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## Delverde and the WTO's British Steel Decision Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization, and United States Countervailing Duty Law Intersect

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# **DELVERDE AND THE WTO'S BRITISH STEEL DECISION FORESHADOW MORE CONFLICT WHERE THE WTO SUBSIDIES AGREEMENT, PRIVATIZATION, AND UNITED STATES COUNTERVAILING DUTY LAW INTERSECT**

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INTRODUCTION .....	80
I. HISTORICAL BACKGROUND: UNITED STATES LAW...	86
A. BACKGROUND ON UNITED STATES COUNTERVAILING DUTY LAW.....	86
B. AGENCY APPLICATION OF UNITED STATES COUNTERVAILING DUTY LAW IN THE PRIVATIZATION CONTEXT .....	88
C. THE CIT CHALLENGES AGENCY APPLICATION: SAARSTAHL .....	91
D. THE COURTS REVIEW AGENCY APPLICATION POST URUGUAY: <i>DELVERDE</i> .....	93
II. THE WTO SUBSIDIES AGREEMENT: UNITED STATES' INTERNATIONAL OBLIGATIONS .....	98
A. THE BEGINNING: 1979 SUBSIDIES CODE .....	99
B. WTO SUBSIDIES AGREEMENT: DEFINING A SUBSIDY .....	100
C. HARMONIZING UNITED STATES LAW WITH THE WTO	

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\* J.D. Candidate, 2002, American University, Washington College of Law. I would like to thank Sue and Jerry Dunne for their constant support and inspiration to achieve great things. I would also like to thank my sisters Jennifer, Janine, and Colleen; and MFC, and all my other family and friends for their love and support during my adventure in law school. I would also like to recognize my grandfathers John Costello and Robert Dunne for their inspiration to another generation of attorneys. Finally, I would like to express my thanks to my editor Barbara Cochrane Alexander for her ideas and attention to detail and thanks to my former professional colleagues for their guidance and assistance in this project.

SUBSIDIES AGREEMENT .....	104
III. ANALYSIS OF RELEVANT PROVISIONS OF WTO	
SUBSIDIES AGREEMENT .....	107
A. WTO SUBSIDIES AGREEMENT: ASSESSMENT .....	107
B. WTO SUBSIDIES AGREEMENT DEFINES A SUBSIDY .....	109
IV. CASE STUDY: BRITISH STEEL .....	111
A. BRITISH STEEL FACTUAL BACKGROUND .....	112
B. COUNTERVAILING DUTIES MAY NOT BE IMPOSED UNLESS A SUBSIDY EXISTS.....	114
C. CRITERIA FOR FINDING WHETHER A SUBSIDY EXISTS MUST INCLUDE A BENEFIT.....	115
D. PRIVATIZATION CAN ELIMINATE BENEFIT FROM PRIOR NON-RECURRING SUBSIDIES.....	117
E. DELVERDE CONSTRUES UNITED STATES LAW AS "NOT INCONSISTENT" WITH WTO BRITISH STEEL DECISION.....	120
V. RECOMMENDATIONS .....	122
A. REASSESS COUNTERVAILING DUTY RULES .....	123
B. INTERVENTION BY CONGRESS .....	125
C. WTO LITIGATION.....	126
CONCLUSION .....	128

## INTRODUCTION

More than ten years after the end of the Cold War era, many countries continue to make the transition from state-dominated to market-based economies.<sup>1</sup> Since the mid-1980s, developed countries

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1. See JACQUES ROGOZINSKI, *HIGH PRICE FOR CHANGE: PRIVATIZATION IN MEXICO* 75 (1998) (explaining the significant breadth of the privatization efforts in Mexico from 1982-94); John White, *Privatization in Eastern and Central Europe*, 13 INT'L L. PRACTICUM 19, 19-20 (2000) (noting a shift from state-led growth strategies in the 1960s and 1970s to privatization in the 1980s and 1990s due to economic inefficiencies attributed to involvement of state actors in industry); *id.* at 21-24 (discussing privatization efforts in Poland, Czech Republic, and Hungary). See generally Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000) (detailing the Russian experience with privatization and concluding that Russia lacked institutions to control self-dealing); John R. Dempsey, Note, *Thailand's Privatization of State Owned Enterprises During the Economic Downturn*, 31 LAW & POL'Y INT'L BUS. 373, 374 (2000) (recognizing economic benefits of privatization, but noting political difficulties in implementation).

have also increasingly attempted to privatize major state-owned industries.<sup>2</sup> Privatization often means that entities the state previously subsidized will no longer receive such subsidies.<sup>3</sup> Thus, privatization raises the question of how to apply the definition of a subsidy<sup>4</sup> in a countervailing duty investigation when a privatized entity, which no longer receives a subsidy, did receive a subsidy before it was privatized. Specifically, the question raised is whether a non-recurring financial contribution to the previous owners still confers a benefit to the new owners, and therefore qualifies as a countervailable subsidy. Countervailing duty law, which is meant to offset subsidies with duties on subsidized products,<sup>5</sup> is a mechanism

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2. See generally HARVEY FEIGENBAUM ET AL., *SHRINKING THE STATE* 36, 59, 87 (1999) (exploring the privatization experiences of Great Britain, France, and the United States); *PRIVATISATION IN THE EUROPEAN UNION: THEORY AND POLICY PERSPECTIVES* 88, 101, 218 (David Parker ed., 1998) (outlining privatization efforts in countries of the European Union including Great Britain, Germany, and France); George Melloan, *Global View: A GOP Challenge: How to De-Invent Government*, WALL ST. J., Nov. 14, 1994, at A11 (noting a trend toward privatizing state-owned sectors in Europe and encouraging United States policymakers to lessen the role of the state). Great Britain, Germany, and France rank among the top ten United States trading partners, which insures that this issue of how to treat prior non-recurring subsidies in privatized entities will be the subject of future disputes. See Census Bureau "Top Ten Countries With Which the United States Trades" at <http://www.census.gov/foreign-trade/top/dst/2000/10/balance.html> (last visited Jan. 11, 2001); Overview of the State-of-Play of WTO Disputes at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (WT/DS212/1) para. VII(72) (last modified July 13, 2001) [hereinafter Status of Dispute Settlement] (stating that European Commission requested on September 10 a panel be formed regarding application of countervailing duties by the United States against several European companies in violation of its obligations under the WTO Subsidies Agreement). Brazil requested consultations Dec. 21, 2000 on the same issue. See *id.* para. VII(78).

3. See JACQUES V. DINAVO, *PRIVATIZATION IN DEVELOPING COUNTRIES: ITS IMPACT ON ECONOMIC DEVELOPMENT AND DEMOCRACY* 14 (1995) (explaining that by eliminating "costly subsidies" that governments pay to state-owned entities, privatization played a significant role in reducing government deficits); *id.* at 4 (describing privatization as a "reduction of the role that the state plays in supplying goods and services to the population").

4. See 19 U.S.C. § 1677(5) (1994) (defining a subsidy generally as a financial contribution by a government actor that confers a benefit).

5. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., *OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES* 59 (Comm. Print 1997) (explaining that countervailing duties imposed are equal to "net

through which many countries, including the United States, may impose a countervailing duty on certain products if a country determines that the product is subsidized and there is a “material injury” to that country’s competing domestic industry.<sup>6</sup>

The United States’ current application of countervailing duty law, wherein the Department of Commerce (“Commerce”) must answer the threshold question of whether a subsidy exists,<sup>7</sup> is inconsistent with its role as a leader in promoting market-based economies with minimal state intervention.<sup>8</sup> Current Commerce methodology, referred to as change-of-ownership methodology, assumes that private investors who buy state-owned companies automatically derive a benefit from past subsidies despite having paid fair market value for the privatized entity.<sup>9</sup> This methodology places an

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amount” of subsidies conferred on imported products).

6. See *id.* (providing general outline on purpose and application of United States countervailing duty law). The 1999 data regarding use of countervailing duty law reflects continuation of trends apparent during the early 1980s (pre-WTO Subsidies Agreement). Compare World Trade Organization Annual Report 2000, at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anre00\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anre00_e.pdf) (last visited Sept. 27, 2001), at 46 [hereinafter WTO Annual Report] (noting that of the thirty-six new countervailing duty cases initiated - and 108 countervailing duty orders in force - in 1999 the United States initiated ten and the European Commission (“EC”) initiated twenty), with 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1986-1992 809, 818 n.47 (Terence P. Stewart ed., 1992) [hereinafter NEGOTIATING HISTORY] (indicating that the United States and Chile initiated more than 90 percent of the countervailing duty cases between 1980 and 1986). The United States has sixty-one, Mexico has eleven, and the EC has six countervailing duty orders in force. See WTO Annual Report, at 46. Countries subject to the newest countervailing duty investigations in 1999 include: India (subject to six), Taiwan, Indonesia, and Thailand (each subject to five), and Korea (subject to three). *Id.*

7. See 19 U.S.C. § 1677(5) (defining subsidy); see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES 59-60 (Comm. Print 1997) (describing the countervailing duty investigation process).

8. See David Codevilla, Comment, *Discouraging the Practice of What We Preach: Saarstahl I, Inland Steel and the Implementation of the Uruguay Round of GATT 1994*, 3 GEO. MASON INDEP. L. REV. 435, 470-71 (1995) (arguing that certain amendments codifying the results of the Uruguay Round into United States law are a “significant disincentive for privatization”).

9. See *WTO Rejects U.S. CVD Rules on Privatization in British Steel Case*, 18 INSIDE U.S. TRADE 19 (May 12, 2000) available at <http://www.insidetrade.com> (reporting on May 10, 2000 WTO Appellate Body ruling that affirmed initial Panel

unnecessary cost on the already difficult task of privatization when the United States insists upon carrying forward liability for prior non-recurring subsidies to the newly privatized entity.<sup>10</sup> Further, this methodology is inconsistent with the United States' obligations under the World Trade Organization's Agreement on Subsidies and Countervailing Measures ("WTO Subsidies Agreement").<sup>11</sup>

This Comment focuses on how the United States applies its definition of subsidy in countervailing duty investigations, which involve newly privatized entities, and explains why this application is inconsistent with the United States' obligations under the WTO Subsidies Agreement. Exploration of these questions is accomplished in the context of recent developments regarding this issue, including: (1) the WTO Dispute Panel Decision in the *British Steel Case*;<sup>12</sup> (2) the Federal Circuit's decision in *Delverde, SrL v. United States*;<sup>13</sup> (3) Commerce's Final Redetermination<sup>14</sup> in response to *Delverde*; and

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Decision in the *British Steel* case and rejected United States' methodology in subsidies cases) (on file with author).

10. See ROGOZINSKI, *supra* note 1, at 135-36 (recognizing among the short-term costs of privatization rising unemployment, reduced profits, and reduced productivity); White, *supra* note 1, at 21 (noting the World Bank's practical assessment that privatization is "intensely a political process" and subsequently some people will suffer costs).

11. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, available at [http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm) (Jan. 11, 2001), or 1994 WL 761483 [hereinafter WTO Subsidies Agreement].

12. See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Panel, WT/DS138/R (Dec. 23, 1999), *aff'd*, Report of Appellate Body, WT/DS138/AB/R (May 10, 2000), at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) [hereinafter *British Steel Panel Decision*] (holding United States in violation of its obligations under the WTO Subsidies Agreement).

13. *Delverde, SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000), *reh'g en banc denied* (June 20, 2000). In 1991, *Delverde* paid fair market value for a pasta factory that had, under its prior ownership, received subsidies from the Italian government from 1983 until 1991. *Id.* at 1362. The court held that Commerce's "per se" rule, which assumed the new owner received a benefit and thus a subsidy continued to exist, was in "direct conflict" with statutory language. *Id.* at 1367.

14. See Final Results of Redetermination Pursuant to Court Remand, (Dec. 4, 2000) *Delverde, SrL v. United States*, Consol. Court No. 96-08-01997, Remand

(4) Final Redeterminations for several steel countervailing duty cases<sup>15</sup> pending before the Court of International Trade (“CIT”) when *Delverde* was decided.

Part I of this Comment provides an overview of the development of United States countervailing duty law, with particular emphasis on Commerce’s applications of the law in the privatization context over time.<sup>16</sup> Part I also discusses the CIT and Federal Circuit’s treatment of Commerce’s methodology before and after changes were made in United States law to reflect WTO Subsidies Agreement obligations.<sup>17</sup> Part I next maintains that Commerce’s current use of the change-of-ownership methodology in its application of countervailing duty law will face serious challenges as a result of a recent Federal Circuit opinion and a WTO panel decision.<sup>18</sup>

Part II provides a brief overview of efforts to formulate a multilateral agreement on subsidies and describes the culmination of this effort in the WTO Subsidies Agreement.<sup>19</sup> It also discusses the evolution of the general definition of a subsidy in the WTO

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Order (Ct. Int’l Trade Sept. 2000) (on file with author) [hereinafter *Delverde* Redetermination] (describing Commerce methodology post-*Delverde*).

15. See Final Results of Redetermination Pursuant to Court Remand, *ILVA Lamiere e Tubi S.p.A. v. United States*, Court No. 00-03-00127, Remand Order (Ct. Int’l Trade Aug. 2000) [Italy 64 Fed. Reg. 73,244] [hereinafter *ILVA* Redetermination]; *Allegheny Ludlum Corp. v. United States*, Consol. Court No. 99-09-00566, Remand Order (Ct. Int’l Trade Aug. 2000) [France 64 Fed. Reg. 30,774] [hereinafter *Usinor* Redetermination]; *Acciai Speciali Terni S.p.A. v. United States*, Court No. 99-06-00364, Remand Order (Ct. Int’l Trade Aug. 2000) [Italy 64 Fed. Reg. 15,508] [hereinafter *AST* Redetermination]]. These cases are a representative sampling of steel-related cases addressing privatization issues that were pending before the Court of International Trade (“CIT”), remanded to Commerce, and filed with the CIT by Commerce in December 2000 [hereinafter *Steel-Related Redeterminations*] (on file at CIT and with the author).

16. See *infra* notes 29-45 and accompanying text (describing development of United States countervailing duty law and Commerce’s application of the same in privatization context).

17. See *infra* notes 46-70 and accompanying text (explaining application of the law in context of the *Saarstahl* and *Delverde* cases).

18. See *infra* notes 71-81 and accompanying text (accounting current litigation before the CIT and WTO, which indicates that the dispute over this issue will continue).

19. See *infra* notes 82-90 and accompanying text (describing development of the 1979 Subsidies Code and WTO Subsidies Agreement).

Subsidies Agreement.<sup>20</sup> Further, this section explains how the United States attempted to harmonize United States law to reflect its international obligations with respect to this subsidy definition.<sup>21</sup>

Next, Part III asserts that the WTO Subsidies Agreement is a viable mechanism for reducing trade-distorting subsidies, but the benefit component of the subsidy definition remains ambiguous in application.<sup>22</sup> Part III continues by analyzing relevant provisions of the WTO Subsidies Agreement, with particular emphasis on the definition of a subsidy.<sup>23</sup> The analysis focuses on the difficulty in defining or attributing the “benefit” component of the subsidy definition and explains why this difficulty is relevant to the privatization of state-owned entities.<sup>24</sup>

Following this analysis, Part IV examines whether United States countervailing duty law is consistent with the United States’ obligations under the WTO Subsidies Agreement through a discussion of the *British Steel* Panel Decision.<sup>25</sup> It further explores the implications of the Federal Circuit’s *Delverde* decision, which addresses the question of whether a benefit can be presumed under United States law when there has been a change-of-ownership and the prior owner received a non-recurring subsidy.<sup>26</sup> Part IV concludes that Commerce’s change-of-ownership methodology is inconsistent with the plain language of the United States statute, thereby violating the United States’ obligations under the WTO Subsidies

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20. See *infra* notes 91-97 and accompanying text (stating the difficulty encountered in formulating an acceptable subsidy definition).

21. See *infra* notes 107-119 and accompanying text (comparing WTO Subsidies Agreement with subsequent changes made to United States law).

22. See *infra* notes 128-138 and accompanying text (assessing WTO Subsidies Agreement, in particular the definition of subsidy).

23. See *infra* notes 139-142 and accompanying text (focusing on potential weakness in WTO definition of subsidy).

24. See *infra* notes 143-145 and accompanying text (suggesting benefit is defined by inference under Article 14 of the WTO Subsidies Agreement).

25. See *infra* notes 147-192 and accompanying text (discussing how WTO panel found United States in violation of its obligations under the WTO Subsidies Agreement).

26. See *infra* notes 195-202 and accompanying text (clarifying that *Delverde* found its interpretation of United States Law as not inconsistent with the WTO *British Steel* decision).



Agreement.<sup>27</sup>

Based on the prior analysis, Part V recommends several ways to address the inconsistency between application of United States countervailing duty law and the United States' obligations under the WTO Subsidies Agreement.<sup>28</sup> First, Commerce should refrain from presuming a benefit has been conferred to a newly privatized entity and engage in a case-by-case analysis of whether the privatization occurred in a way that was consistent with commercial terms. This recommendation could be accomplished through a rulemaking exercise. Second, in light of recent developments, parties to current litigation should continue to pursue their challenges in United States courts. Third, Congress should make clear that it does not intend to discourage privatization and clarify its intent in United States law.

This Comment concludes that the United States should change its current application of countervailing duty law to reflect the original purpose of the law, which is to merely offset subsidies that foreign governments give to products imported by the United States. When newly privatized entities no longer receive the benefit of government subsidies, they should not be penalized with countervailing duties for subsidies received before they were privatized. Further, such changes by Commerce would ensure that United States countervailing duty law is consistent with its obligations under the WTO Subsidies Agreement.

## I. HISTORICAL BACKGROUND: UNITED STATES LAW

### A. BACKGROUND ON UNITED STATES COUNTERVAILING DUTY LAW

Congress passed the first United States countervailing duty law in 1897<sup>29</sup> and did not make any major changes to this law until 1979.<sup>30</sup>

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27. See *infra* notes 203-208 and accompanying text (explaining that the Delverde and WTO British Steel decisions undermine the validity of Commerce's methodology).

28. See *infra* notes 209-225 and accompanying text (outlining recommendations).

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

In 1979, the United States changed its law to comply with the 1979 Tokyo Round General Agreement on Tariffs and Trade ("GATT") Subsidies Code.<sup>31</sup> The next significant change in United States countervailing duty law came in 1994 with the Uruguay Round Agreements Act ("URAA").<sup>32</sup>

Generally, under current United States law, a subsidy exists when a government actor makes a financial contribution to a person (natural or legal) and thereby confers a benefit.<sup>33</sup> Further, the overall

1994). The provisions read:

whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon exportation of any article or merchandise from such country. . . . then upon the importation of any such article or merchandise into the United States . . . there shall be levied and paid . . . an additional duty equal to the net amount of such bounty or grant . . . .

*Id.* The 1897 Act expanded authorization for countervailing duties to all imports from an earlier countervailing duty law, which only applied to sugar. *See* 30 CONG. REC. 2202-04 (1897) (remarks of Sen. Gray) (arguing against legislation on account of a possible violation of treaty obligations and because no justification exists for "compensating" sugar manufacturers and "depriving" American people of cheap sugar). *Cf.* 30 CONG. REC. 2205 (remarks of Sen. Caffrey) (arguing that imposition of countervailing duties is necessary as a "self-defense" measure for domestic companies).

30. *See* STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES 59, 60 (Comm. Print 1997) (outlining development of, and changes in, United States countervailing duty law).

31. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-93 (1979) (current version at 19 U.S.C. §§ 1671-77 (1994)).

32. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, tit. II, 108 Stat. 4809, 19 U.S.C. §§ 1671-77 (1994) [hereinafter URAA] (codifying WTO Agreement into United States law). Relevant sections to this discussion, which address the definition of a subsidy, can be found at section 771(5)(B), (E), and (F) of the 1994 Act and at 19 U.S.C. § 1677(5)(B), (E), and (F). The change-of-ownership provision at 19 U.S.C. § 1677(F) is especially relevant to the privatization issue. *See infra* notes 102-107 and accompanying text (describing the change the URAA made to United States countervailing duty law).

33. *See* 19 U.S.C. § 1677(B). This section, which defines a subsidy under current United States law, states:

A subsidy is described in this paragraph in the case in which an authority - (i) provides a financial contribution, (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and

purpose of countervailing duty law is to offset the "competitive advantage" a foreign producer may have over a domestic producer as a result of subsidies received.<sup>34</sup> There has been much debate, however, as to the purpose, administration, and overall effectiveness of United States countervailing duty law.<sup>35</sup>

## B. AGENCY APPLICATION OF UNITED STATES COUNTERVAILING DUTY LAW IN THE PRIVATIZATION CONTEXT

In 1989, Commerce, for the first time, faced the issue of how to treat prior non-recurring subsidies in a privatized entity in an Administrative Review of a Countervailing Duty Order on Lime from Mexico.<sup>36</sup> In this proceeding, Commerce found that the newly

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the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is there conferred.

*Id.*

34. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (arguing that according to the earliest legislative history of the law and language of the statute, a countervailing duty intends to offset the "unfair competitive advantage" that a foreign producer derives from a subsidy at the expense of a United States domestic producer).

35. See generally E. Kwaku Andoh, *Countervailing Duties in a Not Quite Perfect World: An Economic Analysis*, 44 STAN. L. REV. 1515, 1525-27 (1992) (concluding that application of United States countervailing duty law is inconsistent with its original purpose, which is to offset a competitive advantage of foreign producers who receive a subsidy); *id.* at 1516 (noting "protectionist underpinnings" of United States countervailing duty law); Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507, 605-07 (1990) (complaining that lack of a consistent, underlying economic model to guide implementation of United States countervailing duty law risks an arbitrary United States model that other countries could mimic); Joan L. MacKenzie, *Countervailing Duty Relations-Issues Highlight*, 1075 PLI/CORP 669, 672-75 (1998) (commenting on development of countervailing duty regulations in light of the URAA); Robert E. Nielsen, *The Commerce Department Speaks on International Trade and Investment*, 864 PLI/CORP 7, 23-24 (1994) (explaining Commerce's privatization methodology and why subsidies "pass through"); David Rushford, *Subsidies and Privatization: Protectionism's Integral Role in United States Trade Law*, 32 U.C. DAVIS L. REV. 485, 511 (1999) (concluding that United States countervailing duty law penalizes privatization and undermines free trade).

36. See *Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review*, 54 Fed. Reg. 1753, 1754-55 (Jan. 17, 1989) [hereinafter *Lime from Mexico*] (finding that prior subsidies do not confer a benefit to new private owner). In the Final Results, the original Order was revoked

privatized entity under review was fully privatized in an arm's length transaction for which market value was paid; thus, no benefits passed through from the formerly state-owned entity to the private investor because the price paid reflected market value.<sup>37</sup> Commerce took an entirely different approach, however, when it reviewed the privatization issue in 1993 in the context of several steel countervailing duty investigations.<sup>38</sup> Commerce essentially

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effective on the date of Mexico's accession to GATT due to applicable law. *See* Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order, 54 Fed. Reg. 49,324 (Nov. 30, 1989); *see also* Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada, 51 Fed. Reg. 15,037, 15,042 (Apr. 22, 1986) (finding that, where private investor bought assets of company in receivership in an arm's length transaction at market value, benefits of subsidies "if there are any, are not passed through.").

37. *See* Lime from Mexico, *supra* note 36, at 1754-55 (explaining that fair market value paid extinguishes the benefits of prior non-recurring subsidies for a formerly state-owned company). If a new owner pays fair market value, it is reasonable to presume that the company no longer enjoys any benefit of previous subsidies because such benefits "are fully reflected in the purchase price and are not passed through to the purchaser." *Id.*

38. *See* Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, 58 Fed. Reg. 6237, 6240 (Jan. 27, 1993) (final affirmative determination) [hereinafter U.K. Final Determination] (noting that the formation of a joint venture, where 50 percent of assets were formerly state-owned and received subsidies, occurred after years of contentious arm's-length negotiations). The WTO also reviewed this investigation for its consistency with the WTO Subsidies Agreement, but the period of investigation was 1995-97 because the Uruguay Round Agreement Act was not approved until December 1994 and was not applicable until January 1, 1995 upon effectiveness of the WTO Subsidies Agreement. *See* British Steel Panel Decision, *supra* note 12, para. 2.6 (explaining factual background of dispute); *see also infra* notes 148-208 and accompanying text (analyzing *British Steel* as a case study). It is also interesting to note that this investigation, along with many other steel complaints at the time, was initiated shortly after expiration of several voluntary restraint agreements from the 1980s restricting steel imports, and on the heels of significant political pressure by the United States domestic steel industry to "do something" about imports. *See* John N. Maclean, *Big Steel Fears for Import Lids*, CHI. TRIB., Feb. 9, 1992, available at 1992 WL 11110178 (noting competitive environment of global steel industry and decline of government support (i.e., subsidies) to foreign steel producers); *Steel Companies Seek Relief from Imports*, INDIANAPOLIS STAR, July 1, 1992, available at 1992 WL 3841114 (suggesting that United States steel producers' inability to compete stems from cheap foreign steel that producers in countries such as Brazil, Britain, South Korea, Mexico, Poland, and Romania "dumped" in United States market); *USX Chairman Backs Steel Import Duties*, INDIANAPOLIS STAR, Jan. 30, 1993, available at 1993 WL 5298106 (quoting USX Chairman as saying Clinton

disregarded whether the change-of-ownership occurred at fair market value by maintaining that the sale of a business or business unit does not extinguish a previously conferred non-recurring subsidy.<sup>39</sup> Rather, subsidies would merely travel to their “new home” in the privatized entity with the assumption that the new owner derives a benefit through, for example, receipt of an equity infusion on terms inconsistent with market value.<sup>40</sup>

Six months later, Commerce again changed how it applied countervailing duty law in the privatization context when it issued the General Issues Appendix (“GIA”) in the context of several countervailing duty investigations.<sup>41</sup> In the GIA, Commerce formulated a methodology that assumes a subsidy passes through to the newly privatized entity from the previous state-owned entity, except for the portion of the subsidy that the purchase price is considered to have extinguished or repaid.<sup>42</sup> Commerce calculates this extinguished or repaid portion through a complicated formula it created and allocates the subsidy amount that did pass through according to amortization schedules of the asset that received the

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“can create jobs by fighting unfair trade”).

39. See U.K. Final Determination, *supra* note 38, at 6240 (explaining that Commerce does not “tie the benefit level of subsidies to changes in the company under investigation.”).

40. See *id.* (allocating pass through of subsidies to “productive units” because the administrative burden of allocating according to specific assets is too great). Commerce also noted that it was motivated by a desire to guard against circumvention of countervailing duty laws. *Id.*

41. See General Issues Appendix, appended to Certain Steel Products from Austria, 58 Fed. Reg. 37,217, 37,259-65 (July 9, 1993) [hereinafter GIA] (outlining a new “privatization methodology”).

42. See *id.* at 37,262-63 (noting there was “no guidance” in statute, legislative history, or case law regarding how to calculate repayments or amount of subsidy “extinguished” by purchase price); see also Final Rule Countervailing Duties, 63 Fed. Reg. at 65,348, 65,353 (Nov. 25, 1998) (to be codified at 29 C.F.R. pt. 351) (noting argument by petitioner that repayment methodology is “inconsistent” with benefit-to-recipient standard, and instead reflects cost-to-government standard). The benefit-to-recipient standard, which finds a subsidy to exist when one receives a financial contribution on terms that confer a market advantage, has long been the United States’ position in negotiations regarding international subsidies agreements. See *infra* notes 92, 111, 116 and accompanying text (asserting United States’ long-time support of benefit-to-recipient standard versus European Commission standard of cost-to-government to determine existence of subsidy).

subsidy.<sup>43</sup> Using the GIA methodology, Commerce has never found that an arm's length market-based privatization transaction extinguishes all prior non-recurring subsidies.<sup>44</sup> Furthermore, the GIA methodology makes it impossible to avoid subsidies being passed-through to a new private owner who has paid fair market value for the state-owned entity.<sup>45</sup> The courts have challenged Commerce's GIA methodology in several instances.

### C. THE CIT CHALLENGES AGENCY APPLICATION: SAARSTAHL

In 1994, less than a year after Commerce first promulgated the GIA methodology, the CIT rejected this methodology in the *Saarstahl*<sup>46</sup> ("Saarstahl I") and *Inland Steel*<sup>47</sup> cases. In these cases,

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43. See GIA, *supra* note 41, at 37,262-63 (arguing that the statute did not permit reevaluation of a subsidy "based on subsequent events in the marketplace"). Interestingly, Commerce acknowledged privatization as a valid policy goal in the GIA. *Id.* at 37,263. This acknowledgement was tempered, however, by its argument that this policy "cannot impinge upon the statutory requirements of the CVD law, which is designed to provide remedial relief to domestic industries." *Id.* But cf. James Bovard, *The Morality of Protectionism*, 25 N.Y.U. J. INT'L L. & POL. 235, 247-49 (1993) (suggesting trade barriers are a political decision whereby greater importance is placed on the interests of domestic producers than the interests of consumers). Bovard concludes by saying, "[i]t should not be a federal crime to charge low prices to American consumers." *Id.* at 249.

44. See *British Steel Panel Decision*, *supra* note 12, at Attachment 1.1, paras. 1-2 n.2 (arguing Commerce has not reviewed whether a benefit is conferred to a privatized entity in its application of countervailing duty law, as is required).

45. See *id.* para. 14 n.17 (explaining "average prior subsidies would have to exceed the average net worth of the company" in order to find subsidies extinguished under Commerce's calculations); see also *id.* para. 68 n.62 (explaining how Commerce methodology is "flawed," which results in "arbitrary and irrational" results).

46. See *Saarstahl*, AG v. United States, 858 F. Supp. 187, 195 (Ct. Int'l Trade 1994), *vacated by* 78 F.3d 1539 (Fed. Cir. 1996) (holding Commerce's privatization methodology, which resulted in "pass through" of subsidies to newly privatized entity, was unlawful).

47. See *Inland Steel Bar Co. v. United States*, 858 F. Supp. 179, 186 (Ct. Int'l Trade 1994), *vacated by* 155 F.3d 1370 (Fed. Cir. 1998) (finding privatized business that has paid fair market value has not received a benefit; thus, no "unfair competitive advantage, which must be offset by CVDs" exists). *Inland* was released the same day as *Saarstahl I* (June 7, 1994) and largely references *Saarstahl I*. See *Inland*, 858 F. Supp. at 185-86. Ultimately, the Federal Circuit reversed the CIT's *Inland* decision on the same grounds as *Saarstahl*. See *Inland Steel Bar Co. v. United States*, 86 F.3d 1174 (Fed. Cir. 1996).

the CIT stated that the purpose of countervailing duty laws is not “to capture” a subsidy once bestowed; rather, the purpose is to offset subsidies on goods entering the United States market with duties so that American producers of competing goods are not at a disadvantage.<sup>48</sup> Thus, the CIT applied the pre-URAA countervailing duty law<sup>49</sup> and reasoned that there was no countervailable subsidy because the buyer in a market-based, arm’s-length transaction has paid for all he is to receive; therefore, the buyer receives no competitive benefit, within the meaning of the law, from prior subsidies – the subsidies are extinguished.<sup>50</sup>

In 1996, the Federal Circuit reversed the CIT’s 1994 decision by finding that the lower court failed to give appropriate deference to Commerce’s interpretation of the law in the absence of an “explicit mandate” from Congress.<sup>51</sup> In a footnote to the decision, the court’s majority noted that the CIT’s decision was “fundamentally at odds” with the new statutory scheme per the URAA, which included a provision regarding change-of-ownership.<sup>52</sup> The Federal Circuit,

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48. See *Saarstahl*, 858 F. Supp. at 194 (citing cases from the early 1900s where courts explained the purpose of countervailing duty law, and noting Congress’ lack of guidance in assessing privatization issues).

49. See 19 U.S.C. § 1677(5) (1988) (amended 1994) (defining subsidy as including a domestic subsidy “if provided or required by government action to a specific enterprise or industries, whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise.”); see also *infra* notes 107-119 and accompanying text (regarding United States approval of URAA in December 1994).

50. See *Saarstahl*, 858 F. Supp. at 193 (explaining that in an arm’s-length transaction where fair market value is paid, the benefit does not survive and thus cannot be conferred to a new owner).

51. See *Saarstahl*, 78 F.3d at 1544 (finding Commerce’s methodology accounts for a “number of possible scenarios” when determining the effect of privatization on potential countervailable subsidies). *But see id.* at 1545-49 (Plager, J., dissenting) (emphasizing that Commerce’s methodology fails to fulfill the purpose of United States countervailing duty law, which is “to offset the competitive benefits foreign exporters enjoy through subsidized production or exportation.”).

52. See *id.* at 1543 n.1. The statute provides:

A change-of-ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm’s length transaction.

however, based its decision on the prior statutory scheme.<sup>53</sup> Thus, the Federal Circuit did not seem receptive to construing the law differently in light of URAA changes to the law. This reluctance changed in the *Delverde* case, where the court found that the Uruguay changes should have prompted Commerce to avoid a per se rule, which assumes there is a benefit, and thus a countervailable subsidy remains with the newly privatized entity.<sup>54</sup>

#### D. THE COURTS REVIEW AGENCY APPLICATION POST URUGUAY: *DELVERDE*

The Federal Circuit revisited the prior non-recurring subsidies issue in *Delverde*.<sup>55</sup> *Delverde* specifically addressed the URAA change-of-ownership provision<sup>56</sup> and held that the provision directs Commerce to avoid a per se rule of assuming subsidies pass through to the new owner when the former owner received countervailable subsidies.<sup>57</sup> The *Delverde* court cited report language from the URAA indicating that Commerce has this discretion, but cautioned

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19 U.S.C. § 1677(5)(F) (1994).

53. See 19 U.S.C. § 1677(5)(A) (1988) (defining subsidy pre-URAA); *Saarstahl*, 78 F.3d at 1543 n.1 (arguing that URAA "profoundly changed" the law by addressing specifically the change-of-ownership issue in privatization, whereas this decision applying pre-URAA is a matter of deference to agency).

54. See *Delverde*, 202 F.3d at 1366 (finding that URAA legislative history supported the court's conclusion that there should not be a per se rule).

55. See *id.* at 1369-70 (remanding case to CIT and ultimately to Commerce for a determination on *Delverde* facts consistent with this holding). *Delverde*, which involved a purely private transaction, differs slightly from earlier cases like *Saarstahl* because the change-of-ownership was between purely private parties, but the *Delverde* court did address the wider issue of determining the existence of subsidies where there is any kind of change-of-ownership. See *Saarstahl*, 858 F. Supp. at 189 (stating the state-owned steel producer received subsidies from 1978 until 1985 and was privatized in 1989); *Delverde*, 202 F.3d at 1362 (describing transaction at issue).

56. See 19 U.S.C. § 1677(5)(F) (1994) (noting a change-of-ownership does not by itself require a determination that a previously countervailable subsidy is no longer countervailable).

57. See *Delverde*, 202 F.3d at 1366 (explaining that the change-of-ownership provision does not change the meaning of subsidy, but provision does say that although an arm's-length transaction is required to extinguish subsidy, it may not be sufficient); see also *Saarstahl*, 78 F.3d 1539 at 1548 (Plager, J., dissenting) (discussing interpretation of the statute very similar to *Delverde* majority).



Commerce to conduct a fact-intensive inquiry in order to determine the terms of each transaction at issue and asserted that a presumption that subsidies pass through cannot exist.<sup>58</sup> Consequently, the Federal Circuit vacated the CIT's decision in *Delverde*<sup>59</sup> and directed Commerce to address the question of whether subsidies passed-through in the *Delverde* transaction.<sup>60</sup>

In response to the Federal Circuit's decision, the CIT issued a remand order in September 2000 directing Commerce to reevaluate its methodology to make it consistent with the *Delverde* decision.<sup>61</sup> Commerce filed the Final Redetermination with the CIT on

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58. See *Delverde*, 202 F.3d at 1366-67 (suggesting that legislative history supports the court's interpretation of the statute that requires finding a financial contribution and benefit from government, and rejecting the assumption implicit in Commerce's methodology that subsidies automatically pass through to new owner); H.R. REP. NO. 103-826(I), at 110 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3882 (noting that the issue of privatization is "extremely complex and multifaceted", and stating congressional intent that Commerce retain discretion in privatization situations and give careful consideration to the facts of each case); S. REP. NO. 103-412, at 92 (explaining that an arm's-length transaction is not sufficient to extinguish prior subsidies; Commerce should make a determination "based on the facts" of each situation as to whether or not a privatization "actually serve[s] to eliminate" subsidies). The language in the House and Senate Reports does not announce that subsidies will continue to be countervailable despite a fair market value transaction, which is Commerce's current practice; the language merely cautions Commerce to examine the facts of arm's-length transactions. See H.R. REP. NO. 103-826(I), at 110; see also S. REP. NO. 103-412, at 92.

59. See *Delverde*, 989 F. Supp. 218, 228, 230 (Ct. Int'l Trade 1997) (finding Commerce's privatization methodology inconsistent with § 1677(5)(F) and further distinguishing *Delverde* from *Saarstahl* because *Delverde* involved purely private transaction and URAA era law applies), remanded, 24 F. Supp. 2d 314 (Ct. Int'l Trade 1998) (finding Commerce's clarification of its application of change-of-ownership and benefit provisions, which results in subsidies passing through to new entity, "not the most natural reading of the statute . . . [but nonetheless] permissible."), vacated and remanded, 202 F.3d 1360 (Fed. Cir. 2000), *reh'g en banc denied* (June 2000).

60. See *Delverde*, 202 F.3d at 1369-70 (directing Commerce to examine the "facts and circumstances, including the terms of the transaction" to determine whether a subsidy exists).

61. See *Delverde v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) (remanding case to Commerce); *Delverde Redetermination*, *supra* note 14, at 2 (noting court's order to consider "facts and circumstances" and "terms of transaction" in its assessment of whether a benefit was received).

December 4, 2000.<sup>62</sup> In the Delverde Redetermination,<sup>63</sup> Commerce essentially returned to the pre-GIA methodology, which assumes that all prior non-recurring subsidies pass through to a new owner.<sup>64</sup> Commerce declared that the test for whether subsidies pass through to the new owner is whether the post-sale entity is a distinct entity from the pre-sale entity.<sup>65</sup> Essentially, Commerce's most recent methodology asks, "whether the post-sale entity is the same 'person'"<sup>66</sup> in order to assess whether the privatized entity has received a benefit, and therefore, a potentially countervailable subsidy.

Subsequently, Commerce found the post-sale Delverde entity was not distinct from the pre-sale Delverde entity.<sup>67</sup> Commerce argued

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62. Delverde Redetermination, *supra* note 14, at 2. Several steel cases, which also raised the subsidies pass through issue and were pending before the CIT in Spring 2000, were also remanded for a Redetermination consistent with Delverde. See Steel-Related Redeterminations, *supra* note 15. Final Redeterminations of these cases were also filed with the CIT in December 2000 and are now pending before the CIT. *Id.*

63. See generally Delverde Redetermination, *supra* note 14. The Redeterminations for the steel cases, where the company at issue was privatized, all espouse the same methodology. See generally Steel-Related Redeterminations, *supra* note 15.

64. See *supra* notes 36-45 and accompanying text (discussing Commerce's application of countervailing duty law in privatization context).

65. See Delverde Redetermination, *supra* note 14, at 14 (explaining that inquiry into whether subsidies pass through to new owners will focus on "whether the post-sale entity is the same 'person' as the subsidized pre-sale entity"). Commerce based its assessment of whether there were distinct pre- and post-sale entities on the following factors: (1) continuity of general business operations; (2) continuity of production facilities; (3) continuity of assets and liabilities; and (4) retention of personnel. *Id.*; see also Steel-Related Redeterminations, *supra* note 15 (imposing same test as in Delverde Redetermination on privatized steel companies to determine whether post-sale entity is distinct from pre-sale entity).

66. See Delverde Redetermination, *supra* note 14, at 14 (explaining the focus of inquiry regarding subsidies).

67. See *id.* at 14-15 (stating that Delverde can be considered a "continuous business entity," and thus still liable for subsidies before sale). Delverde's liability was based on the fact that operations continued in "substantially the same manner before and after the change in ownership." *Id.* at 15; see also ILVA Redetermination, *supra* note 15, at 13; Usinor Redetermination, *supra* note 15, at 23; AST Redetermination, *supra* note 15, at 14 (examining privatization transactions and determining that all three companies are not distinct from pre-sale entities; thus, privatized companies are liable for prior non-recurring subsidies).

the post-sale Delverde was essentially the same “operation” as the pre-sale Delverde.<sup>68</sup> Thus, post-sale Delverde was liable for subsidies given to pre-sale Delverde even though post-sale Delverde never received any subsidies.<sup>69</sup> In its analysis, however, Commerce completely disregarded (1) whether the transaction occurred at arm’s-length and (2) the fact that the new owners of Delverde paid fair market value for the business entity. Such inquiry would indicate whether the new owner derived a “benefit,” as is required to determine the existence of a subsidy.<sup>70</sup>

Although the CIT will consider the Final Redetermination filed by Commerce in the near future, it has not yet scheduled further consideration of the issue.<sup>71</sup> This development does not bode well for resolving this issue on the international stage. Moreover, in the *British Steel* Panel Decision, the WTO found that the GIA methodology,<sup>72</sup> which Commerce has applied without change in both pre-URAA<sup>73</sup> and post-URAA<sup>74</sup> contexts, is inconsistent with the

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68. See Delverde Redetermination, *supra* note 14, at 15; see also *British Steel* Panel Decision, *supra* note 12, para. 6.70 (rejecting the United States’ argument that “operations of [United Engineering Steels Limited] and [British Steel plc] are essentially the same as the operations of [British Steel Corporation]” because the privatized entities are distinct from pre-privatized entities due to “payment of consideration for productive assets” acquired from pre-privatized entity). The Panel Decision continues by saying that consideration paid should raise the possibility that the privatized entity no longer enjoys a “benefit.” See *id.*

69. See Steel-Related Redeterminations, *supra* note 15 (finding a subsidy in privatization transactions of several steel companies).

70. See 19 U.S.C. § 1677(5)(B), (E) (1994) (requiring a financial contribution and a benefit before finding that a subsidy exists under United States law).

71. Commerce and Delverde settled this matter in April 2001, after Delverde Redetermination, so that duties were reduced by amount of alleged subsidies prior to privatization. However, Commerce did not acknowledge any flaws in its change-of-ownership methodology. See U.S. Customs Instruction Letter from Paul Schwartz, Director, Trade Enforcement and Control to Directors of Field Operations and Port Directors (Apr. 23, 2001) (on file with author) (regarding liquidation instructions for certain pasta from Italy produced and/or exported by Delverde). Thereafter, the Final Redeterminations in the various steel cases were submitted to CIT, and the litigation has proceeded before the CIT, with parties in the midst of briefing issues as of this writing.

72. See GIA, *supra* note 41, at 37,259-65 (discussing privatization methodology).

73. See *Saarstahl*, 78 F.3d at 1543 & n.1 (noting application of pre-URAA law where Congress does not give guidance to resolve privatization issue).

United States' obligations under the WTO Subsidies Agreement.<sup>75</sup> Thus, the step back to the pre-GIA methodology<sup>76</sup> in the *Delverde* Final Redetermination,<sup>77</sup> which assumes a complete pass through of subsidies to a newly privatized entity, does not seem likely to gain acceptance by United States trading partners.<sup>78</sup>

The international debate is certain to continue in light of Commerce's recent final redeterminations.<sup>79</sup> The European Commission has already requested consultations on United States Countervailing Duty Orders on several privatized entities.<sup>80</sup> Thus, the change-of-ownership provision promulgated via the URAA persists and the question of whether the URAA codified the WTO Subsidies Agreement in a way that is consistent with its obligations remains.<sup>81</sup>

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74. See *Delverde*, 202 F.3d at 1366 (applying URAA statute, which prohibits a per se rule assuming pass through of subsidies with change-of-ownership).

75. See *British Steel Panel Decision*, *supra* note 12, para. 6.86 (finding the United States in violation of its WTO Subsidies Agreement Article 10 obligations).

76. See *supra* notes 38-40 and accompanying text (explaining that this methodology completely disregards whether there was a fair market value change-of-ownership transaction).

77. See *supra* note 14 (describing privatization/ change-of-ownership methodology after the Federal Circuit's June 2000 decision).

78. See *Status of Dispute Settlement*, *supra* note 2, para. VII(78) (alleging the United States' violation of WTO commitments based on continued application of the change-of-ownership methodology, otherwise known as GIA methodology).

79. See *supra* notes 14-15 (noting Commerce's application of a new methodology in *Delverde* and several steel cases in response to the CIT's remand order).

80. See *Status of Dispute Settlement*, *supra* note 2, para. VII(72), at 40 (asserting United States' violation of WTO commitments based on continued application of the change-of-ownership methodology). The United States Trade Representative ("USTR") requested comments on the EC's allegations. See *WTO Consultations Regarding Countervailing Duty Measures Concerning Certain Products from the European Communities*, 65 Fed. Reg. 76,336 (Dec. 6, 2000). As of February 15, 2001, The Stainless Steel Industry of North America, Inc. ("SSINA") and New World Pasta, Inc. had filed comments. See *Letter from Eric R. McClafferty, Esq., Collier Shannon Scott, PLLC, to Sandy McKinzy, USTR Office of the General Counsel 4* (Jan. 16, 2001) (on file with the author) (explaining the EC complaint is moot since in the aftermath of *Delverde* Commerce has "replaced" the methodology used in the countervailing duty orders cited by the EC); *id.* at 6-7 (suggesting EC reliance on the *British Steel Panel Decision* is misguided because that decision was limited to the facts of that case).

81. See *Codevilla*, *supra* note 8, at 462 (arguing that URAA amendments

It is instructive to examine the overall development of the WTO Subsidies Agreement and the provisions of this Agreement at issue, in order to highlight the conflict between current application of United States countervailing duty law and the United States' international obligations.

## II. THE WTO SUBSIDIES AGREEMENT: UNITED STATES' INTERNATIONAL OBLIGATIONS

The WTO Subsidies Agreement is the culmination of great effort and much debate over the development of a multilateral agreement addressing the issue of subsidies, their effect on trade, and legal responses to subsidized goods by individual countries, otherwise referred to as countervailing duty laws.<sup>82</sup> Nations first addressed the subject of subsidies in a multilateral context in the original GATT of 1947.<sup>83</sup> The major international agreements relevant to the

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regarding change-of-ownership and benefit to recipient are inconsistent with the WTO Subsidies Agreement).

82. See generally JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 279-303 (MIT Press, 2d ed. 1997) (discussing the economic effect of subsidies and evolution of current international subsidies disciplines); M. Jean Anderson & Gregory Husisian, *The Subsidies Agreement*, in *THE WORLD TRADE ORGANIZATION: MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION* 299 (Terence P. Stewart ed., 1996) (summarizing the multilateral subsidies system pre-Uruguay, outlining United States negotiating objectives in the Uruguay Round with respect to subsidies, and describing the WTO Subsidies Agreement, including codification of the WTO Subsidies Agreement in United States law); *NEGOTIATING HISTORY*, *supra* note 6, at 809-1007 (reviewing various approaches to refining the multilateral subsidies disciplines pre-Uruguay and various proposals during Uruguay negotiations); Jacques H.J. Bourgeois, *The GATT Rules for Industrial Subsidies and Countervailing Duties and the New GATT Round – The Weather and the Seeds*, in 5 *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* 219-35 (Ernst-Ulrich Petersmann & Meinhard Hilf eds., 2d 1990) (noting economic backdrop when Uruguay Round negotiations on subsidies began and describing problems with 1979 Subsidies Code).

83. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187, arts. II (para. 4), VI, XVI [hereinafter GATT 1947]; JACKSON, *supra* note 82, at 285-86 (1997) (observing that the GATT 1947 treatment of subsidies was limited, but included permission to use countervailing duties, a reporting requirement, and a general obligation to refrain from imposing subsidies, which inhibited trade); *NEGOTIATING HISTORY*, *supra* note 6, at 813-15 (noting that Article VI addressed imposition of anti-dumping and countervailing duties, while Article XVI outlined general obligations

development of multilateral subsidies regimes, after 1947, are the 1979 GATT Subsidies Code ("1979 Subsidies Code")<sup>84</sup> and the current regime embodied in the WTO Subsidies Agreement.<sup>85</sup>

#### A. THE BEGINNING: 1979 SUBSIDIES CODE

After the original GATT of 1947, the next comprehensive treatment of subsidies came in the Tokyo Round GATT negotiations, which resulted in the 1979 Subsidies Code.<sup>86</sup> During the Tokyo Round, the United States advocated stricter rules to govern the use of subsidies, but many other participants were reluctant to restrain their abilities to use domestic subsidies.<sup>87</sup> Instead, these other participants focused on restraining the United States' ability to use countervailing duties.<sup>88</sup> One criticism of the 1979 Subsidies Code was that it did not

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regarding subsidies and in particular focused on export subsidies). Prior to 1947, bilateral treaties addressed the subsidies issue. See JACKSON, *supra* note 82, at 285.

84. See Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 57 (1980) [hereinafter 1979 Subsidies Code] (outlining rules for international subsidies regime).

85. See generally WTO Subsidies Agreement, *supra* note 11 (outlining multilateral subsidies discipline).

86. See JACKSON, *supra* note 82, at 288-89 (explaining that the 1979 Subsidies Code addressed international rules on how governments should implement their countervailing duty laws); *id.* (outlining international obligations with respect to subsidies, such as commitments to refrain from imposing export subsidies and general statements regarding valid policy objectives of domestic subsidies); NEGOTIATING HISTORY, *supra* note 6, at 817 (explaining that the United States agreed to use the material injury test in its application of countervailing duty investigations of products from countries that agreed to be bound by the 1979 Subsidies Code in return for the more comprehensive treatment of subsidies in the Agreement).

87. See NEGOTIATING HISTORY, *supra* note 6, at 816 (stating that many countries believed rules regarding subsidies would infringe on "internal policy matters"); see also *id.* at 815 n.26 (citing 1984 report, which found significant increases in the use of subsidies as a percentage of GDP by European countries).

88. See *id.* at 815-16 (suggesting that economic conditions were influencing parties' reluctance to restrain subsidies); see also S. REP. NO. 96-249, at 40-41 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 426-27 (recognizing that the United States' primary motivation in the Tokyo negotiations was to impose "greater discipline" on trading partners using subsidies, while trading partners sought adoption of the material injury test into United States countervailing duty law).

specifically define the term subsidy.<sup>89</sup> Until the WTO Subsidies Agreement, a subsidy was defined in general terms with an “illustrative” list of export subsidies and ambiguous language regarding “subsidies other than export subsidies,” or in other words, domestic subsidies.<sup>90</sup>

## B. WTO SUBSIDIES AGREEMENT: DEFINING A SUBSIDY

The WTO Subsidies Agreement, which became effective in 1995,<sup>91</sup> was the result of many years of tough negotiations during the Uruguay Round.<sup>92</sup> The WTO Subsidies Agreement is important because, unlike the 1979 Subsidies Code, it includes a general definition for a “subsidy”<sup>93</sup> and it is mandatory for all WTO

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89. See Bourgeois, *supra* note 82, at 228 (suggesting that lack of a subsidy definition made realization of a consensus difficult in negotiating future refinements of the 1979 Subsidies Code); see also NEGOTIATING HISTORY, *supra* note 6, at 847 (noting that the subsidy definition was a major unresolved issue in the Tokyo Round that needed to be addressed during the Uruguay Round).

90. See 1979 Subsidies Code, *supra* note 84, art. 11, annex at 80-82 (listing prohibited export subsidies); see also Klaus Kautzor-Schroder, *Subsidies and Countervail in the Uruguay Round: A Comment*, in 5 THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS, *supra* note 82, at 237-38 (noting a correlation between ambiguities of the 1979 Subsidies Code and the high incidence of disputes and panel proceedings).

91. See WTO Annual Report 2000, *supra* note 6, at 44 (noting the effective date of the WTO Subsidies Agreement was January 1, 1995).

92. See NEGOTIATING HISTORY, *supra* note 6, at 833-34 (observing that global economic recessions of the 1980s led to increased trade tensions, especially in the area of subsidies, and the growing recognition in the early 1980s that subsidies would have to be a priority in the next negotiating round); see also *id.* at 844-45 (recognizing the United States' interest in the issue driven by an overall belief that subsidies were trade distorting, while other participants saw subsidies as a legitimate economic policy tool and sought to restrain the United States' countervailing duty investigations); *id.* at 861, 863 (noting that the United States proposal for subsidy definition included benefits to recipient, whereas the EC proposal for the same definition included a benefit to the recipient that resulted in a net cost to the government). The language ultimately appears to reflect the former approach. *Id.*; see *id.* at 872-73 (describing the United States position supporting the elimination of domestic subsidies as contentious); See *id.* at 875 (considering subsidies negotiations among the “most difficult” within the Uruguay Round).

93. See WTO Subsidies Agreement, *supra* note 11, art. 1.1. Article 1.1 states: a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to

members.<sup>94</sup> Although this agreement was modeled on the 1979 Subsidies Code, it is broader in scope.<sup>95</sup> More importantly, WTO members may enforce this agreement through the WTO Dispute Settlement Mechanism.<sup>96</sup> The WTO Subsidies Agreement provides comprehensive rules in the subsidies area.<sup>97</sup>

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in this Agreement as "government"), i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [footnote omitted]; (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) or (iii) above which would normally be vested in the government and the practice in no real sense differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred.

*Id.* (emphasis added).

94. See Statement of Administrative Action, *reprinted in* Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, 103d Cong., 2d Sess., H.R. DOC. NO. 103-316, at 910 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4228 [hereinafter SAA] (explaining how the WTO Subsidies Agreement improved on the 1979 Subsidies Code). *Cf.* JACKSON, *supra* note 82, at 290 (stating that at the end of GATT's existence and the end of the Uruguay Round only twenty-four countries had ratified the 1979 Subsidies Code).

95. See *generally* Anderson & Husisian, *supra* note 82, at 309 (remarking that the WTO Subsidies Agreement dramatically expanded types of prohibited subsidies by making all export subsidies - previously limited to particular types of products - and import substitution per se inconsistent with signatories' obligations).

96. See WTO Subsidies Agreement, *supra* note 11, art. 30 & n.35 (providing that the Agreement is subject to a dispute settlement mechanism, and noting that national countervailing duty investigations may parallel WTO enforcement actions, but members are limited to one remedy); see also Anderson & Husisian, *supra* note 82, at 303, 310 (noting the importance of enforcing subsidies disciplines through the WTO dispute settlement mechanism and providing an overview of the dispute settlement process under the WTO Subsidies Agreement).

97. See JACKSON, *supra* note 82, at 290 (stating that the WTO Subsidies Agreement effectively replaced the 1979 Subsidies Code because of its extensive and detailed treatment of the subsidies issue); see also STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES 59, 61-65 (Comm. Print 1997) (discussing highlights of the WTO Subsidies Agreement, including the red, yellow, and green light



The WTO Subsidies Agreement contains five major parts and is divided into two subject areas: (1) general international obligations (Parts I, II, III, IV) regarding different types of subsidies; and (2) disciplines for national countervailing duty laws (Part V).<sup>98</sup> Part I of the WTO Subsidies Agreement defines the term “subsidy” and requires that the subsidy be specific to a “certain enterprise” in order to qualify as prohibited, actionable, or subject to national countervailing duty laws.<sup>99</sup> Part II outlines prohibited or so-called “red light” subsidies, which generally include export subsidies and import substitution policies.<sup>100</sup> Part II also references Annex I as an “illustrative list,” but not necessarily a complete list, of prohibited subsidies.<sup>101</sup> The majority of subsidies, however, fall within the

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approaches to distinguishing between types of subsidies).

98. See WTO Subsidies Agreement, *supra* note 11 (setting forth the two-part structure of the Agreement); see also WTO, *Subsidies and Countervailing Measures: Overview*, at [http://www.wto.org/english/tratop\\_e/scm\\_e/scm.htm](http://www.wto.org/english/tratop_e/scm_e/scm.htm) (May 20, 1998) (outlining the structure and coverage of the Agreement, general categories of subsidies, and requirements for countervailing measures). Other parts of the WTO Subsidies Agreement include: (1) provisions establishing a Committee on Subsidies and Countervailing Measures within the WTO (art. 24); (2) provisions requiring members to notify the WTO regarding specific subsidies so that these subsidies may be evaluated (arts. 25-26); (3) rules for developing countries, which require phasing out export subsidies and import substitution policies (i.e., subsidies contingent on using domestic inputs over imported goods) (art. 27); and (4) provisions for countries making transition from centrally planned to market economies (arts. 28-29). WTO Subsidies Agreement, *supra* note 11. The WTO Subsidies Agreement addresses privatization only in Article 27.13, which states that debt forgiveness and “subsidies to cover social costs,” when used on a non-recurring basis and when “directly linked” to privatization of enterprises, will not be actionable for developing countries. *Id.* art. 27.13.

99. See WTO Subsidies Agreement, *supra* note 11, art. 2 (explaining the circumstances under which objective criteria for eligibility as a subsidy, articulated in law or regulation and verifiable, will not be considered specific to “certain enterprise”); see also JACKSON, *supra* note 82, at 296 (explaining that a subsidy is not specific where it is generally available for use by all exporters and noting that the specificity concept was first articulated in United States law); see also NEGOTIATING HISTORY, *supra* note 6, at 819-20 (indicating that Tokyo Round negotiators discussed the idea of a specific definition for subsidy but the general consensus was that a definition would be “either under- or over-inclusive”).

100. See WTO Subsidies Agreement, *supra* note 11, arts. 3, 4 (stating “subsidies contingent, in law or . . . upon export performance” are unlawful under this Agreement) (footnote omitted).

101. See *id.* annex I, at 262 (listing twelve examples of prohibited subsidies, including direct subsidies from the government contingent on exporting, tax breaks

“yellow light” category, outlined in Part III.<sup>102</sup> Part IV describes the so-called “green light” or legal subsidies.<sup>103</sup>

Finally, if a country chooses to utilize countervailing duty measures in response to illegal subsidies, Part V outlines guidelines for administering countervailing duty laws.<sup>104</sup> Part V does not include any rules specific to the privatization situation.<sup>105</sup> WTO members who have codified these provisions into their national laws have implemented the Agreement to varying degrees, but the United States codified these provisions through the Uruguay Round Agreements Act in 1994.<sup>106</sup>

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related to exports, government provided export credit guarantees, or insurance programs).

102. See *id.* arts. 5, 6, & 7 (providing that subsidies that have “adverse effects” on other members or cause “serious prejudice” are grounds for members to request consultations under auspices of the WTO); see also JACKSON, *supra* note 82, at 292 (suggesting this is a “residual” category of all things not provided for in the strictly prohibited subsidies).

103. See WTO Subsidies Agreement, *supra* note 11, art. 8 (listing legal subsidies subject to certain criteria, including subsidies for research assistance, assistance to disadvantaged regions, and assistance for environmental adaptation); *id.* art. 31 (sun-setting so called “green light” (i.e., legal) subsidies as of December 1999); SAA, *supra* note 94, at 917 (explaining that Congress agreed to limited legal subsidies as long as such subsidies meet strict criteria); United States Trade Representative and Department of Commerce, *Subsidies Enforcement Annual Report to Congress*, pt. B at 1 at <http://ia.ita.doc.gov/esel/reports/seo2000/report2k.html> (Feb. 2000) (explaining that the WTO Subsidies Committee failed to reach consensus on whether or how to extend “green light” subsidy provisions; therefore, provisions expired Jan. 1, 2000).

104. See WTO Subsidies Agreement, *supra* note 11, arts. 10-23 (providing rules for initiating investigations, gathering evidence, and determining and imposing injuries; providing “guidelines” for assessing whether a benefit has been conferred; and incorporating Article VI of GATT 1994). See generally Anderson & Husisian, *supra* note 82, at 304-05 (describing the general outline of the WTO Subsidies Agreement).

105. Cf. WTO Subsidies Agreement, *supra* note 11, art. 27.13 (noting that subsidies directly linked to privatization and given in a developing country may not be actionable under the Agreement).

106. See URAA, *supra* note 32 (codifying the Uruguay Round Agreements into United States law).

### C. HARMONIZING UNITED STATES LAW WITH THE WTO SUBSIDIES AGREEMENT

Generally, the WTO Subsidies Agreement is considered a negotiating success for the United States because it strengthens subsidy disciplines and generally reflects United States countervailing duty law.<sup>107</sup> Congress harmonized United States law with the WTO Subsidies Agreement through the 1994 URAA.<sup>108</sup> The URAA did not make wholesale changes to United States law, but Congress did make some important changes to reflect United States obligations under the WTO Subsidies Agreement.<sup>109</sup> The URAA replaced an arguably ambiguous subsidy definition in United States law<sup>110</sup> with the subsidy definition from the WTO Subsidies Agreement, imposing a few clarifications.<sup>111</sup>

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107. See Anderson & Husisian, *supra* note 82, at 303 (describing WTO Subsidies Agreement as “a major negotiating victory” for the United States); see also *id.* at 299 (explaining the breakthrough nature of the WTO Subsidies Agreement in relation to 1979 Subsidies Code).

108. See URAA, *supra* note 32 (codifying the 1994 Uruguay Round Agreement, which included the WTO Subsidies Agreement).

109. See Anderson & Husisian, *supra* note 82, at 329-37 (detailing changes in United States countervailing duty law). New provisions were added to (1) coordinate United States countervailing duty investigations with WTO enforcement actions and (2) strictly monitor WTO members’ use of “green light” subsidies. *Id.* Changes to United States countervailing duty law included: (1) general definition of subsidy; (2) specificity standards; (3) injury test for all WTO members; and (4) rules requiring “sunset reviews” of pre-existing orders to limit duration of countervailing duty orders. *Id.*; see also H.R. REP. NO. 103-826(I), at 106-27 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3880-99 (explaining various provisions of URAA implementing the WTO Subsidies Agreement).

110. See Codevilla, *supra* note 8, at 439 (suggesting ambiguity in the pre-URAA subsidy definition, which considered a subsidy to have the same meaning as “bounty or grant,” but neither bounty nor grant was defined in the statute); see also Andoh, *supra* note 35, at 1523 (discussing early case law regarding subsidy definition, which tended to define the term broadly and found subsidy to exist where “something of value was given to a foreign company”).

111. See SAA, *supra* note 94, at 912-13 (noting that “guidelines” for assessing “benefit” are expressed in Article 14 of WTO Subsidies Agreement, which, according to the United States, reflects benefit-to-recipient methodology, as opposed to net cost-to-government methodology that others, including the EC, support in negotiations); Mark D. Herlach & David Codevilla, *Major Changes in U.S. Countervailing Duty Law: A Guide to the Basics*, 722 PLI/CORP 53, 58-63 (1995) (describing provisions of URAA implementing the WTO Subsidies

The changes to URAA sections 771(5)(C)<sup>112</sup> regarding “other factors,” 771(5)(E)<sup>113</sup> regarding benefit, and 771(5)(F)<sup>114</sup> regarding change-of-ownership are most relevant to the discussion in this Comment. Section 771(5)(C) clarifies that Commerce is not required to consider the effect of a subsidy in determining whether a subsidy exists.<sup>115</sup> Section 771(5)(E) seems to codify Article 14 of the WTO Subsidies Agreement, which describes how to determine a benefit.<sup>116</sup> While section 771(5)(E) lists the same basic factors as Article 14 for determining when a benefit is conferred,<sup>117</sup> a subtle change exists in

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Agreement definition of subsidy).

112. See 19 U.S.C. § 1677(5)(C) (1994) (noting that a subsidy can be direct or indirect and clarifying that Commerce is not required to “consider the effect of a subsidy in determining whether a subsidy exists”).

113. See 19 U.S.C. § 1677(5)(E) (1994) (stating that “a benefit shall normally be treated as conferred . . .”).

114. See 19 U.S.C. § 1677(5)(F) (1994) (indicating that a change-of-ownership is not a sufficient ground to assume that a prior subsidy no longer is countervailable, even if the change occurred via an arm’s-length transaction); see also Codevilla, *supra* note 8, at 461-62 (observing that drafters of the change-of-ownership amendment, who generally represented domestic steel and lumber industries, pushed the amendment to address 1994 CIT cases, which held that fair market value change-of-ownership transactions extinguish benefit of prior non-recurring subsidies). Codevilla, who was a Senate staffer at time of the URAA drafting, also notes that there was little debate or understanding of implications of this amendment by members of Congress. *Id.*

115. See SAA, *supra* note 94, at 926 (noting Administration’s intent that “a new definition of subsidy does not require that Commerce consider or analyze the effect of a government action on the price or output of the class or kind of merchandise under investigation or review.”); see also Rushford, *supra* note 35, at 492 (explaining that administration of United States countervailing duty law is a “multiagency, multistep process” in which Commerce makes the threshold determination of whether or not a subsidy exists).

116. See 19 U.S.C. § 1677(5)(E)(i), (iv) (1994) (describing situations where benefit is conferred to include terms “inconsistent with usual investment practices of private investors” or where goods or services are “provided for less than adequate remuneration”); WTO Subsidies Agreement, *supra* note 11, art. 14 (explaining that a government-provided equity or loan, etc. “shall not be considered as conferring a benefit, unless” in situations where provision is inconsistent with commercial terms or usual investment practice); see also H.R. REP. NO. 103-826(I), at 109, *reprinted in* 1994 U.S.C.C.A.N. 3773, 3881 (noting the congressional view that this provision is consistent with the WTO Subsidies Agreement and reflects the benefit-to-recipient standard long supported by the United States).

117. See WTO Subsidies Agreement, *supra* note 11, art. 14 (listing the types of

the language of United States law that presumes a benefit unless proven otherwise.<sup>118</sup> Section 771(5)(F) clarifies that selling a business entity in an arm's-length transaction is not determinative on the question of whether prior subsidies conferred have been extinguished.<sup>119</sup>

In the aftermath of URAA and after three years of debate,<sup>120</sup> Commerce promulgated final countervailing duty rules to reflect changes in the law.<sup>121</sup> Commerce received many comments on the privatization issue, specifically regarding the new change-of-ownership provision, but Commerce ultimately retained the status quo GIA methodology for applying countervailing duty law in the privatization context.<sup>122</sup> Commerce's interpretation of what is required under the URAA and the WTO Subsidies Agreement in defining a subsidy is a source of conflict among the United States and the WTO's recent *British Steel Panel Decision*.<sup>123</sup> Thus, it is important to analyze the subsidy definition under the WTO Subsidies

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transactions that will confer a benefit).

118. See Herlach & Codevilla, *supra* note 111, at 61-62 (arguing that Article 14 language does not presume a benefit is conferred). Article 14 presumes there is *no* benefit unless a financial contribution is given on terms inconsistent with commercial considerations. *Id.* In other words, a benefit exists if a loan is given at below market terms or an equity infusion is made without consideration for market value. *Id.* In contrast, URAA language implementing Article 14 begins with the presumption that there *is* a benefit unless respondent proves otherwise. *Id.*

119. See H.R. REP. NO. 103-826(I), at 110 (recognizing that privatization is a "complex and multifaceted" transaction and directing Commerce to exercise discretion by considering facts of each case).

120. See Comments on the Proposed CVD Regulations (1997), at <http://ia.ita.doc.gov/cvd-cmts/> (June 6, 1997) (listing several sets of comments from various parties dated June and December 1997).

121. See Final Rule Countervailing Duties, 63 Fed. Reg. 65,348, 65,348-65,418 (Nov. 25, 1998) (outlining changes in countervailing duty regulations).

122. See *id.* at 65,355 (stating reluctance to codify a privatization methodology and apparently deferring to the courts' future interpretation of law to validate or reject commenters' suggested methodologies). Commerce further stated "rapidly changing economic conditions around the world, particularly with respect to state ownership" indicate it would be prudent to allow further policy development on the privatization issue. *Id.*

123. See *British Steel Panel Decision*, *supra* note 12, para. 6.85 (finding that Commerce did not construe "benefit" as intended under the WTO Subsidies Agreement, thus Commerce's methodology did not sufficiently demonstrate existence of a subsidy).

Agreement and discuss the potential ambiguity in this definition.

### III. ANALYSIS OF RELEVANT PROVISIONS OF WTO SUBSIDIES AGREEMENT

Trade negotiators have long focused on reducing tariff barriers and have largely succeeded in that area throughout the various trade rounds since the founding of GATT in 1947.<sup>124</sup> The more difficult task for trade negotiators, which began in earnest in Tokyo in 1979, has been to address non-tariff barriers to trade, such as subsidies.<sup>125</sup> The subsidies issue, first addressed on a multilateral basis in the 1979 Subsidies Code, was part of the Uruguay Round negotiations.<sup>126</sup> By the end of the Uruguay Round, trade negotiators were successful in establishing a viable framework for addressing trade-distorting mechanisms like subsidies.<sup>127</sup>

#### A. WTO SUBSIDIES AGREEMENT: ASSESSMENT

In general, through the WTO Subsidies Agreement, the United States has achieved its objective of creating an effective mechanism to control foreign subsidies.<sup>128</sup> The United States has won WTO

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124. See ORG. FOR ECON. COOPERATION AND DEV., OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALISATION 31 (OECD ed., 1998) (noting reduction of tariffs from an average of forty percent in 1947 to an average of four percent after Uruguay Round). The OECD Report emphasizes the correlation of market-oriented economic policies and liberalization of trade and investment with increasing economic growth. *Id.*

125. See JACKSON, *supra* note 82, at 279-85 (discussing economic and political aspects of subsidies in international trade). The unique achievement of the Uruguay Round is that it expanded the scope of the international rules-based trading system beyond tariff reduction to non-tariff barriers such as subsidies. *Id.* at 305.

126. See *id.* at 290 (explaining that the subsidies agreement that emerged from Uruguay Round utilized a conceptual framework first proposed in Tokyo).

127. See Anderson & Husisian, *supra* note 82, at 299 (emphasizing improvements in WTO Subsidies Agreement over the 1979 Subsidies Code).

128. See Richard O. Cunningham, *Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures*, 31 LAW & POL'Y INT'L BUS. 897, 904 (2000) (noting the United States' success with WTO Subsidies Agreement and raising the question why more United States companies do not pursue complaints under this agreement). *But see* Paul C. Rosenthal & Robert T.C. Vermeylen, *The WTO Antidumping and Subsidies*

cases in which the country alleged WTO Subsidies Agreement violations.<sup>129</sup> Further, in the Canadian Aircraft Panel Decision, the WTO validated the United States' long held benefit-to-recipient standard for finding a subsidy.<sup>130</sup> The difficulties negotiators face in defining a subsidy, however, continue with application of the subsidy definition in WTO disputes regarding the Subsidies Agreement.<sup>131</sup>

The WTO Subsidies Agreement has been the subject of a number of disputes before the WTO Dispute Settlement Body, including those concerning the definition of a subsidy and related issues under the Agreement.<sup>132</sup> These decisions begin the process of testing the

*Agreements: Did the United States Achieve its Objectives During the Uruguay Round*, 31 LAW & POL'Y INT'L BUS. 871, 885 (describing British Steel Panel Decision as "disturbing" because it did not defer to Commerce's finding and requires Commerce to conduct "a new analysis of how the subsidies benefit new owners of a firm" with each change-of-ownership). Rosenthal and Vermeylen argue there is a need for further interpretation of the WTO Subsidies Agreement. *Id.* at 872.

129. See WTO Panel Report on Indonesia - Certain Measures Affecting the Automobile Industry, WT/DS55/R, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e](http://www.wto.org/english/tratop_e/dispu_e/distab_e) (July 2, 1998); WTO Panel Report on Australia—Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/R, at [http://www.wto.org/english/tratop\\_e/dispu\\_e/distab\\_e](http://www.wto.org/english/tratop_e/dispu_e/distab_e) (May 25, 1999). The United States initiated twelve of the completed cases where panel reports were issued and won the two cases it initiated regarding the WTO Subsidies Agreement. See Status of Dispute Settlement, *supra* note 2, para. VIII A (listing completed WTO cases where the panel issued a decision).

130. See WTO Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R para. 156 (Aug. 2, 1999) [hereinafter Canada-Aircraft Appellate Body Report] (stating determination of the cost to government is not an element for deciding whether there has been a benefit); see also JOINT REP. OF U.S. TRADE REPRESENTATIVE AND COM. DEP'T: SUBSIDIES ENFORCEMENT ANN. REP. TO CONG. 23, at <http://ia.ita.doc.gov/esel/reports/seo2001/report2001.html> (Feb. 2001) [hereinafter Subsidies Enforcement Annual Report] (confirming the United States approach to determining subsidy, which is to ask "whether the recipient received something on better-than-market terms," versus what the subsidy cost the government).

131. See Canada-Aircraft Appellate Body Report, *supra* note 130, para. 154 (Aug. 20, 1999) (stating that a benefit is present when someone can receive and use the benefit); *id.* para. 155 (asserting a link between a benefit as described in Article 14 and as used in Article 1.1(b)).

132. See Status of Dispute Settlement, *supra* note 2 (reporting the WTO Dispute Settlement Body has heard twenty-five distinct matters related to the WTO Subsidies Agreement).

consensus that negotiators reached in the Uruguay Round.<sup>133</sup> The heart of the dispute in a countervailing duty investigation of a privatized entity is the question of when a subsidy exists.<sup>134</sup> Before turning to a specific dispute regarding the subsidy definition, one must understand what the consensus was regarding the definition of a subsidy at the end of the Uruguay Round.

## B. WTO SUBSIDIES AGREEMENT DEFINES A SUBSIDY

As mentioned earlier, an important breakthrough in negotiations accompanied acknowledgement of a general definition of a subsidy.<sup>135</sup> The WTO Subsidies Agreement subsidy definition requires a finding of a direct or indirect financial contribution by a government actor and a benefit subsequently conferred.<sup>136</sup> This definition remains ambiguous, however, because the WTO Subsidies Agreement does not explicitly define the “benefit” requirement of the subsidy definition.<sup>137</sup> The WTO Subsidies Agreement leaves part of the subsidy definition ambiguous perhaps in part because a more specific definition in theory would limit the discretion of national

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133. Cf. Guy de Jonquieres, *Europe Breaks WTO Rules on Anti-dumping*, FIN. TIMES, Mar. 2, 2001; Edward Alden & Frances Williams, *WTO Orders U.S. Dumping Law to Change*, FIN. TIMES, Mar. 1, 2001; Frances Williams, *Censure for U.S. Over Steel Duties*, FIN. TIMES, Feb. 26, 2001 [hereinafter Recent WTO Anti-dumping Decisions] (illustrating several cases where the consensus reached on the WTO anti-dumping agreement is being tested and where the United States and the EC have been on the losing end of Panel decisions).

134. See Anderson & Husisian, *supra* note 82, at 301 (listing as one of the primary goals of American negotiators during the Uruguay Round better recognition of when a subsidy exists).

135. See *id.* at 305 (noting that Tokyo negotiators did not reach a consensus on subsidy definition, and instead hoped that an international consensus would “evolve in practice”).

136. See WTO Subsidies Agreement, *supra* note 11, art. 1.1. This definition is not unlike the definition codified in United States law. See 19 U.S.C. § 1677 (5)(B) (1994) (requiring a financial contribution and a benefit conferred for a subsidy determination to exist).

137. See Anderson & Husisian, *supra* note 82, at 306 (explaining that “benefit” is not explicitly defined, while “financial contribution” is defined in the Agreement); compare WTO Subsidies Agreement, *supra* note 11, art. 1.1(a) (listing four examples of financial contributions) with WTO Subsidies Agreement, *supra* note 11, art. 1.1(b) (stating without clarification, “and a benefit is thereby conferred”).



agencies that administer countervailing duty laws.<sup>138</sup>

The key to the privatization question is clarifying the second part of the subsidy definition regarding benefit.<sup>139</sup> Specifically, the question remains as to how to measure the conferral of a benefit, if any, to a newly privatized entity that received a subsidy before privatization, but has not received a subsidy as a private entity. Application of the subsidy definition answers the threshold question of whether there is an actionable subsidy subject to countervailing duties or dispute settlement.<sup>140</sup> Although the WTO Agreement is not clear on how to define a benefit,<sup>141</sup> the “benefit” component of the subsidy definition could be defined by reference to Article 14 of the WTO Subsidies Agreement.<sup>142</sup>

Article 14 provides “guidelines” for calculating the “Amount of Subsidy in Terms of the Benefit to the Recipient.”<sup>143</sup> These guidelines begin with the presumption that there is no benefit unless the equity infusion, loan, loan guarantee, provision of goods and services, or purchase of goods and services occurs on terms

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138. See Codevilla, *supra* note 8, at 439 (suggesting, in the case of pre-URAA United States law, that an ambiguous subsidy definition gave greater discretion to administering agencies, resulting in “inconsistent and economically questionable definitions of subsidies.”).

139. See WTO Subsidies Agreement, *supra* note 11, art. 1.1 (giving some clarification on “financial contribution” but no clarification on second part of subsidy definition “benefit”).

140. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES 59 (Comm. Print 1997) (discussing application of United States countervailing duty law).

141. See WTO Subsidies Agreement, *supra* note 11, art. 1.1(b) (linking conferral of a benefit to government financial contribution in the definition of a subsidy).

142. See WTO Subsidies Agreement, *supra* note 11, art. 14 (describing permissible calculation of subsidy amount “in terms of the benefit to the recipient”); see also Gary N. Horlick & Peggy A. Clarke, *The 1994 WTO Subsidies Agreement*, 863 *PLI/CORP* 683, 705 (1994) (stating Article 14 is the “only Article to provide guidance on the measurement of a benefit conferred by actionable subsidies for countervailing duty purposes.”).

143. See WTO Subsidies Agreement, *supra* note 11, art. 14 (establishing four guidelines, which generally set forth commercial benchmarks used to measure the benefit conferred to recipient); see also SAA, *supra* note 94, at 912 (equating the definition of benefit in Article 14 with the benefit required in Article 1.1(b) general subsidy definition).

inconsistent with commercial or market-based terms.<sup>144</sup> These guidelines suggest that an arm's length transaction between unrelated parties, each acting in its own interest and who negotiate and arrive at a fair market value price, would not confer a benefit because the new owners paid for all they received.<sup>145</sup>

In order to understand how the WTO Dispute Panel applies the definition of a subsidy in the privatization context and whether a benefit passes through to the new owner, Part IV analyzes a specific case. In *British Steel*, the WTO Dispute Panel rejected Commerce's methodology for applying the subsidy definition in the privatization context and held that a benefit cannot be presumed in a privatization situation.<sup>146</sup>

#### IV. CASE STUDY: BRITISH STEEL

In the *British Steel* case, the WTO Dispute Panel found the privatization methodology used by Commerce in countervailing duty investigations inconsistent with the United States' obligations under the WTO Subsidies Agreement.<sup>147</sup> While the *British Steel* case was pending before the WTO, a sunset review<sup>148</sup> of the countervailing duty order at issue resulted in its revocation.<sup>149</sup> Subsequently, the

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144. See WTO Subsidies Agreement, *supra* note 11, art. 14(a)-(d) (listing "guidelines" for determining existence of a benefit).

145. See Codevilla, *supra* note 8, at 455 (arguing that no benefit can exist where the terms of a commercial transaction between a private entity and the government are consistent with normal commercial terms).

146. See *British Steel* Panel Decision, *supra* note 12, paras. 6.70-.71 (stating that change-of-ownership should have prompted Commerce to examine whether production by new owners was subsidized).

147. See *id.* para. 6.85 (finding Commerce's methodology did not establish whether or not the respondent received a benefit).

148. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., OVERVIEW AND COMPILATION OF UNITED STATES TRADE STATUTES 59, 76-77 (Comm. Print 1997) (describing a provision of Uruguay Round Agreement, which requires termination of a countervailing duty order after five years unless the agency finds that expiration will likely lead to continuation or recurrence of subsidies).

149. See Sunset Review: Final Results of Reviews and Revocation, 64 Fed. Reg. 61,821 (Nov. 15, 1999) (revoking countervailing duty order effective January 1, 2000 because no domestic party responded to sunset review notice).

United States reported to the WTO that no further action was necessary to comply with the Dispute Panel's final ruling.<sup>150</sup> The European Commission's ("EC") recent challenges to twelve United States countervailing duty orders against EC imports<sup>151</sup> and several steel/privatization related cases pending before the CIT<sup>152</sup> indicate that litigation over the subsidies issue will continue. In light of these pending cases, it is instructive to analyze the WTO Dispute Panel's application of the subsidy definition in the *British Steel* decision. The following discussion describes the privatization transaction and the countervailing duty investigation at issue in *British Steel*.

### A. BRITISH STEEL FACTUAL BACKGROUND

In order to give context to this dispute, a brief history on the companies whose products were subject to countervailing duties is necessary. United Engineering Steels Limited ("UES"), and British Steel plc ("BSplc"), later renamed British Steel Engineering Steels ("BSES"), had a prior relationship with state-owned British Steel Corporation ("BSC").<sup>153</sup> In 1986, state-owned BSC and privately

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150. See Subsidies Enforcement Annual Report, *supra* note 130, at 26 (reporting that at the WTO meeting of July 5, 2000 the United States noted the British Steel action was closed since the order was no longer in place).

151. See Status of Dispute Settlement, *supra* note 2, para. VII(72) (requesting consultations in November 2000 on the matter of twelve CVD orders against EC, where Commerce's change-of-ownership methodology was used, and alleging violations of the WTO Subsidies Agreement). Brazil also requested consultations on the same issue in December 2000. *Id.* para. VII(78). During the WTO Dispute Settlement body meeting of September 10, 2001, the EC requested and received permission to move the case forward when the WTO agreed to establish a panel to resolve this dispute. See *U.S. Affirms Compliance with WTO Ruling on Korea Stainless Steel Antidumping Duties*, Int'l Trade Rep. (BNA) (Sept. 11, 2001) (noting activities of September 10 meeting of WTO Dispute Settlement Body including EC's request to establish panel to consider twelve U.S. countervailing duty orders imposed on various steel imports from former state-owned mills in France, Germany, Italy, Spain, Sweden, and the United Kingdom).

152. See Steel-Related Redeterminations, *supra* note 15 (describing Commerce's adjustments to prior change-of-ownership determinations and placing the matter before CIT for further consideration).

153. See British Steel Panel Decision, *supra* note 12, paras. 2.3-2.4 (noting the relationship between UES and BSplc/BSES and BSC); see also David White, *Productivity Gains Cannot Stave off Steel's Job Losses*, FIN. TIMES, Jan. 24, 2001, at 12 (reporting on current developments with respect to British Steel, which merged with Netherlands-based Hoogovens in 1999 and was renamed Corus).

owned Guest, Keen and Nettlefolds (“GKN”) created UES in a joint venture.<sup>154</sup> BSC did receive subsidies before it was privatized in 1988, but the subsequent owners of UES (BSES and BSplc) did not receive subsidies.<sup>155</sup> BSC was privatized through a process wherein BSplc was created to assume the rights and liabilities of BSC, and eventually BSplc shares were sold in a transaction “at arm’s length, for fair market value and consistent with commercial considerations” to complete the process.<sup>156</sup> In 1995, BSplc bought out GKN’s interest in UES and renamed UES British Steel Engineering Steels (“BSES”).<sup>157</sup>

The United States first imposed the countervailing duty order at issue in 1993.<sup>158</sup> Subsequent Administrative Reviews of this order in 1995, 1996, and 1997 resulted in the continuation of duties on imports of hot-rolled lead and bismuth carbon steel from UES and BSES.<sup>159</sup> Using its GIA methodology,<sup>160</sup> Commerce allocated pre-privatization subsidies to BSC over a period that included the creation of UES (1986), privatization of BSplc (1988), and buy-out of GKN by BSplc for full ownership of UES and renaming of UES to BSES (1995).<sup>161</sup> Generally, Commerce applied its change-of-

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154. See British Steel Panel Decision, *supra* note 12, para. 2.3 (stating UES was equally owned by BSplc and GKN, which were both privately owned companies).

155. See *id.* para. 6.35 (acknowledging BSC did receive a financial contribution, which conferred a benefit); *id.* para. 6.23 (noting privatization date). Neither party who had owned UES received the alleged subsidies, but state-owned BSC did receive them. *Id.* para. 2.3.

156. See *id.* para. 2.3 (describing privatization process and noting both EC and United States agreed that the transaction was consistent with “commercial considerations”).

157. See *id.* para. 2.4 (noting change in UES’ name to BSES).

158. See Countervailing Duty Order: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom, 58 Fed. Reg. 15,327 (Mar. 22, 1993) (making an affirmative injury determination and authorizing a duty on imports from United Engineering Steels Limited (“UES”) based on 12.69 percent subsidy rate).

159. See British Steel Panel Decision, *supra* note 12, paras. 2.6-2.9 (noting the chronology of Administrative Reviews subsequent to original countervailing duty order).

160. See *supra* notes 41-45 and accompanying text (discussing Commerce methodology).

161. See British Steel Panel Decision, *supra* note 12, para. 6.25 (stating

ownership methodology in the Administrative Reviews and found that the subsidies provided to BSC “traveled” to UES, and thus a portion of the benefit passed through to UES and BSplc/BSES.<sup>162</sup> The EC subsequently challenged the continued imposition of countervailing duties by the United States against imports of hot-rolled lead and bismuth carbon steel products from the United Kingdom.<sup>163</sup>

## B. COUNTERVAILING DUTIES MAY NOT BE IMPOSED UNLESS A SUBSIDY EXISTS

In response to the EC’s challenge, the Panel said the authority to impose countervailing duties is conditioned on fulfilling the terms of the WTO Subsidies Agreement, which is explicit in requiring a subsidy determination consistent with the terms of the Agreement.<sup>164</sup> This requirement underlines the overall purpose of the WTO Subsidies Agreement, which is to offset subsidies.<sup>165</sup> Article 10 of the WTO Subsidies Agreement asserts that a WTO member country is not authorized to impose countervailing duties unless there is a subsidy to offset.<sup>166</sup> Further, Articles 19.1 and 19.4 require a member

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Commerce found that BSC received non-recurring subsidies prior to 1986, which were allocated over a period of fifteen years).

162. *See id.* paras. 6.26-30 (stating outcomes of Administrative Reviews and noting Commerce used a “two-stage” pass through methodology for the 1996 Administrative Review, which covered 1995 imports and BSplc’s acquisition of UES).

163. *See id.* paras. 2.1-.2 (noting preliminary facts of dispute).

164. *See id.* para. 6.57 (stating the cumulative effect of Articles 19.1, 19.4, and 21.1 is to link existence of subsidy with countervailing duty imposition).

165. *See id.* para. 6.56 (asserting overall purpose of WTO Subsidies Agreement is to utilize countervailing duties only when necessary to offset subsidies). The EC argued that the underlying objective of merely offsetting subsidies reflects a “measured response” that “neutralizes” subsidies without going further. *Id.* Attachment 1.1, paras. 90-91. The United States conceded that countervailing duties are imposed to offset subsidies and not to deter, but the United States clarified by saying the overall Agreement is intended to deter use of subsidies. *Id.* Attachment 2.6, paras. 80-81; *Zenith*, 437 U.S. at 455-56 (stating the purpose of United States countervailing duty law was “to offset the unfair competitive advantage” imports may enjoy as a result of government subsidies).

166. *See* WTO Subsidies Agreement, *supra* note 11, art. 10 (requiring members to “take all necessary steps” to ensure that countervailing duty investigations are conducted according to terms of Agreement).

to answer the threshold question of whether a subsidy exists before countervailing duties are imposed.<sup>167</sup> Finally, Article 21.1 links the continuation of a subsidy to persistent imposition of a countervailing duty.<sup>168</sup> Thus, a member country will violate the WTO Subsidies Agreement if the country imposes a countervailing duty and fails to demonstrate the existence of a subsidy.<sup>169</sup> The Panel next asked what criteria the WTO Subsidies Agreement requires in order to find the existence of a subsidy.<sup>170</sup>

### C. CRITERIA FOR FINDING WHETHER A SUBSIDY EXISTS MUST INCLUDE A BENEFIT

Article 1.1 of the WTO Subsidies Agreement requires a financial contribution by a government actor or a benefit conferred for a subsidy to exist.<sup>171</sup> The language of the agreement suggests a causal link between financial contribution and a benefit.<sup>172</sup> The *British Steel* Panel, relying on the *Canadian Aircraft* Panel Decision, found that the word benefit connotes “some form of advantage” such that the recipient has a more advantageous position relative to the market, which it would not have gained but for a financial contribution from the government.<sup>173</sup>

167. See *British Steel* Panel Decision, *supra* note 12, para. 6.50 (stating Article 19.1 conditions countervailing duties on finding existence of a subsidy and finding that subsidized imports are causing domestic products injury). The Panel found in Article 19.4 a “clear nexus” between existence of a subsidy and imposition of countervailing duties. *Id.* para. 6.52.

168. See WTO Subsidies Agreement, *supra* note 11, art. 21.1 (providing “[a] countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury.”).

169. See *British Steel* Panel Decision, *supra* note 12, para. 6.47 (explaining that the country’s failure to adhere to the terms of the WTO Subsidies Agreement when it imposes a countervailing duty results in an Article 10 violation).

170. See *id.*, para. 6.58 (finding the existence of a subsidy to depend on financial contribution by a governmental or public body).

171. See WTO Subsidies Agreement, *supra* note 11, art. 1.1 (requiring a financial contribution or a benefit conferred to find a subsidy).

172. See *British Steel* Panel Decision, *supra* note 12, Attachment 1.1, para. 103 (recognizing a causal relationship and stating the EC argument that “a state-owned company cannot casually confer a benefit on a privately-owned buyer of assets” that were once state-owned in an arm’s length transaction).

173. See *id.* paras. 6.64-66 (finding *Canadian Aircraft* discussions of benefit

The Panel also clarified conditions regarding when a benefit is conferred and to whom or what a benefit is conferred.<sup>174</sup> The Panel disagreed with the United States' argument for an irrebuttable presumption that a benefit is conferred after a change-of-ownership.<sup>175</sup> In addition, the Panel found unpersuasive the United States' argument that the present tense language of Article 1.1 limits the benefit determination to the time that the original subsidy was bestowed, thus there was no need to reassess the benefit.<sup>176</sup> According to the Panel, the benefit and financial contribution must be found during the investigation period and not exclusively at the time of the original subsidy.<sup>177</sup> In support of its claim that a reassessment of benefit was not necessary, the United States argued that a benefit is conferred upon "manufacture, production or export of any merchandise" and not necessarily to a specific person.<sup>178</sup> However, the Panel rejected this approach calling it abstract and illogical, since a recipient must exist in order for a benefit to arise.<sup>179</sup>

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persuasive and holding that determination of a benefit is based on whether "a legal or natural person, has received a financial contribution on terms more favourable than those available to the potential recipient or beneficiary in the market."); *see also* Canada-Aircraft Appellate Body Report, *supra* note 130, para. 155 (asserting that textual reference to Article 1.1 in Article 14 – "benefit to recipient conferred pursuant to paragraph 1 of Article 1" – supports a connection between a benefit conferred relative to the market).

174. *See* British Steel Panel Decision, *supra* note 12, paras. 6.64-.79 (discussing the Panel's interpretation of "benefit").

175. *See id.* para. 6.71 (finding a presumption of benefit with "successor companies" potentially rebutted in certain change-of-ownership situations).

176. *See id.* para. 6.72 (describing the United States' argument, which supported the idea that benefit need only be found at the time of a financial contribution).

177. *See id.* paras. 6.73-.74 (rejecting the United States' argument regarding narrow temporal reading of Articles 1.1 and 14 as inconsistent with the "ordinary meaning" of the language).

178. *See id.* para. 6.77 (explaining the United States' reading of Articles 1.1 and 10 as supporting the view that a "subsidy benefits the manufacture, production or export of merchandise" as opposed to a legal or natural person).

179. *See id.* para. 6.78 (arguing benefit must be determined relative to the recipient and finding the United States approach unworkable); *see also id.* paras. 6.82-.83 (rejecting the United States' argument drawing a distinction between new owners and companies for purposes of repayment of subsidies as "elevat[ing] form over substance"). The WTO panel also cited Commerce's own language in rejecting this distinction and concluding that money repaid through a fair market value transaction is fungible. *Id.* para. 6.83.

When the Panel rejected these arguments, it made it difficult for the United States to support its finding that there was in fact a benefit, and therefore a subsidy, existing in the post-privatization entity.

#### D. PRIVATIZATION CAN ELIMINATE BENEFIT FROM PRIOR NON-RECURRING SUBSIDIES

The crux of the dispute in the *British Steel* decision was whether the United States made its determination regarding the conferral of a benefit because this is a crucial component in the subsidy definition.<sup>180</sup> The United States argued that UES and then BSplc/BSES continued to benefit from subsidies conveyed to BSC prior to privatization.<sup>181</sup> Thus, after making the initial subsidy determination and applying Commerce's change-of-ownership methodology,<sup>182</sup> which allocates the benefit stream over time, there was neither a need nor a legal requirement to reevaluate this determination.<sup>183</sup> Indeed, the United States argued that Commerce appropriately applied United States law, which has an "irrebuttable presumption" that non-recurring subsidies "benefit merchandise produced by [the] recipient over time."<sup>184</sup> Further, United States law

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180. See *British Steel Panel Decision*, *supra* note 12, para. 6.58 n.69 (noting a lack of EC dispute to the assertion that a "financial contribution" was made to BSC). The EC conceded that financial contributions to BSC benefited BSC in the past, but argued that these prior subsidies were not at issue. *Id.* Attachment 1.1, paras. 131-32.

181. See *id.* paras. 6.60-62 (discussing Commerce findings that the benefit conferred on BSC by 1985-86 financial contributions passed-through to privatized entities).

182. See *id.* Attachment 2.1, para. 50 (stating United States law did not give guidance on how to calculate a portion of subsidies repaid by change-of-ownership transaction). The United States said there are significant administrative barriers to conducting "extensive econometric analysis" to determine repayment amounts, which was the alternative to the methodology that Commerce eventually adopted. *Id.* n.307.

183. See *id.* Attachment 2.1, para. 107 (explaining the United States' view that the WTO Subsidies Agreement did not provide guidance on how to address a change-of-ownership situation). The United States argued that Article 1.1 required a finding of a benefit "once as of the time of the subsidy bestowal." *Id.* para. 109; see also *id.* para. 111 (indicating Commerce's methodology accorded with Subsidies Agreement).

184. See *id.* Attachment 2.1, paras. 43-46 (asserting Commerce's irrebuttable presumption of benefit and allocation methodology is consistent with WTO). The



does not require reassessment of the subsidies based on “use or effect” or “subsequent events” in the market.<sup>185</sup> In essence, the United States argued that privatization had little to no impact on a determination that the privatized entity continued to receive a benefit and consequently a subsidy, even though the privatized entity never received a subsidy.<sup>186</sup>

In response, the EC argued that the United States “improperly assumed” a benefit was conveyed to UES and BSplc/BSES by a previous financial contribution to BSC.<sup>187</sup> The privatized companies merely bought part or all of a company that had previously received subsidies in a fair market value transaction.<sup>188</sup> Thus, the United States never demonstrated the existence of a subsidy because it made an assumption without acknowledging that an arm’s length fair market value transaction by definition generally ensures the purchaser does not derive a benefit.<sup>189</sup>

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United States relied on Annex IV, para. 7 of WTO Subsidies Agreement, which provides for allocation of subsidy over time, to support its contention that Commerce’s methodology is WTO consistent. *Id.* para. 44-45. *But see Delverde*, 202 F.3d at 1367 (determining Commerce’s presumption of a benefit is in “direct conflict” with the statute).

185. *See* British Steel Panel Decision, *supra* note 12, Attachment 2.1, para. 43 (arguing absence of requirement to reevaluate “use or effect” of subsidies). Perhaps the United States’ analysis confuses the terms “effect” and “benefit” since the United States statute seems to distinguish between the two terms by defining them in distinct provisions. *See* 19 U.S.C. § 1677(5)(C), (E) (1994). Further, the United States statute seems to provide for “subsequent events in the marketplace” with the change-of-ownership provision. *See* 19 U.S.C. § 1677(5)(F) (allowing consideration by Commerce of change-of-ownership); *see also supra* notes 102-117 and accompanying text (discussing aforementioned provisions in United States law regarding subsidy term).

186. *See* British Steel Panel Decision, *supra* note 12, Attachment 2.1, para. 181 (asserting that the “productive assets” which previously benefited from a subsidy before privatization are identical to those used by the new owners).

187. *See id.* Attachment 1.1, para. 133 (arguing Commerce’s formula, which treats fair market price as irrelevant, does not reflect “economic reality”). The EC argued “price paid necessarily values and incorporates within the transaction any subsidy previously conferred.” *Id.* para. 50.

188. *See id.* Attachment 1.1, para. 132 (asserting UES and BSplc, who have not received subsidies, should not be assessed duties on their products).

189. *See id.* para. 2.3 (stating both parties agreed that BSplc privatization “was at arm’s length, for fair market value and consistent with commercial considerations.”). The EC argued that “a purchase at fair market value necessarily

After considering both of these arguments, the Panel found that the United States failed to establish the conferral of a benefit on UES and BSplc/BSES.<sup>190</sup> The Panel reasoned that consideration paid in the course of a change-of-ownership should have prompted Commerce to make a determination regarding the existence of a subsidy with respect to UES and BSplc/BSES and not their previous owner, BSC.<sup>191</sup> Further, the Panel found that UES and BSplc/BSES did not receive a benefit as a result of 1985-86 financial contributions to BSC since the fair market value had been paid.<sup>192</sup>

In *Delverde*, the Federal Circuit, independent of the WTO Panel's analysis, also found Commerce's methodology, which presumes a benefit to a privatized entity, invalid.<sup>193</sup> Thus, both the WTO and the Federal Circuit essentially agreed that Commerce cannot presume a benefit in order to find a subsidy in the privatization context. Presuming a benefit in this context is inconsistent with the intent of United States law and with the United States' obligations under the WTO Subsidies Agreement.<sup>194</sup>

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includes the residual value of any remaining subsidies at the time of the sale." *Id.* Attachment 1.1, para. 135. Further, the EC suggested that the benefit inquiry should incorporate the degree to which market value was paid. *Id.* para. 61.

190. *See id.* paras. 6.85-86 (finding Commerce incorrectly construed the term benefit and failed to establish existence of a subsidy, thus the United States violated its Article 10 commitments).

191. *See id.* para. 6.70 (finding since benefit determination with regard to BSC was based on BSC receiving a financial contribution irrespective of commercial terms, consideration paid in change-of-ownership would change the equation).

192. *See id.* para. 6.81 (explaining that fair market value consideration for productive assets ensures UES and BSplc/BSES did not receive assets on terms more favorable than the market would allow, therefore, there is no benefit).

193. *See Delverde*, 202 F.3d at 1367 (explaining Commerce's per se rule - that a privatized entity derives a benefit from a prior non-recurring subsidy - is in "direct conflict" with the statute).

194. *See id.* at 1366 (explaining that Congress did not intend Commerce to always presume that a previously countervailable subsidy continues in a change-of-ownership situation); British Steel Panel Decision, *supra* note 12, paras. 6.71-72 (rejecting the United States' argument, that there is an irrebuttable presumption that a benefit continues to flow to a privatized entity, as inconsistent with Article 1.1(b)).

E. DELVERDE CONSTRUES UNITED STATES LAW AS “NOT INCONSISTENT” WITH WTO BRITISH STEEL DECISION

Although the *Delverde* court did not base its analysis on the WTO Subsidies Agreement, it delivers a devastating blow to Commerce’s current application of the benefit component of the subsidy definition in the privatization context.<sup>195</sup> The *Delverde* court specifically referred to 19 U.S.C. §§ 1677(D) and (E) as clearly defining the subsidy elements of financial contribution and benefit.<sup>196</sup> Further, the court said the change-of-ownership provision does not alter the meaning of a subsidy.<sup>197</sup> The change-of-ownership provision merely cautions Commerce to refrain from making a per se rule assuming a benefit is conferred or, in the alternative, assuming a benefit is extinguished.<sup>198</sup> As the court explained, if Commerce had examined the terms of the transaction between Delverde and the previous owner of the pasta factory, it may have reached the conclusion that Delverde paid full market value for the assets purchased; thus, Delverde could not have received a benefit from the previous owner’s subsidies.<sup>199</sup>

In spite of this holding, Commerce does apply a per se rule, which is exactly what the court cautions against.<sup>200</sup> The Court held that

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195. See *Delverde*, 202 F.3d at 1369 (noting that the WTO Panel deemed Commerce’s methodology invalid under the WTO Subsidies Agreement, while the Court found the same methodology invalid under the amended Tariff Act).

196. See *id.* at 1365-66 (stating that 19 U.S.C. §§ 1677 (E)(i)-(iv) construe a benefit where a person receives an advantage from that which is available in the market, including the purchase of goods or services for more than “adequate remuneration”); see also *supra* notes 102-117 and accompanying text (discussing how the URAA changed United States law to comply with the WTO Subsidies Agreement).

197. See *Delverde*, 202 F.3d at 1366 (explaining that the change-of-ownership provision does not change the fundamental requirement that a financial contribution, directly or indirectly given, and a benefit must be found for a subsidy to exist).

198. See *id.* (finding that Congress did not intend a “per se rule” declaring an arm’s length change-of-ownership irrelevant or dispositive in determining whether a privatized entity has received a benefit).

199. See *id.* at 1368 (referring to 19 U.S.C. §§ 1677(5)(D)(iii) and (E)(iv) to support the assertion that a subsidy could only be found where goods and services were purchased for less than adequate remuneration).

200. See *id.* at 1367 (arguing the fact that Congress added the change-of-

Commerce's methodology was inconsistent with the language of the statute because Commerce's methodology presumed Delverde received a benefit based solely on the fact that Delverde purchased assets from an owner who had previously received subsidies.<sup>201</sup> The Court directed Commerce to examine the "facts or circumstances" of the relevant transaction.<sup>202</sup>

Thus, *Delverde's* message is similar to the *British Steel* Panel Decision: the benefit analysis begins and ends with whether or not there was an arm's length fair market value transaction.<sup>203</sup> If fair market value was paid, the benefit of a prior non-recurring financial contribution to a state-owned entity before privatization is extinguished.<sup>204</sup> As a result, the benefit does not travel to the new owners who paid value for all they now own.<sup>205</sup> The *Delverde* and

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ownership provision implied that Congress did not consider such an event irrelevant); *id.* (failing to make specific fact findings regarding a transaction results in a per se rule assuming a benefit is conferred, which is inconsistent with the intent of the statute). *But see* Final Rule Countervailing Duty Regulations 63 Fed. Reg. at 65,354 (asserting that there is no need to re-determine whether a benefit is conferred because a change-of-ownership provision is irrelevant despite a fair market value transaction).

201. *See Delverde*, 202 F.3d at 1367 (reporting Commerce incorrectly deemed that the fact that Delverde's purchase was for fair market value was irrelevant to the subsidy determination).

202. *See id.* (finding Commerce failed to produce *any* evidence that assets were bought for "less than adequate remuneration") (emphasis added); *id.* at 1370 (suggesting Commerce recalculate the countervailing duties to be imposed against Delverde "without regard to the former owner's subsidies" if Commerce is unable to support a determination of a benefit conferred).

203. *See id.* at 1368 (distinguishing prior precedent, including *Saarstahl*, as not in conflict with the *Delverde* holding because those cases were limited to the privatization context where Commerce applied its methodology under an "ambiguous" pre-URAA statute). The court does note a distinction between a private-to-private sale, as was the case in *Delverde*, and a privatization transaction, where a government may have "other goals" that could "affect the terms of the privatization transaction," potentially resulting in terms inconsistent with market considerations. *Id.* at 1369. Despite the aforementioned distinction, the overall concept that a benefit cannot be assumed and no benefit can be conferred where fair market value is paid remains valid. *Id.* at 1368.

204. *See id.* at 1368 (explaining that Commerce must determine whether Delverde paid full value for assets in order to determine whether a benefit had been conferred from prior owner's subsidies).

205. *See id.* (asserting that the statute does not permit Commerce to assume Delverde received a benefit and allocate a portion of subsidies to privatized entity,

*British Steel* decisions seriously undermine the validity of Commerce's methodology by finding it inconsistent with the intent of United States law and with the United States' obligations under the WTO Subsidies Agreement. Although Commerce currently appears unwilling to recognize the binding precedent of these decisions, these decisions should prompt Commerce to change its policy.<sup>206</sup>

Notwithstanding the binding precedent of *Delverde*, Commerce has a duty to consider the United States' international obligations, especially as discussed in *British Steel*, when applying the subsidy definition.<sup>207</sup> Indeed, the *Charming Betsy* doctrine of 1804 states, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>208</sup>

## V. RECOMMENDATIONS

The United States should apply its countervailing duty law in a way that encourages, rather than penalizes, privatization efforts.<sup>209</sup> In

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thereby implicitly rejecting GIA methodology).

206. See *supra* notes 63-70 and accompanying text (noting that Commerce Redeterminations subsequent to *Delverde* adopted the pre-GIA methodology where the terms of the transaction are completely irrelevant and a benefit is presumed to confer to the new owners).

207. See *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (explaining that absent explicit congressional intent to the contrary, statutes should be interpreted in a way that is consistent with international obligations); see also *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1226, 1227 (1994) (stating that WTO panel decisions serve to clarify provisions of the WTO Agreements).

208. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804) (asserting that the interpretation of the Act should be done in context of the "laws of nations"); *id.* at 118-21 (finding the *Charming Betsy* not subject to seizure despite prohibition of commerce between United States citizens and France because the Act of Congress did not cover the owner, a foreign national).

209. See *British Steel Panel Decision*, *supra* note 12, paras. 4.20-23 (discussing that Brazil, a third party participant in the *British Steel* decision, stated that it has undertaken a "vast privatization programme" with the intent of eliminating government subsidies, but it was concerned about the effect of United States policy on these efforts); *id.* para. 4.104 (expressing Mexico's concerns that current United

particular, the United States should assess whether privatized entities derive a “benefit” from prior non-recurring subsidies by recognizing that the prior “benefit” is extinguished if there is an arm’s length transaction at fair market value.

#### A. REASSESS COUNTERVAILING DUTY RULES

In light of recent developments, Commerce should undertake a rulemaking exercise to reassess its countervailing duty rules with respect to privatization. A policy adjustment via a rulemaking exercise would reinforce the United States’ long-term leadership role as an advocate for competitive market-based economies and in particular privatization of state-dominated economies.<sup>210</sup> Commerce

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States policy could negatively impact exports of privatized steel companies). Indeed, Professor Cooper, an international economics professor at Harvard University and former Under Secretary of State for Economic Affairs, commented:

U.S. countervailing duty practice ensures that countervailing duties will be assessed as financial penalties on privatized firms that enjoy no economic benefit from government contributions provided to state-owned predecessors. [T]he United States is not countervailing any economic benefit conferred on goods crossing our borders. The practice must be seen as purely protectionist on behalf of U.S. domestic firms in competition with the newly privatized firms.

*quoted in British Steel Panel Decision, supra note 12, Attachment 1.2, para. 17.*

210. See DINAVO, *supra* note 3, at 44 (noting the statement by the Treasury Department that the United States should “support private sector-oriented growth, encourage privatization, and discourage, where appropriate, direct government activity in the economy”); *id.* at 56 (explaining that the United States Agency for International Development (“USAID”) has been instrumental in encouraging and assisting developing countries in their privatization efforts); *Secretary of State Confirmation Hearing Before Senate Foreign Rel. Comm.*, 107th Cong. 15 (2001), available at 2001 WL 39589 (Statement of Colin Powell, Secretary of State nominee) (arguing that privatization could be an important part of economic recovery in Nigeria); *Asian Fin. Crisis Hearing Before Asia Pac. Subcomm. of House Int’l Rel. Comm.* 105th Cong. 7 (1998), available at 1998 WL 47081 (Statement of Lawrence Summers, Deputy Secretary of the Treasury) (expressing support for the International Monetary Fund reform plans for Indonesia and Thailand in the wake of Asian financial crisis, which emphasized the need for accelerated privatization programs); *Fast Track Authority Hearing Before International Economic Policy and Trade Subcomm. of House International Relations Comm.*, 105th Cong. 3 (1997), available at 1997 WL 592066 (Statement of Stuart Eizenstat, Under Secretary of State for Economics, Business and Agriculture) (stating United States’ failure to adhere to “difficult path of market freedom” and continue to lead on trade will undoubtedly slow privatization and deregulation efforts in other countries); *FY 98 Budget Multilateral Development*

should reconsider proposals put forward during the 1998 rulemaking process for countervailing duty regulations.<sup>211</sup> In particular, Commerce should consider regulations that would establish a rebuttable presumption that subsidies are extinguished in the case of an arm's length fair market value change-of-ownership transaction.<sup>212</sup> The outcome of pending cases before the CIT may prompt these changes.<sup>213</sup>

Since prior United States case law addressing this issue applied pre-URAA United States countervailing duty law, Commerce's current methodology can and will be challenged.<sup>214</sup> The Federal Circuit's *Delverde* decision and its dicta regarding *British Steel* opens the door for a challenge under current United States countervailing duty law by a formerly state-owned privatized company that has been assessed countervailing duties.<sup>215</sup> These developments should hearten interested parties and parties should continue to pursue this litigation, especially if Commerce proves unwilling to engage in a rulemaking exercise.

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*Banks Hearing Before International Economic Policy, Export and Trade Promotion Subcomm. of Senate Foreign Relations Comm.*, 105th Cong. 6 (1997), available at 1997 WL 165598 (statement of Lawrence Summers, Deputy Secretary of the Treasury) (arguing for continued support of development banks that provide support for privatization efforts worldwide).

211. See Final Rule Countervailing Duty Regulations, 63 Fed. Reg. 65,348 (Nov. 25, 1998) (detailing various sides of subsidy debate in privatization context); see also Comments of British Steel PLC on proposed CVD regulations (Nov. 17, 1997), available at <http://www.ia.ita.doc.gov/cvd-cmts.htm> (listing several sets of comments from various parties dated June and December 1997, where British Steel suggests a specific regulation for privatization situations in countervailing duty investigations).

212. See Final Rule Countervailing Duty Regulations, 63 Fed. Reg. at 65,352 (repeating one group of commenters' argument that Congress' mandate to examine change-of-ownership transactions on an individual basis indicates Congress contemplated extinguishing prior subsidies in such circumstances).

213. See *supra* note 15 and accompanying text (noting the status of several steel cases pending before the CIT).

214. See *Delverde*, 202 F.3d at 1368 (noting *Saarstahl* concerned privatization, but applied pre-URAA law). Commerce filed final Redeterminations regarding several steel-related cases in December 2000. These cases are in the briefing stage before the CIT as of this writing. See Steel-Related Redeterminations, *supra* note 15.

215. See *Delverde*, 202 F.3d at 1369 (stating that the Federal Circuit decision "is not inconsistent" with *British Steel Panel Decision*).

## B. INTERVENTION BY CONGRESS

If a rulemaking exercise is not an option, Congress could intervene by discussing the implications of 19 U.S.C. § 1677(5)(F) regarding change-of-ownership and subsequently clarifying its intent with respect to this provision. As previously mentioned, little debate on the implications of the change-of-ownership provision occurred during consideration of the URAA.<sup>216</sup> Report language, which could be added to upcoming trade legislation, should interpret this statute in a way that is consistent with the holdings in *Delverde* and *British Steel*. The language could also include a policy statement reaffirming United States support for the transition from state-dominated to free-market economies through privatization and other means. Moreover, the language must emphasize the positive effects of privatization on the global economy and economies of developing countries, as well as potential disincentives that current United States countervailing duty law has on privatization.<sup>217</sup> The strength of domestic interests who originally supported 19 U.S.C. § 1677(5)(F)<sup>218</sup> and the increasingly fragile congressional support for free trade<sup>219</sup> will make

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216. See Codevilla, *supra* note 8, at 462 (stating that the change-of-ownership amendment was adopted as part of non-controversial staff recommendations because there was little understanding of the economic and legal implications of this amendment).

217. See WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP 45-46 (Oxford Press 1995), available at <http://www.worldbank.org/html/extpb/Bureaucrats/soc.htm> (arguing that large state-owned sectors inhibit growth, a problem that is pronounced in low-income countries, which tend to have large state-owned sectors). Compare *id.* at 39 (reporting on several case studies where privatization efforts resulted in tangible benefits, including more efficient operations and greater investment). This report details the difficult challenges countries already face in reducing the role of the state in their economies without the added challenge of United States countervailing duty laws. *Id.* at 175.

218. See Codevilla, *supra* note 8, at 461 (asserting that this amendment was a "top priority" for the steel industry lobbyists).

219. See Edward Alden et al., *Zoellick Faces Task of Building Trade Bridges*, FIN. TIMES, Jan. 12, 2001, at 4 (noting difficult task ahead for USTR nominee in building a cooperative relationship between Congress and the Executive Branch in light of the Clinton Administration's inability to win congressional approval of trade negotiating authority). Compare 146 CONG. REC. H 4909 (daily ed. June 21, 2000) (rejecting a joint resolution to withdraw from the World Trade Organization by a vote of 363-56) with I.M. DESTLER, AMERICAN TRADE POLITICS 30-32 (3d



this policy option a complex political undertaking, but one worth pursuing in the long term.

### C. WTO LITIGATION

The WTO litigation concerning the EC's challenge to the twelve U.S. countervailing duty orders on imports of various steel imports from formerly state-owned steel mills has recently moved forward. After consultations, which began in November 2000, proved unsuccessful, the EC requested the WTO Dispute Settlement Body to establish a panel to consider the matter.<sup>220</sup> The panel report on this matter will likely be released Spring 2002.<sup>221</sup> If the United States finds itself on the losing end of this dispute as it did in the British Steel case, it will be required to bring its policy in line with its commitments under the WTO Subsidies Agreement.<sup>222</sup> The United States should agree to adjust current administration of its law and take a case-by-case approach when it examines privatization transactions for purposes of determining whether a benefit has been conferred, as opposed to assuming a benefit is conferred. The EC for its part should accept the benefit-to-recipient standard for determining a subsidy that it advocated in *British Steel*,<sup>223</sup> as opposed

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1995) (noting general consensus and nonpartisan nature of a generally "open-market" trade policy by Congress in the post World War II period up until the 1980s).

220. See Status of Dispute Settlement, *supra* note 2 (noting EC's request for consultations on twelve countervailing duty orders); *U.S. Affirms Compliance with WTO Ruling on Korea Stainless Steel Antidumping Duties*, Int'l Trade Rep. (BNA) (Sept. 11, 2001) (noting activities of September 10 meeting of WTO Dispute Settlement Body including EC's request to establish panel to consider twelve U.S. countervailing duty orders imposed on various steel imports from former state-owned mills in France, Germany, Italy, Spain, Sweden, and the United Kingdom).

221. See *WTO Trading into the Future Disputes Overview*, at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.html](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.html) (last visited Oct. 1, 2001) (explaining it can take up to 45 days for a panel to be named plus six months for a panel to conclude by issuing its report).

222. See *id.* (noting losing party must state its intention to follow recommendations of panel at dispute settlement body meeting held within 30 days of issuance of panel report and losing party will be given reasonable time to comply once its states its intention to follow the recommendations).

223. See *British Steel Panel Decision*, *supra* note 12, Attachment 1.1, para. 117 (explaining the benefit requirement mandate that before countervailing duties can be imposed, the "company under investigation" must have been deemed to have

to the cost-to-government approach it has previously supported.<sup>224</sup> Such an agreement would establish a precedent for resolving future subsidy cases.

Failure to resolve this conflict portends greater conflict in the future, as more countries adopt countervailing duty laws modeled after the United States become members of the WTO and attempt to lessen the government's role in their economies.<sup>225</sup> Indeed, if other countries apply countervailing duty laws in the privatization context as the United States currently does, the United States could face liability for past subsidies given to now privatized entities. In *British Steel*, the EC raised this possibility by citing the United States Enrichment Corporation ("USEC") case involving a formerly government-owned company that oversaw uranium processing and received billions of dollars in subsidies.<sup>226</sup> The EC suggested the United States could face potential liability for subsidies given to USEC if other WTO members were to apply countervailing duty laws as currently applied by the United States.<sup>227</sup>

The United States should move quickly in meeting WTO-related challenges to its countervailing duty laws, especially in light of increasing tensions over the subject of unfair trade laws in the WTO

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received a competitive advantage).

224. See *supra* notes 42, 92, 111, 116 and accompanying text (asserting United States' long time support of the benefit-to-recipient standard, versus EC cost-to-government standard, to determine existence of a subsidy).

225. See Frances Williams, *Beijing Optimistic on WTO Talks*, FIN. TIMES, Jan. 11, 2001, at 8 (noting difficult issues that remain for negotiators including Beijing's use of agricultural and industrial subsidies); Frances Williams, *Report Reveals Change in WTO Actions*, FIN. TIMES, Dec. 7, 2000 (reporting statistics from United Nations Conference on Trade and Development (Unctad), which suggest developing countries are increasingly resorting to anti-dumping and countervailing duty investigations).

226. See *British Steel Panel Decision*, *supra* note 12, Attachment 1.1, para. 62 (describing the privatization process for a major United States exporter, the former United States government-owned USEC, which received "subsidies amounting to billions of dollars over more than 50 years").

227. See *id.* para. 65 (describing the valuation process for USEC, which did not include an accounting of prior subsidies, as consistent with accepted valuation techniques, but noting the inconsistency with current administration of United States countervailing duty law).

context.<sup>228</sup> Meanwhile in future trade rounds, the United States should not only continue to press its case for reducing disruptive trade subsidies, but also adhere to the holding in *Zenith Radio Corp. v. United States* that countervailing duties should offset a benefit, or in other words, a competitive advantage gained in a manner inconsistent with commercial terms.<sup>229</sup>

## CONCLUSION

The WTO found that the United States violated its obligations under the WTO Subsidies Agreement in the December 1999 *British Steel Panel Decision*.<sup>230</sup> This decision, which rejected Commerce's change-of-ownership methodology,<sup>231</sup> in conjunction with the *Delverde*<sup>232</sup> decision, suggests that Commerce's current practice of assuming a benefit is conferred regardless of the terms of the change-of-ownership transaction must change.

This particular dispute regarding subsidies can be resolved with

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228. See Recent WTO Anti-dumping Decisions, *supra* note 133 (noting that in several recent WTO decisions concerning trade laws, in separate cases, the EC and United States were both found to be violating their WTO obligations); see also Peter Norman et al., *U.S. Threatens the EU with Sanctions*, FIN. TIMES, Mar. 8, 2001, at 5 (describing at least nine major trade disputes between the United States and the EC). *But see* Hugh Carnegie, *Guilt Drives West to Adopt Lofty Ideals: Will Rhetoric on Tackling World Poverty Translate into Action*, FIN. TIMES, Jan. 30, 2001, at 9 (describing non-tariff barriers as an obstacle to growth for developing countries, while commenting that United States and EC disputes regarding subsidies could lead to a reduction in such barriers overall).

229. See *Zenith*, 437 U.S. at 455-56 (holding countervailing duties are meant to offset an "unfair competitive advantage" conveyed to foreign producers as a result of government subsidies).

230. See *British Steel Panel Decision*, *supra* note 12, para. 6.86 (finding the United States failed to demonstrate the existence of subsidy; therefore, the United States application of its countervailing duty law was inconsistent with the purpose of such duties, which is "to offset any subsidy bestowed directly or indirectly" upon a particular product).

231. See *id.* para. 8.2 (finding no provision of United States law requires imposing countervailing duties in privatization context, but urging the United States to reform its administrative practice to avoid imposition of countervailing duties where legitimate privatization occurs).

232. See *Delverde*, 202 F.3d at 1369 (holding Commerce's methodology inconsistent with United States law "irrespective" of the WTO decision, but noting the WTO decision "is not inconsistent with [the court's] holding.").

minimal political costs in the international arena and should be removed from the growing list of trade conflicts between the United States and Europe.<sup>233</sup> The United States and Europe already face a difficult task in building consensus between developed and developing countries.<sup>234</sup> This dispute could have important implications for privatization efforts in developing countries and should not be allowed to drive a further wedge between developed and developing countries.<sup>235</sup> Developing countries are struggling to build consensus for a future trade round and are already litigating a number of difficult disputes within the WTO dispute mechanism.<sup>236</sup>

Failure to adjust Commerce's current application of the countervailing duty rules threatens the United States' credibility in its efforts to pursue a trade policy oriented toward liberalization and open markets.<sup>237</sup> In Commerce's 1998 final countervailing duty regulations, it refrained from changing its privatization methodology by saying that unless the courts interpret the law differently the status quo is sufficient.<sup>238</sup> The recent decisions of the Federal Circuit and WTO suggest that the status quo violates United States international obligations under the WTO Subsidies Agreement as well as United

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233. See *A Different, New World Order*, THE ECONOMIST, Nov. 11, 2000, at 89 (listing major trade disputes involving the European Union and the United States).

234. See *id.* at 83-84 (noting rising influence of Mexico, India, South Africa, and Egypt, among others, in pressing the United States and Europe to uphold their Uruguay Round commitments and pursue trade agendas often at odds with the United States and Europe).

235. See *id.* at 83 (discussing tensions between developed and developing countries in formulating a trade agenda and noting developing countries are more reluctant to follow the lead of the United States and Europe in trade matters).

236. See *id.* at 89 (illustrating twelve disputes that are either coming to fruition, on appeal, or have been decided with sanctions in place).

237. See JACKSON, *supra* note 82, at 300 (suggesting a way in which individual countries respond to subsidies via implementation of countervailing duty laws can "undermine liberal trade policies").

238. See Final Rule Countervailing Duties, 63 Fed. Reg. at 65,355 (explaining reluctance to codify new privatization rule based on the possibility that the "courts may, in the course of their review of the current methodology, adopt an interpretation of the law that would either validate or overturn" competing suggestions for a new rule). Commerce seemed to leave it to the courts to decide between commenters' primary suggestions, which provided for no pass through of a benefit where there was an arm's length fair value transaction or a complete pass through of a benefit regardless of nature of transaction. *Id.*

States law. Thus, the time is ripe for a policy change from Commerce. If the CIT remands some of the current litigation on this matter, Commerce would do well to engage in a rulemaking exercise to bring administration of the law into compliance with these recent decisions.