says that a countervailing duty may not be applied unless GATT or the Subsidies Code provides for such a countervailing duty and that GATT or the Subsidies Code do not provide for this type of countervailing duty. Proposed Amendments to the Countervailing Duty Law, supra note 112, at 135. This contention, however, appears to be an overly stretched reading of art. 1 for the following reasons:

Article 1 - Application of Article VI of the General Agreement
the natural resource bills apply countervailing duties against traditionally non-countervailable domestic subsidies that legitimately fall within both the GATT framework and within international trade.\footnote{116} The bills' opponents contend that the natural resource bills would deny rights that GATT and the Subsidies Code expressly grant to lesser developed countries (LDC).\footnote{117}

The above arguments are unpersuasive for two principle reasons. First, the Subsidies Code does not provide a clear conclusion concerning the permissible scope of domestic subsidies to LDCs or non-LDCs.\footnote{118} Second, the countervailing duties and subsidies provisions of the GATT and the Subsidies Code are entirely disconnected. The allowance of a subsidy under the Subsidies Code does not preclude a

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

Subsidies Code, \textit{supra} note 6. Article 1 seems only to say that signatories must impose countervailing duties in accordance with article VI of the GATT. The fact that article VI of the GATT does not specifically provide for the imposition of the type of countervailing duties at issue here would not appear to mean that it prohibits the imposition of such duties.

\footnote{116. \textit{Proposed Amendments to the Countervailing Duty Law}, \textit{supra} note 112, at 26 (testimony of Alan Holmer, Deputy Assistant Secretary for Import Administration); \textit{id}. at 160 (testimony of Gerard Van Heuven, on behalf of United States-Mexico Chamber of Commerce); \textit{see also} Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 63-66.}


\footnote{118. The Preamble to the Subsidies Code states: "Recognizing that subsidies are used by governments to promote important objectives of national policy . . . ." \textit{Subsidies Code, supra} note 6. Article 11:1 states, "Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives . . . ." \textit{Id}. However, art. 11:2 of the Subsidies Code does recognize the harms that such domestic subsidies can cause to other countries, particularly where such subsidies would adversely affect the conditions of normal competition. \textit{Id}. The Code further states, "Signatories shall therefore seek to avoid causing such effects through the use of such subsidies." \textit{Id}.}

As the above language indicates, it is generally recognized that the negotiators at the Tokyo Round were unable to reach an agreement on a definition of what constitutes a countervailable domestic subsidy. \textit{Note, supra} note 16, at 277.

In regard to LDCs, art. 14:2 states, "[T]his Agreement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those of the export sector." \textit{Subsidies Code, supra} note 6. Article 14:7 states, "Signatories recognize that in developing countries, governments may play a large role in promoting economic growth and development." \textit{Id}. Article 14:1 states, "Signatories recognize that subsidies are an integral part of economic development programmes of developing countries." \textit{Id}. However, certain provisions of article 14, such as 14:7, recognize that there are limits to which developing countries may impose subsidies that are damaging to the importing countries' industry. \textit{Id}.

Although the Subsidies Code may recognize certain special needs of LDCs, the countervailing duty provisions of the Code grant them no special privileges. Rivers & Greenwald, \textit{The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences}, 11 \textit{LAW \& POL'Y INT'L BUS.} 1447, 1481 (1979).
country from applying countervailing duties.\textsuperscript{119}

\textbf{D. THE ADVANTAGES OF THE NATURAL RESOURCE BILLS OUTWEIGH THE DANGERS OF RETALIATION AND MIRROR LEGISLATION}

Opponents of the natural resource bills assert that if the bills are enacted, they may violate GATT. Such a GATT violation would result in GATT-authorized retaliation.\textsuperscript{120} As noted above, however, the natural resource proposals do not violate the language or spirit of GATT or the Subsidies Code.

Aside from the possibility of GATT-authorized retaliation, there exists the danger of other countries enacting mirror legislation.\textsuperscript{121} United States Deputy Trade Representative Michael B. Smith warns that the United States definition of countervailable natural resource subsidies would not bind other countries even though the natural resource subsidy bills' definition attempted to provide a safe harbor for United States domestic subsidies.\textsuperscript{122} Other countries could form their own definitions of countervailable natural resource subsidies to attack U.S. industries that have a competitive advantage in their markets.\textsuperscript{123}

Although the natural resource subsidy bills may induce mirror legislation, such a danger is present every time the United States enacts trade legislation of this type. The 1974 Trade Act, the 1979 Trade Agreements Act, and the 1984 Trade Act all produced talk of mirror legislation, but none of these acts resulted in such retaliation.\textsuperscript{124} Furthermore, GATT and Subsidies Code signatory countries are bound not to enact countervailing duties that violate GATT or the Subsidies Code.

Finally, critics contend that the natural resource bills represent unilateral action where multilateral action would be more effective and compatible with United States international trade obligations.

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{119} In regard to subsidies provided by a government to promote the general welfare of its citizens, Barshefsky, Diamond and Ellis state that "the international community has agreed that such actions are exempt if the benefit provided is not sector-specific in nature." Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 65. The authors use the term "sector-specific" to refer to the specificity test. In support of their statement, however, they cite no more than the 1979 TAA. \textit{Id.} at 115. As previously stated, the fact that the United States has incorporated the specificity test within its own countervailing duty law does not mean that the specificity test is an internationally agreed upon principle.
\item \textsuperscript{120} \textit{Proposed Amendments to the Countervailing Duty Law, supra} note 1 (testimony of Michael B. Smith).
\item \textsuperscript{121} \textit{Id.; see also} Barshefsky, Diamond & Ellis, \textit{supra} note 20, at 70-72; Bello & Holmer, \textit{supra} note 12, at 321-23.
\item \textsuperscript{122} \textit{Proposed Amendments to the Countervailing Duty Law, supra} note 1 (testimony of M. Smith).
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Proposed Amendments to the Countervailing Duty Law, supra} note 1 (testimony of Robert Liuzzi on behalf of the Ad Hoc Committee of Domestic Nitrogen Producers).
\end{itemize}
\end{footnotes}
Although such multilateral action may be preferable, it has proved unobtainable, despite United States efforts.\textsuperscript{125}

The potential benefits of such legislation to United States domestic industry must be weighed against the potential dangers of mirror legislation and loss of good will among United States trading partners.

**CONCLUSION**

The natural resource bills clearly possess some drawbacks; however, the bills fill an injurious void in United States trade law. Existing trade laws are unable to remedy the problems caused by natural resource subsidies. In comparison to the existing countervailing duty law, the natural resource bills contain many advantages.

The United States has three basic choices for dealing with natural resource subsidies. The United States can: 1) take no action to counteract the natural resource subsidy problem; 2) continue to strive for multilateral action; or 3) take unilateral action enacting the pending natural resource bills or some similar legislative provisions. The seriousness of injury to United States domestic industries requires that some action be taken. The second choice seems unrealistic based on the dim prospect for any multilateral agreement. Therefore, the third choice appears the most reasonable to remedy United States industries' problems resulting from foreign natural resource subsidies.

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\textsuperscript{125} At the 1979 Tokyo Rounds, the United States negotiators sought to reach agreement on the proper use of domestic subsidies and to establish a procedure for consultation between parties when domestic subsidies proved injurious. The United States negotiators embodied their suggested approach in the Supplementary Understanding on Internal Subsidies [unpublished document on file at the offices of LAW & POLICY IN INTERNATIONAL BUSINESS], which was rejected. Rivers & Greenwald, *supra* note 118, at 1471-73.