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Subsidization of State-Trading Enterprise Production of Mineral Products: An Assessment of Possible Revisions to the GATT Articles and Subsidies Code in the Uruguay Round of Trade Negotiations

*Kenneth R. Button**

I. Introduction

This article assesses possible revisions to the Articles of Agreement of the General Agreement on Tariffs and Trade (GATT)¹ and to the GATT Subsidies Code² in order to address the problem of trade distortion arising from government subsidization of the production and sale of mineral products in their raw and refined forms. This problem frequently is most visible with regard to the state-trading enterprises (STE) operating in the minerals industries.³ The paper concludes that revision of GATT Article XVII regarding STE activities is warranted; however, attaining meaningful GATT discipline also requires the revision of other GATT provisions. Such provisions would include Article VI concerning unilateral application of countervailing duties (CVD),⁴ Article XVI concerning multilateral

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¹ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, *reprinted in* LAW AND PRACTICE UNDER THE GATT (K. Simmonds & B. Hill eds. 1989) [hereinafter GATT].

GATT is the principal international body concerned with global trade. GATT is not actually an organization, but is an agreement that sets out a code of rules by which countries trade, as well as a forum for resolving disputes. Signed in 1947 as an interim agreement, GATT is now a formal multilateral agreement with the goal of expanding and liberalizing world trade. The rules of GATT are intended to provide specific discipline over the use of trade barriers and to help reduce confusion and uncertainty in the international trade arena. GATT also provides a forum in which countries can attempt to resolve trade disputes and to carry out negotiations aimed at reducing tariff and nontariff trade barriers.

² Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 26 GATT BISD Supp. 56, *entered into force* Jan. 1, 1980 [hereinafter Subsidies Code].

³ See *infra* notes 12-28 and accompanying text.

⁴ See *infra* notes 43-49 and accompanying text.

discipline on subsidies,⁵ and the Subsidies Code providing interpretive guidance for both Article VI and Article XVI.⁶

Section II of this paper describes and analyzes the particular problem that the U.S. mining and minerals industry faces with regard to foreign government subsidization practices and their relation to STEs.⁷ The central problem arises from the cyclical, commodity nature of the market for the industry's products and STE efforts to shift the burden of adjusting to market changes from itself to private producers in other countries.

The third section of the paper assesses the current GATT discipline on mineral industry subsidization.⁸ The section first analyzes Article XVII in terms of the discipline it provides concerning STE operations and governmental subsidization of STEs. The section then addresses the scope of and limitations on unilateral action by the U.S. industry in a CVD proceeding under U.S. trade law as permitted by Article VI.⁹ Finally, this section contains an analysis of the utility of Article XVI's multilateral procedures from the U.S. mineral industry's perspective.

The paper's fourth section provides suggestions for the revision of Article XVII, Article VI, Article XVI, and the Subsidies Code in order to address the U.S. industry's special problems with foreign government subsidy practices, particularly with regard to STEs.¹⁰ An opportunity to achieve such revision exists in the Uruguay Round of Multilateral Trade Negotiations currently underway in Geneva.¹¹

II. The Problem of Government Subsidization of STEs

The term STE can refer to enterprises with a variety of organizational or ownership structures. Although an STE need not be owned entirely by the government, the STE will generally have some type of government equity participation or be subject to other legal authority by which the government can influence the operational decisions

⁵ See *infra* notes 50-72 and accompanying text.

⁶ See *infra* notes 55-74 and accompanying text.

⁷ See *infra* notes 12-28 and accompanying text.

⁸ See *infra* notes 29-72 and accompanying text.

⁹ GATT Article VI authorizes individual GATT member countries to take unilateral action to counter the injurious impact of foreign subsidy and dumping practices. GATT, *supra* note 1, art. VI, at 12. It provides the GATT sanction for the U.S. CVD law. 19 U.S.C. § 1671 (1988).

¹⁰ See *infra* notes 73-74 and accompanying text.

¹¹ The United States and 96 other member countries of GATT are participating in a four-year negotiation on a variety of trade-related issues under the auspices of GATT. LAW AND PRACTICE UNDER THE GATT 28-29 (K. Simmonds & B. Hill eds. 1989). The current negotiations, which are termed the "Uruguay Round," were initiated in September 1986 at a meeting of GATT representatives at Punta Del Este, Uruguay. These negotiations are the eighth round held by the GATT. The seventh round from 1973 to 1979 was termed the "Tokyo Round" based on the site of the agreement for its initiation. *Id.* at 14.

of the enterprise.¹² The STE's obligation to conform to government direction on operational matters, such as production and employment, most clearly distinguishes it from purely private firms.¹³

Stemming from such governmental involvement, another distinguishing feature of an STE is that it may pursue multiple goals, not just profit maximization.¹⁴ As a public or quasi-public institution, an STE may serve as a governmental instrument to further a variety of social, economic, or political objectives. Such objectives might include, *inter alia*, the creation and maintenance of employment, the development of particular regions of the country, and the generation of foreign exchange. It is in the willingness to sacrifice commercial interests in the furtherance of other priorities that STEs inflict economic distortion on the world trading system.¹⁵

¹² STEs have existed virtually for as long as there have been states. In modern history the Dutch of the sixteenth century, and later the British were very much involved in promoting the business activities of their respective trading organizations. The expansion of socialism in the twentieth century made STEs the only form of trade organization for a number of countries. A significant transition in the types and number of STEs has taken place since the end of World War II. In the late 1940s, most state-owned enterprises in noncommunist countries were public utilities. Since then there has been a growth in the activity of noncommunist, non-utility STEs, particularly in developing countries and in the natural resource sector including products such as crude oil, copper, iron ore, and phosphate. For a discussion of the expansion of STE activity, see R. VERNON, *EXPLORING THE GLOBAL ECONOMY: EMERGING ISSUES IN TRADE AND INVESTMENT* ch. 6 (1985).

¹³ U.S. nonmineral industries have also criticized STEs for a wide variety of practices which they consider to be trade distorting. Such practices include, for example, official import monopolies (e.g., the Japanese and French tobacco import monopolies), industrial targeting, and counter-trade requirements imposed on foreign purchasers or suppliers. The highly diverse array of practices tends to have in common the potential for effective host government influence in transactions. This influence tends to be directed at the establishment of price, the terms of payment, and access to the market. While these STE practices focus on purchasing and selling activities, the practices of concern to the minerals industry primarily concern STE production decisions made without appropriate regard to the commodity's price. See *State Trading Enterprises: Hearing on S. 2660 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 46 (1986) (Statement of John H. Paul on behalf of the American Mining Congress). For a brief discussion of S. 2660, see *infra* note 72.

¹⁴ Although STEs in the minerals sector operate with varying degrees of concern for profit maximization, the mineral STEs of some countries have shown relatively little concern for commercial success. Brazil, Peru, Venezuela, Zaire, and Zambia are notable among such countries in the noncommunist world. In the socialist bloc, countries such as the Soviet Union and those in Eastern Europe have rarely given commercial success the highest operational priority. With the prospect of GATT membership and most-favored nation tariff benefits, the Soviet Union's role as a STE mineral exporter could expand dramatically. For extensive discussion of the conflict between a STE's commercial and noncommercial objectives, see *STATE TRADE IN INTERNATIONAL MARKETS: THEORY AND PRACTICE OF INDUSTRIALIZED AND DEVELOPING COUNTRIES* (M. Kosteci ed. 1982) and R. MONSEN & K. WALTERS, *NATIONALIZED COMPANIES: A THREAT TO AMERICAN BUSINESS* (1983). For discussions focusing on the minerals industry, see M. RADETZKI, *STATE MINERAL ENTERPRISES: AN INVESTIGATION INTO THEIR IMPACT ON INTERNATIONAL MINERAL MARKETS* (1985); Labys, *The Role of State Trading in Mineral Commodity Markets*, in *STATE TRADE IN INTERNATIONAL MARKETS: THEORY AND PRACTICE OF INDUSTRIALIZED AND DEVELOPING COUNTRIES* (M. Kosteci ed. 1982).

¹⁵ Under optimal free trade and full employment conditions, economic theory suggests that all countries produce at the point on their production possibilities frontiers at

Government subsidization of STEs is a problem primarily because it permits STE producers to transfer to non-STE private companies the adjustment burden that STE producers are unwilling to accept themselves during periods of cyclical downturn in minerals demand.¹⁶ Absent such subsidies the burden of adjustment to cyclical market forces is distributed among producers more in accordance with relative economic efficiencies.¹⁷

Generally, the trade distortions arising from STE operations in the minerals industry are less acutely felt during periods of relatively high demand and therefore relatively high price.¹⁸ During such cyclical peaks product prices will normally permit recovery of operating costs and capital costs as well as profit. However, during periods of cyclical downturn in demand the impact of STE practices can become highly damaging.¹⁹ When the unit price falls below full oper-

which the domestic price ratios equal the international trade price ratios. It is under these conditions that (1) each country achieves its maximum welfare, and (2) the allocation of the world's resources is most efficient. Any price distortion (such as a tariff or subsidy) which moves production away from this point reduces world welfare as well as the efficiency of resource allocation. For a discussion of the impact of economic distortions on welfare, see R. CAVES & R. JONES, *WORLD TRADE AND PAYMENTS* 205-10 (1985).

A subsidy to a STE reduces the operating and capital costs faced by the producer and, hence, increases profitability. The subsidy thereby causes an outward shift in the firm's supply curve and artificially encourages additional production of one product which in turn draws resources, such as labor and capital, away from the production of other products. This change from the optimal production pattern for the country causes a reduction in its welfare and an inefficient allocation of its and the world's resources. See M. CHACHOLIADES, *INTERNATIONAL TRADE THEORY AND POLICY* 503-04 (1978). See also CAVES & JONES, *supra*, at 252-54.

¹⁶ The distortion from state-trading enterprises arises in the following manner: Consider two firms, one STE and one non-STE, with the non-STE being slightly more efficient than the STE (*i.e.*, having a slightly lower average variable cost (AVC)). If the STE's AVC after reduction (or offset) by the subsidy is less than the AVC of the non-STE, the market will not operate efficiently. In such a case, when prices fall, the more efficient firm (the non-STE) will stop producing rather than the less efficient firm (the STE).

¹⁷ The basic economic logic underlying this conclusion is as follows: The aggregate market supply curve for a product is the sum of the individual producing-firms' supply curves for the product. At any price an efficient firm supplies a quantity determined by its marginal cost curve so long as the price exceeds the firm's AVC. If price does not exceed AVC, the firm supplies no product to the market because the variable cost to produce each unit is less than the per unit revenue received. Economic theory predicts, therefore, that in the presence of a cyclical downturn in a product's price, firms with AVCs which exceed the new, lower market price will suspend production. See J. HENDERSON & R. QUANDT, *MICROECONOMIC THEORY: A MATHEMATICAL APPROACH* 140-43 (1980) (discussing individual firm and market supply functions).

¹⁸ Fluctuations in the prices of mineral products, such as copper, lead, and zinc, tend to reflect shifts in the level of industrial activity in the overall economy. Over the period between 1970 and 1988, for example, trends in world prices for these products generally followed the trends of gross national product (GNP) growth for the United States and the industrialized world. See *METAL STATISTICS* 1988, at 59, 88, & 204; *1988 ECONOMIC REPORT OF THE PRESIDENT*, table B-5, at 255 (GNP data from the Council of Economic Advisers); *ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), 1 NATIONAL ACCOUNTS: 1960-1987 MAIN AGGREGATES* table R.1.

¹⁹ Commodity prices can be highly volatile. During the 1974-75 recession, for example, world copper prices fell by 40%. *WORLD BANK, 1987-88 COMMODITY TRADE AND PRICE TRENDS* 84. Within 1989 alone monthly average prices per pound fluctuated

ating and capital cost, a profit-maximizing producer must consider whether it can afford to continue operations over an extended period.²⁰ If prices fall below variable cost the private firm may be forced to curtail operations because it loses money on each unit that it produces.²¹ It would only resume operations when prices rise to a level sufficient to permit variable cost recovery and, ultimately, renewed profitability.²²

STEs, however, may not operate in a similar manner. As prices fall, a government may be unwilling to let an STE mineral producer curtail uneconomic operations because to do so would result in politically or socially unprofitable levels of unemployment.²³ There-

greatly. Copper prices fell from \$1.58 in January to \$1.13 in July (28% decline), then rose to \$1.38 in August (22% increase from July), and fell again to \$1.09 by December (21% decrease from August). *Metals Week* compilation of monthly averages for 1989.

²⁰ Over the long term a firm must cover all of its costs or it must leave the industry. Such costs include a "normal profit" as a necessary return to capital. For a presentation of the basic economic concept of the "long-run break-even condition," see P. SAMUELSON & W. NORDHAUS, *ECONOMICS* 544-46 (13th ed. 1989).

²¹ For an analysis of the "shutdown price" for a firm, see R. LEFTWICH & R. ECKERT, *THE PRICE SYSTEM AND RESOURCE ALLOCATION* 317-19 (9th ed. 1985).

²² A member of the U.S. copper industry characterizes the marketing strategies of developing country STEs as disastrous for the global copper industry:

The copper industry, when controlled by private investment, would react to economic downturns in conventional fashion, by restricting production and withholding copper from the market. The CIPEC [Intergovernmental Council of Copper Exporting Countries] nations were motivated by a different set of factors, including employment considerations, the need for foreign exchange, and social/political costs of production curtailments.

Thus, when demand fell off during a recession, instead of curtailing deliveries to the market, the CIPEC countries would maintain them, or if possible, increase them.

Tateosian, *The Copper Industry is Still Changing: The Short-Term Policies of CIPEC Are Seen as a Disturbing Influence*, *American Metal Market—Copper Club*, Feb. 6, 1990, at 10A.

²³ An STE may, in effect, treat labor costs for a certain size work force as a fixed cost rather than as a variable cost as is normally the case. As such, the STE might be willing to continue producing even when the market price covers only the remaining variable costs. In a number of STE countries the importance of employment considerations is heightened by the fact that mineral deposits may be located in remote or underdeveloped regions where mineral mining and processing operations are primary or even exclusive sources of employment. A case in point is Zambia, where a majority of the copper industry is state owned. One study of Zambian copper operations concluded that there is "strong social and political pressure to avoid labor force reductions." RADETZKI, *supra* note 14, at 125; see *id.* at ch. 6. The Radetzki study suggests that:

[M]anagement has discouraged the introduction of labor-saving innovations and the government will not accept closures of installations that would result in large-scale labor redundancies, unless alternative employment opportunities for the redundant labor could be provided.

Id. at 114.

The Radetzki study also assessed Venezuela's STE producing iron ore. Although at that time (1982) it did not find strong evidence of uneconomic expansion of mine capacity, it did find a consensus among company and government officials that "profit maximization is not a company goal." *Id.* at 94. More important goals were (1) the "assurance of raw material supply to the domestic steel industry, presumably meaning that delivery to satisfy domestic needs should have priority over export deliveries" and (2) development in the mining region. *Id.* at 95. However, in 1989, according to the World Bank, Venezuela's iron ore STE was selling to the state-owned Sidor steel company at only 56% of the export

fore, the government may be willing to provide the STE with some form of subsidy to permit it to continue operation when it would otherwise shut down. Likewise, the STE may be a strategic source of foreign exchange revenue for the government. The government may be willing to provide a local currency subsidy to the STE in order to continue the flow of STE foreign exchange receipts.²⁴

The effect of such STE overproduction during periods of relatively low demand is to depress or suppress further the price of the mineral product and to delay further the time when prices could return to levels permitting non-STE companies to operate at acceptable profitability.²⁵ Absent such government subsidies to STEs the global supply would respond to demand changes more smoothly and with less severe disruption to the private producers around the world.²⁶ The countries subsidizing their STE mineral companies in this manner are in effect transferring the burden of cyclical adjustment from their own economies to the economies of non-STE countries.²⁷

price in order to help support the loss-plagued steel company. Sweeney, *Venezuela Seeks Export Markets for Sidor's Steel: Despite \$7 Billion Investment, Complex Near Collapse*, *American Metal Market*, Dec. 18, 1989, at 4. The steel company's labor force was reportedly twice the size required for truly efficient operations. *See id.*

²⁴ For certain countries in which mineral products are among a relatively small array of exportable products, limiting mineral exports could slow the inflow of foreign exchange needed to purchase imports. For example, copper export earnings as a percent of total export earnings reached 85% for Zambia, INT'L MONETARY FUND, INT'L FINANCIAL STATISTICS 228 (Sep. 1989), 49% for Chile, *Id.* at 293, 23% for Peru, *Id.* at 636, and 20% for Zaire, *Id.* at 754 (for each country the ratios were calculated by dividing IFS line 70c by line 70 for 1988). Other mineral commodities can also play this central role. For example, Surinam's exports are 64% alumina. *Id.* at 366 (ratio is IFS line 70cr divided by line 70 for 1987). Morocco's exports are 12% phosphate. *Id.* at 686 (ratio is IFS line 70ar divided by line 70 for 1988). Brazil's exports are 6% iron ore. *Id.* at 223 (ratio is IFS line 70gd divided by line 70 for 1988). Local currency subsidies would cover costs for expenses such as local labor, electric power, and local freight.

²⁵ As price falls, some STEs may actually increase production in order to maintain total foreign exchange receipts. Such a motivation was possibly involved as copper prices fell by 52% in real (inflation adjusted) terms during the period between 1980 and 1986, while copper production increased in Chile by 16% and in Zaire by 107% over the same period. However, copper production in the major non-STE countries of Canada and the United States fell. WORLD BANK, *supra* note 19, at 84. Refined copper production data from AMERICAN BUREAU OF METAL STATISTICS, NON-FERROUS METAL DATA 1982 at 11 and AMERICAN BUREAU OF METAL STATISTICS, NON-FERROUS METAL DATA 1988 at 11.

²⁶ For the various mineral products that are produced as byproducts or coproducts of the production of other minerals, the price and cost relationships may be more complex. Even for non-STE firms, the volume of production of a byproduct mineral may vary as much in accordance with the price of the firm's main mineral product as with the price of the byproduct itself.

²⁷ *See* CHACHOLIADIS *supra* note 15, at 503-05 (regarding economic distortions). Chacholiadis states that although a government may try to correct some distortion in the domestic economy through some protective measure for an industry such as a subsidy, "protection remedies a domestic distortion at the expense of a foreign distortion." *Id.* at 505.

III. Current GATT Discipline on Subsidization in the Mineral Industry

Subsidization of the mineral industry encouraging uneconomic production during periods of cyclical downturn, particularly by STEs, is largely unreachable under current GATT disciplines.²⁸

A. Article XVII—State-Trading Enterprises

Article XVII addresses in only a limited way the conduct of state-trading enterprises.²⁹ In particular, it does not address the issues related to production volume or the subsidization of production costs which are important concerns of the U.S. minerals industries. Indeed, the concept of consistency with “commercial considerations” cited in the article³⁰ has very limited applicability.

Paragraph 1 of Article XVII requires that STEs accord “non-discriminatory treatment” in their purchases and sales involving imports and exports by private traders.³¹ The basic requirement for non-discriminatory treatment is provided in subparagraph (a).³²

²⁸ STE practices have long been an issue of concern in multilateral trade discussions and present very difficult definitional and political problems. Indeed, even the Draft Charter for the International Trade Organization (ITO)—the abortive precursor to the GATT—contained provisions devoted to restrictive business practices, including STE practices. In the establishment of GATT, key STE sections of the ITO Draft Charter’s Article 29 were carried over virtually unchanged into GATT Article XVII. During these early deliberations, just as today, a controversial issue was the degree of state “control” necessary in order for an entity to be considered a STE. For a detailed history of the early GATT consideration of STE issues, see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969).

²⁹ The early concern in GATT with STEs was not so much with STE operations per se, but rather that a country would use STEs in a discriminatory manner in order to nullify tariff and other benefits received by other countries during trade negotiations. A tariff concession granted by a country could be nullified if its STE import agents refused to make purchases from particular countries. See *State-Trading Enterprises: Hearings on S. 2660 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 20, 22 (1986) (Statement of Alan F. Holmer, General Counsel, U.S. Trade Representative).

³⁰ GATT, *supra* note 1, art. XVII, para. 1(b), at 38. Subparagraph (b) states:

The provisions of sub-paragraph (a) [regarding nondiscrimination] . . . shall be understood to require that such enterprises shall . . . make any such purchases or sales solely in accordance with commercial considerations . . . and shall afford the enterprises of the other contracting parties adequate opportunity . . . to compete for participation in such purchases or sales.

Id.

³¹ *Id.* There is dispute whether “non-discriminatory treatment” requires merely that an STE afford most-favored nation treatment (*i.e.*, all foreign countries are treated alike) or whether the STE must also provide national treatment (*i.e.*, treat foreign countries in the same way as domestic suppliers). Office of the U.S. Trade Representative, *U.S. Statement on Article XVII: Negotiating Group on GATT Articles 3* (May 25, 1988).

³² GATT, *supra* note 1, art. XVII, para. 1(a), at 38. Subparagraph (a) states:

Each contracting party undertakes that if it establishes, or maintains a State enterprise, wherever located, or grants to any enterprise, . . . exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this agreement

There is a reference in subparagraph (b) to the concept of operating "in accordance with commercial considerations," but that reference appears merely to provide interpretive guidance on how the non-discriminatory treatment cited in subparagraph (a) is to be achieved. It appears that the purpose of acting "in accordance with commercial considerations" is the avoidance of discriminatory treatment among other countries. Thus, so long as the STE acts in a non-discriminatory manner it is at least arguable that Article XVII imposes no separate obligation to act "in accordance with commercial considerations."³³

Furthermore, even if one could interpret the article as not being limited in its scope to "purchases or sales," the concerns of the mineral industry would still not be met. Phrasing in subparagraph (b) provides explanatory guidance for the meaning of "commercial considerations" but excludes the concepts of cost and production.³⁴ The provision merely enumerates a list of commercial considerations that clearly focuses only on the purchasing and selling functions of an organization (*i.e.*, selecting among potential buyers or sellers of a product).³⁵ It does not address the underlying circumstances of the product's production or the circumstance in which its profitability was assessed.

No other paragraph of Article XVII imposes any significant limitation on STE activities. Paragraph 2, in fact, provides an exemption from the constraints of non-discriminatory treatment and associated commercial considerations with regard to imports by an STE when the products are for governmental consumption.³⁶ Paragraph 3 acknowledges that an STE "might be operated so as to create serious obstacles to trade" and simply states that "negotiations . . . designed to limit or reduce such obstacles are of importance to the expansion of international trade."³⁷ There is no further reference to any

Id.

³³ In testimony before Congress concerning the "commercial considerations" provision, the General Counsel of the Office of the U.S. Trade Representative stated that "[t]his obligation extends only to purchases and sales of goods" *State Trading Enterprises: Hearings on S. 2660 Before the Subcomm. on International Trade of the Senate Comm. on Finance, 99th Cong., 2d Sess. 20, 22 (1986)* (Statement of Alan F. Holmer, General Counsel, U.S. Trade Representative).

³⁴ GATT, *supra* note 1, art. XVII, para. 1(b), at 38.

³⁵ *Id.* The text of Article XVII, subparagraph (b) cites "commercial considerations, including, price, quality, availability, marketability, transportation and other conditions of purchase or sale." *Id.*

³⁶ *Id.*, art. XVII, para. 2, at 38. Paragraph 2 states:

[P]aragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

Id.

³⁷ *Id.*, art. XVII, para. 3, at 38-39.

negotiations.

Paragraph 4 does establish certain notification obligations.³⁸ First, it requires all countries to report to GATT the products that are imported or exported by an STE.³⁹ Second, countries having an STE with an import monopoly on a product must report the import markup imposed on the product if another country requests such information.⁴⁰ Third, at the request of a member country believing that it is adversely affected by the STE activities of another country, GATT may request the other country to supply information about its STE operations.⁴¹ However, a country need not report what it considers to be "confidential information" in complying with any of the article's notification requirements.⁴²

In sum, Article XVII confers certain exemptions from GATT discipline and imposes some limitations. None of the limitations, however, meaningfully address the STE subsidy concerns of the U.S. minerals industry.

B. Article VI—Unilateral CVD Sanctions

Article VI permits a GATT signatory unilaterally to impose countervailing duties (CVD) on imports from another country to offset government subsidies so long as the imports are causing, or threaten to cause, "material injury" to the domestic industry of the importing country.⁴³ The array of actionable subsidies is relatively broad, including a "bounty or subsidy" that has been "granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product."⁴⁴ Production subsidies are explicitly included in the actionable list.⁴⁵

There are, however, two key limitations on the applicability of Article VI to the U.S. industry's problem with subsidized foreign production. First, Article VI requires that there be *imports* into the

³⁸ *Id.*, art. XVII, para. 4(a)-(d), at 39.

³⁹ *Id.*, art. XVII, para. 4(a), at 39. The United States has largely complied with its notification responsibilities. It has submitted notifications concerning U.S. "state trading" in fissionable materials, helium, the national security stockpile, and various dairy and agricultural products. See *State Trading Enterprises: Hearings on S. 2660 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 1 (1986).

⁴⁰ GATT, *supra* note 1, art. XVII, para. 4(b), at 39.

⁴¹ *Id.*, art. XVII, para. 4(c), at 39.

⁴² *Id.*, art. XVII, para. 4(d), at 39.

⁴³ *Id.*, art. VI, paras. 3 & 6, at 13-14.

⁴⁴ *Id.*, art. VI, para. 3, at 13-14.

⁴⁵ *Id.*

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party . . . "[C]ountervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed . . . upon the . . . production . . . of any merchandise.

United States that benefit from the foreign subsidy.⁴⁶ While such imports do occur, much subsidized production from foreign STEs is absorbed in the producing country, sent to third country markets, or sold on the London Metal Exchange (LME) or New York Commodity Exchange (COMEX) and does not enter *any* "market" directly. Therefore, the proportion of the output of the subsidized production that is reachable through Article VI is limited.⁴⁷

The second key constraint on the utility of Article VI is the requirement that the effect of the subsidized imports is to *cause* or threaten material injury.⁴⁸ For most industrial products the core of a CVD injury case tends to be price undercutting by imports benefiting from foreign subsidies. However, for many mineral products, price undercutting is difficult to identify as prices are set on a commodity exchange in response to global supply and demand forces.⁴⁹ Thus, even when there are U.S. imports, it can be very difficult to prove a causal link between foreign subsidies and U.S. industry injury.

Therefore, even though the array of subsidy practices eligible for remedy action is relatively broad, the utility of Article VI (and the U.S. CVD law which largely mirrors Article VI) is limited because it focuses only on imports into the United States that can be proven to cause injury.

C. Article XVI—Multilateral Discipline

Article XVI imposes certain constraints on foreign government

⁴⁶ *Id.*, art. VI, para. 7, at 15.

⁴⁷ Section 301 of the Trade Act of 1974 provides a limited avenue for addressing the impact of foreign subsidies in displacing U.S. exports to third countries. Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1954, 2041-43 (1975) (codified as amended at 19 U.S.C. § 2411 (1988)).

⁴⁸ As a measure to encourage countries to become signatories to the GATT Subsidies Code, U.S. CVD law provides that a U.S. petitioner is required to prove "material injury," or threat thereof, *only if* the respondent country is a Code signatory or has a bilateral agreement with the United States imposing "substantially equivalent" obligations on the country. Tariff Act of 1930, ch. 497, § 701 (a)-(b), 46 Stat. 763, *amended by* Pub. L. No. 96-36, 93 Stat. 151, 151-52 (1979) (codified as amended at 19 U.S.C. § 1671 (1988)). While the injury test is thus avoided for a number of nonsignatories, U.S. law still requires that there be imports of the subject merchandise into the United States in order to use the CVD remedy.

⁴⁹ For noncommodity products, the commercial impact of a subsidy is frequently to permit a producer to charge a lower price than his competitor; such price undercutting permits the subsidized producer to take sales away from competitors. However, for globally traded homogeneous commodities, such as copper, vigorous arbitrage and highly sophisticated exchange markets tend to equalize prices around the world very quickly. Producers tend to sell at the "world market" price, adjusted from freight costs. When prices fall, it is generally not the result of conscious price undercutting by a producer, but rather the impact of excess supply for a given level of demand. Therefore, in a CVD injury investigation regarding such commodities, even a highly subsidized respondent may be able to claim with a certain basis that he has not taken advantage of his subsidies to charge an unduly low price; he has merely sold at the prevailing world price. The core of the problem, however, is the prevailing world price may be low in some measure because of an excess supply caused by the subsidization of his production.

subsidy practices; its role is to indicate what signatories should not do.⁵⁰ Signatories violating Article XVI provisions or otherwise nullifying benefits to which other signatories are entitled may be subject to GATT multilateral discipline through the machinery provided in Article XXIII.⁵¹ The Subsidies Code,⁵² which was negotiated during the Tokyo Round, interprets and expands to some degree the provisions of Articles VI, XVI, and XXIII.

1. *Establishing That STE Production Subsidies Have Harmful Effects Within the Terms of GATT*

Article XVI focuses on the premise that export subsidies and domestic subsidies can have "harmful effects" or cause "serious prejudice" to the interests of other countries.⁵³ A central problem for the U.S. minerals industry in addressing subsidized production by STEs is establishing a basis within GATT for declaring that these subsidy practices have harmful effects for other signatories. The potential negative results of using subsidies have been categorized by GATT. Specifically, the GATT Subsidy Code exhorts parties to avoid letting their subsidies cause "(a) injury to the domestic industry of another signatory, (b) nullification or impairment of the benefits accruing to another signatory under [GATT], or (c) serious prejudice to the interests of another signatory."⁵⁴ The Code explains that the adverse effects a signatory must show to demonstrate nullification, impairment, or serious prejudice are:

- (a) the effects of subsidized imports in the domestic market of the importing signatory,
- (b) the effect of the subsidy in displacing or impeding the imports of like products into the market of the subsidizing country, or
- (c) the effects of subsidized exports in displacing the exports of like products of another signatory from a third country market.⁵⁵

The nature of production subsidies to state-trading producers of mineral and metal commodity products, however, may make it difficult to tie such practices directly to these measures of adverse impact.⁵⁶ Displacement of exports either to the subsidizing country or to a third country similarly is not easily proven in situations of STE overproduction. It is not clear what GATT benefit is being nullified or impaired or which interest of a signatory is being prejudiced when the signatory faces continuing STE production during a cyclical

⁵⁰ GATT, *supra* note 1, art. XVI, at 36-37.

⁵¹ *Id.*, art. XXIII, at 55-56.

⁵² See *supra* notes 2 and 6 and accompanying text.

⁵³ GATT, *supra* note 1, art. XVI, paras. 1 & 2, at 36-37.

⁵⁴ Subsidies Code, *supra* note 2, art. 8, para. 3.

⁵⁵ *Id.*, art. 8, para. 4.

⁵⁶ See *supra* note 48 (discussing the difficulties of keying on injury and its reliance on imports as the medium by which the injury is caused).

downturn of a commodity product whose price is set on a commodity exchange.

2. *Mineral Products as Nonprimary Products*

A basic purpose of Article XVI and the Subsidies Code is to limit export subsidies. However, GATT only prohibits export subsidies on nonprimary products. No real limits are placed on the use of export subsidies for "primary products."⁵⁷

A problem exists for the minerals industry with regard to the definition of the term primary product as used in GATT. Article XVI specifically categorizes mineral products as primary products, thus they are not subject to the export subsidy prohibition.⁵⁸ In the Subsidies Code, however, a later recategorization of mineral products clearly placed them in the nonprimary product category and subjected them to the export subsidy prohibition. Therefore, only signatories of the Subsidies Code are barred from using export subsidies to promote mineral exports.

It is relevant that many significant mineral and metal producing countries are *not* signatories to the Subsidies Code. Such non-signatories include: Botswana, Guyana, Jamaica, Mexico,⁵⁹ Morocco, Peru, South Africa, Zaire, and Zambia.⁶⁰ While GATT has ninety-six contracting parties, there are only twenty-four signatories to the Code.⁶¹

⁵⁷ GATT, *supra* note 1, art. XVI, para. 3, at 37. Paragraph 3 only requests that "contracting parties should seek to avoid the use of subsidies on the export of primary products." *Id.*

⁵⁸ The definition of a primary product is "any product of farm, forest, or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." *Id.*, notes and supplementary provisions, at art. XVI, § B(2), at 90-91.

During the Tokyo Round the Subsidies Code signatories agreed to delete "mineral products" from the primary product category. Thus, for Code purposes "'certain primary products' means the products referred to in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words, 'or any mineral.'" Subsidies Code, *supra* note 2, art. 9. The revised definition, however, is only binding with respect to Code signatories in an action brought under the Code. It is not controlling for purposes of GATT Article XVI.

⁵⁹ The United States and Mexico have a bilateral agreement on export subsidies and countervailing duties which contains a commitment by Mexico to phase out its export subsidies. See Office of the U.S. Trade Representative, *Joint Statement by USTR Brock and Mexican Commercial Secretary Hernandez on Bilateral Trade* (Apr. 23, 1985).

⁶⁰ The countries that are not GATT members would also be free of this restriction. The two most prominent non-GATT mineral producers are the USSR and China.

⁶¹ LAW AND PRACTICE UNDER THE GATT, *supra* note 11, at 28. Some EC members are parties to the Code through the EC's accession. Article XXXIII defines accession as:

[A] government not party to this Agreement, or a government acting on behalf of a separate custom territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for this agreement, on its own behalf or on the behalf of that territory, on terms to be agreed between such governments and the contracting parties.

GATT, *supra* note 1, art. XXXIII, at 72.

3. "Special and Differential" Treatment for Less Developed Countries

The Code also contains a provision that, in essence, may exempt a less developed country (LDC) from the Code's prohibition in Article 9 on export subsidies on nonprimary products.⁶² Article 14 states that "the commitment of Article 9 shall not apply to developing country signatories," subject to certain conditions including a "commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and development needs."⁶³ It is up to the LDC to determine whether a particular export subsidy is inconsistent with its competitive and development needs.⁶⁴ The only leverage for encouraging LDCs to make such commitments comes in bilateral agreements with industrialized countries, such as the United States, to apply the CVD injury test to imports from such LDCs only in return for a subsidy-reduction commitment.⁶⁵

4. Domestic Subsidies

Domestic subsidies are entirely unregulated under the multilateral provisions of GATT. The only obligation placed on signatories by Article XVI is to notify GATT of the subsidy practice if it acts to increase exports or decrease imports.⁶⁶ In the Subsidies Code the only additional restraint is found in Article 11 which merely requires signatories to "seek to avoid" causing serious prejudice through the effects of domestic subsidies.⁶⁷ No obligation is imposed to limit the practices.

The Code does, however, contain general language with a perspective that the U.S. minerals industry would like to see applied to domestic subsidies that benefit STE operations. Article 11 of the Code, for example, notes that nonexport subsidies can have adverse consequences "in particular where such subsidies would adversely affect the conditions of normal competition."⁶⁸ By preventing the supply-dampening effect of market forces during cyclical downturns, state-trading production subsidies distort the basic conditions of normal competition. Furthermore, in assessing the impact of their subsidies, the Code requires signatories to "weigh, as far as practicable, . . . possible adverse effects on trade"⁶⁹ and specifically to "consider the conditions of world trade, production (*e.g.*, price, capacity

⁶² GATT, *supra* note 1, art. XIV, at 32-33.

⁶³ *Id.*, art. XIV, paras. 2 & 5, at 32, 33.

⁶⁴ *Id.*, art. XXXVII, para. 4, at 33.

⁶⁵ See *supra* note 50.

⁶⁶ GATT, *supra* note 1, art. XVI, para. 1, at 36.

⁶⁷ Subsidies Code, *supra* note 2, art. 11, para. 2.

⁶⁸ *Id.*

⁶⁹ *Id.*

utilization, etc.); and supply in the product concerned."⁷⁰ These general references are the closest that any GATT language comes to addressing the problem of state-trading subsidies for production. Even so, there is no reference to the concepts of cost or recovering cost.

IV. Possible Revisions of the GATT Articles or the Subsidies Code

As the subsidy practices related to overproduction by STE mineral producers are not currently addressed by the GATT Articles or the Subsidies Code, revisions in them appear to be necessary if meaningful discipline on these practices is to be achieved. The revisions suggested here may be pursued individually, although each item tends to reinforce the disciplinary effect of the others. Some revisions address the issue of STE overproduction directly while others would further a general increase on subsidy discipline relevant to a range of subsidy problems.⁷¹

A. Article XVII Concerning STEs

Certain weaknesses of Article XVII can be addressed merely through new agreements interpreting the current language.⁷² However, to address the key weaknesses in a truly meaningful manner would require a revision in the text of Article XVII itself. One interpretive issue is whether the fundamental purpose of the article is to impose additional disciplines on signatories or rather to provide ex-

⁷⁰ *Id.*

⁷¹ The U.S. Congress has from time to time considered legislation intended to address the problems caused by foreign STE practices. On July 21, 1986, Senator Lloyd Bentsen and eight other senators introduced S. 2660 to address the problem of state trading. The proposed measure sought to use Section 301 of the Trade Act of 1974 as a mechanism to convince foreign countries to halt STE practices that harmed U.S. interests. If negotiations with the foreign government failed, the United States would impose sanctions consisting largely of restrictions on U.S. imports from the country concerned. The legislation implicitly incorporated an interpretation of GATT Article XVII's "commercial considerations" provision as being applicable to all activities of an STE, not just to the STE's "purchases or sales." Such an interpretation is at best questionable. See *State Trading Enterprises: Hearings on S. 2660 Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 20 (1986) (Statement of Alan Homer, General Counsel, U.S. Trade Representative). The legislation also had difficulty with the task of defining with precision what constituted a STE because the proposed unilateral U.S. sanctions did not have a clear basis in GATT Article VII or elsewhere in the GATT. *Id.* at 1.

⁷² The U.S. Government appears to have made a decision to avoid making proposals that require amendment of the text of Article XVII. Reportedly, such an effort is believed to be too controversial. Therefore, the U.S. proposals regarding Article XVII will be restricted to seeking agreements interpreting the current text. The Department of Commerce has publicly stated regarding Article XVII that the United States:

would like to clarify these provisions so as to discourage discriminatory trading practices by state trading enterprises. The United States is also seeking to improve GATT's notification provisions to enhance transparency over state trading practices and plans to submit a proposal on state trading this fall [1989].

U.S. Dep't of Commerce, Int'l Trade Admin., *Uruguay Round Update* 6-7 (Sept. 1989).

emptions from other GATT disciplines. An agreement that the article is meant to impose meaningful additional disciplines would be very useful. In addition, it would be helpful to reach an agreement to achieve real compliance with the article's notification requirements which have largely been ignored.

Meaningful improvement of Article XVII could be achieved through three specific changes to the article's text. First, a provision could be added simply requiring that STEs conduct their operations, including production, purchases, and sales in accordance with commercial considerations. Second, the concept of operations in accordance with commercial considerations could be defined to include the recovery of all operating and capital costs. Third, a provision could state explicitly that the failure of an STE to operate in accordance with commercial considerations can result in serious prejudice to the interests of other signatories.

The effect of these additional provisions would be to require that production decisions be made in accordance with commercial considerations, that such considerations include the recovery of cost, and that the failure to do so could be actionable under GATT Article XXIII.

B. Article VI Concerning Unilateral CVD Action

Efforts to amend Article VI to expand unilateral CVD authority would be very controversial, particularly given the fact that several countries reportedly hope to use the Uruguay Round negotiations to narrow such unilateral rights.⁷³ Relaxing the current requirement that injury be causally linked to imports would be one possible addition to Article XVII making some STE production subsidies more reachable through CVD actions. Another revision might permit the determination of injury for the minerals industry to be based not on imports, but on the injury resulting from commodity price suppression or depression arising from subsidized uneconomic production. Support for such revision would be very narrow.

C. Article XVI and the Subsidies Code Concerning Multilateral Disciplines

Article XVI and the Code need to be revised to deal with the particular problems arising from subsidies to STEs. First, the Code's Article 3, paragraph 4, explaining the meaning of "nullification or

⁷³ For example, Canada has proposed in the Uruguay Round subsidy negotiations to exempt from subsidy discipline certain types of government programs, such as "environmental management and conservation" and "regional development assistance" which are especially relevant to the minerals sector. Multinational Trade Negotiations of the Uruguay Round: Negotiating Group on Subsidies and Countervailing Measures, *Framework for Negotiations: Communication from Canada* (GATT Pub. No. MTN.GNG/NG10/W/25) 8-9 (June 28, 1989).

impairment" and "serious prejudice," could be expanded with an additional point to the effect that such harm to a signatory can result from the uneconomic production of commodity products made possible by subsidization. Thus, the phenomenon of overproduction leading to excess supply that unreasonably depresses or suppresses price would become actionable under GATT multilateral discipline procedures. Uneconomic production would be interpreted as persistent production for which the sales revenue does not permit the recovery of operating and capital costs.

Second, for the purposes of Article XVI, as well as the Code, mineral products should be considered nonprimary products. This measure would make the mineral production of those countries which have not yet signed the Code subject to the explicit prohibition on export subsidies. Third, the special and differential treatment afforded LDCs by the Code could be adjusted to increase the leverage on LDCs to make commitments to curtail export subsidies for mineral products. Fourth, aside from the institution of some basic discipline on domestic subsidies, an agreement might specify that overproduction of commodity products benefiting from subsidies is not a permissible practice.

In the Uruguay Round negotiations the U.S. Government has proposed a "red, yellow, and green light" approach to the domestic subsidies problem in which certain subsidy practices are per se "prohibited," others are "actionable," and still others are "non-actionable."⁷⁴ The key criterion appears in theory to be whether the subsidy practice has a trade distorting impact. Export subsidies, which are assumed per se to have a trade distorting impact, are generally prohibited. Nonactionable subsidies are those presumed to have no trade distorting effect. Actionable subsidies are those whose impact on trade depends on the particular circumstances involved.

From the U.S. minerals industry's perspective, mineral production subsidy practices ideally would be presumed to be trade distorting and thereby prohibited. However, it is quite important to assure the explicit inclusion of such practices at least in the actionable category, where the minerals industry has the opportunity to demonstrate the trade distorting effect of the subsidy. To ignore such subsidies, or to consider them nonactionable would increase the vulnerability of the U.S. minerals industry to the impact of subsidized STE operations.

V. Conclusion

The Uruguay Round Trade Negotiations provide an opportunity

⁷⁴ See generally Multinational Trade Negotiations of the Uruguay Round: Negotiating Group on Subsidies and Countervailing Measures, *Elements of the Framework for Negotiations: Submissions by the United States* (GATT Pub. No. MTN.GNG/NG10/W/29) (Nov. 22, 1989).

to achieve some measure of discipline over government subsidy practices that benefit STE operations and promote uneconomic mineral production. However, the achievement of meaningful discipline will require changes to the GATT articles and the Subsidies Code that may be quite controversial. Nonetheless, as GATT currently provides no limitation on such production subsidy practices—outside of the unilateral CVD rights under Article VI—the U.S. Government should make the achievement of additional disciplines a high priority.

