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CVD LAW FROM THE GENERAL TO THE SPECIFIC: SOME OF THE SIGNIFICANT ISSUES AND DEVELOPMENTS

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CVD LAW FROM THE GENERAL TO THE SPECIFIC: SOME OF THE SIGNIFICANT ISSUES AND DEVELOPMENTS

John A. Ragosta, Brent Bartlett, Michael R. Geroe, and John R. Magnus[1/]

This paper explores recent developments in the area of U.S. countervailing duty (CVD) law, in particular subsidy identification and measurement. In addition, several interesting aspects of recent countervailing duty debate will be considered. The various topics touched upon do not address the CVD law as a whole -- they focus only on some of the most significant recent issues and developments. Though it has not been included in the course title, before plunging into recent developments, the opportunity to discuss briefly the underpinnings of countervailing duty law cannot be missed.

While a debate rages as to the merits of and the appropriate breadth of the antidumping (AD) duty law, there is little serious doubt that a countervailing duty law is a useful if not necessary tool to respond to government subsidies. For example, Professor John Jackson recently spoke at the ABA international law conference of the need for a much "more prominent" role for CVD.[2/]

Although the law was created for several purposes, the most important among them include: 1) discouraging subsidies that may be trade distorting and/or world wealth reducing,[3/] and 2) providing a remedy to U.S. manufacturers that are asked, unfairly, to compete against not simply foreign producers, but foreign governments.[4/]

1/ The views expressed in this paper are the authors' own and not necessarily those of Dewey Ballantine nor any of Dewey Ballantine's clients.

2/ Author's notes on presentation of John Jackson at the Annual Meeting of the American Bar Association Section of International Law and Practice (April 28, 1994). Jackson also noted the necessity of an effective antidumping law, but differed as to the appropriate breadth of such a law.

3/ As Professor Hufbauer notes:

> Put simply, apart from clear instances of grasping monopoly, why should the international community be the keeper of national export morals? The answer is also simple: unbridled and competing national subsidies can undermine world prosperity.

Gary Hufbauer and Joanna Shelton Erb, Subsidies in International Trade, 8 (1984).

4/ See, e.g., Ragosta, "Natural Resource Subsidies and the Free Trade Agreement: Economic Justice and the Need for Subsidy Discipline," 24 G. Washington J. of (continued...)

Interestingly, anecdotal evidence suggests that the law has been effective at discouraging subsidies.[5/] While recent, ill-informed criticisms have arisen,[6/] the law has broad support on economic, political and normative grounds.[7/]

Though not within the narrow ambit of the conference's topic, these observations are useful and informative. If nothing else, it should be remembered that as a remedial

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4/(...continued)
Int'l L. and Economics 255, 262-66 (1990). Recently, for example, the Financial Times bemoaned that pervasive and endemic European steel subsidies are

> distorting the steel market by giving inefficient government-owned companies an unfair advantage over efficient private-sector groups which are already suffering from a severe recession.

Id. (Nov. 17, 1993). Ruprecht Vondran, president of the German Steel Federation stated bluntly: "The politicians . . . must decide if they are willing to have an efficient German industry destroyed by the industrial policies conducted in other European capitals." Financial Times (Dec. 18-19, 1993). In this regard, there is nothing like the faith of the converted. Consider the comments of the British Iron and Steel Producers Association (which members, of course, received enormous subsidies throughout the 1980s):

> Unless subsidies are brought under swift and firm control, the inefficient producers in Europe will be preserved at the expense of the more efficient, unsubsidized companies. . . .

American Metal Market (July 27, 1993).

5/ Jackson, "Perspectives on Countervailing Duties," 21 L. and Policy in Int'l Business 742, 743 (1990).

6/ For example, a draft Congressional Budget Office study which criticizes the law -- "U.S. Antidumping and Countervailing Duty Law: A Policy Untethered from its Rationale," (Draft of May 2, 1994) -- is riddled with inaccuracies and misunderstandings. While a full recitation of its errors cannot be made in this space, as an indication of the breadth of misunderstanding, the report suggests that the countervailing duty law is intended to respond to foreign predatory pricing, id. at x, which is certainly not the case, and ignores the real rationale for the law, discussed briefly above.

7/ In addition to the analyses by Hufbauer, Jackson and Ragosta noted above, one might also explore Robert E. Baldwin, "The Economics of the GATT," Issues in International Economics 86 (1980). Consider also James A. Brander, "Rationales for Strategic Trade and Industrial Policies: Profit Shifting Subsidies," in Paul R. Krugman, Strategic Trade Policy and the New International Economics 26 (1987).

statute, the CVD law should be interpreted broadly. Any approach which encourages more complicated forms of government assistance by relieving such complicated subsidies of countervailing duties should be discouraged.

I. Identification of Subsidies

The countervailing duty law can, in its most basic form, be summed up in one sentence:

- If a government gives a particular type of merchandise a non-market benefit that is not spread broadly throughout the economy, that benefit is subject to offset at U.S. borders (assuming that the other provisions of the statute are met).

Identification of countervailable subsidies, then, involves four questions:

a) Is there government action?

b) Does it provide a non-commercial benefit?

c) Does it benefit a particular sector rather than being spread broadly through the economy as a whole?

d) Does it involve production or export of the subject merchandise?

A. Government Issues

Most subsidies involve an actual financial outlay by the government or failure to collect funds otherwise due, such as taxes. These easily satisfy the requirement.

Several types of "indirect" subsidies, however, have also been considered actionable under U.S. law.[8/] For example, export restrictions (which effectively force producers of the non-exportable item to subsidize their customers)[9/], government-directed preferen-

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8/ See 19 U.S.C. § 1671(a) ("If [there is], directly or indirectly, a subsidy with respect to the manufacture . . . of a class or kind of merchandise imported . . . into the United States," and the Commission finds injury, then a countervailing duty is imposed on the merchandise) (emphasis added).

9/ See Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (Dep't Comm. 1992) (final affirm. determ.) and Leather from Argentina, 55 Fed. Reg. 40,212 (Dep't Comm. 1990) (final affirm. determ.).

tial electricity pricing by a utility,[10] and government-directed provision of soft loans by banks[11] have all been countervailed.

The key to understanding this portion of the statute is appreciating the requirement that there be some action by a government; an independent decision by one private actor to subsidize another is not reachable under U.S. law. Where there is government action, some resulting artificial benefit to subject merchandise, and an adequate nexus between the two (what the Department of Commerce ("DOC") called a "direct and discernible" result in the Leather and Lumber cases), however, U.S. law provides for countervailing duties.[12]

Similarly, the new Agreement on Subsidies and Countervailing Measures which was negotiated in the Uruguay Round (the "SCM Code") defines subsidies in terms of a "financial contribution" from a government. Yet, it adopts a broad definition of financial contribution which includes not only direct government outlays but also financial benefits conferred by private parties acting at the direction of a government.[13]

B. Benefit Issues

Generally, a subsidy requires some type of non-commercial competitive benefit. The new Subsidies Code recognizes, consistent with long-standing Department policies, that the key issues are (1) whether or not the program provides a benefit to the recipient (rather than a cost to the government) and (2) whether the benefit is non-commercial (i.e. whether the recipient receives better than it would in the market).[14]

In many cases, the issue of whether a benefit is provided is not difficult. The benefit standard can prove complicated, however, in some cases.

1. Indirect Subsidies

Where indirect subsidies -- i.e. subsidies in which the government is not directly transferring wealth to the subject merchandise -- are concerned, it is necessary to ask not

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10/ Pure Magnesium and Alloy Magnesium from Canada, 57 Fed. Reg. 30,946, 30,949 (Dep't Comm. 1992) (final affirm. determ.) ("Magnesium from Canada").

11/ See Proposed Regulations, 54 Fed. Reg. 23,378, 23,379 (proposed as 19 C.F.R. § 355.41(k)) (definition of "provided" means provided "directly or indirectly by a government, or required by government action.").

12/ See discussion below.

13/ See Article 1, Agreement on Subsidies and Countervailing Measures.

14/ See Article 14, SCM Code.

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only (i) whether the government was involved at all (see I.A above) but also (ii) whether some "benefit" has been provided and (iii) whether an adequate relationship exists between the government action identified and the benefit identified. For example:

- In Flat Steel from Korea, the government action was permitting the Korean flat-rolled industry disproportionate access to foreign capital. The benefit was the favorable cost of capital not generally available in Korea.

- In Lead and Bismuth Steel from Germany (and Flat Steel from Germany), the government action was convincing Saarstahl's private creditors to forgive some debts in exchange for a government guarantee of the debts which were not forgiven. The benefit was the debt forgiveness.

- In Softwood Lumber, the government action was an export ban which effectively prohibited the export of logs and thus drove down the price of logs to the benefit of log users (including lumber producers). Similarly, in Leather, the government action was a system of restrictions on the export of hides which drove down the price of hides to the benefit of hide processors. By comparison, the export restriction in Malaysian Rubber was not shown to have provided a benefit in the form of lower prices or otherwise.[15]

As noted above, the new SCM Code imposes a "financial contribution" requirement, but it is clear (and there is little clear in this provision) that some forms of private or indirect subsidies are included.[16] Determining the breadth of this clause will be important. The likely key factor will be the extent of the linkage between the government action and the benefit provided.

2. Effects Test

Some litigants have argued that once it is determined that a benefit has been provided, it is necessary for the Department to further find that the subsidy had the effect of raising output or lowering unit costs for the subject merchandise. In the Lead and Bismuth Steel and Flat Steel cases (both on appeal), the DOC specifically found that effects need not be shown. The reasons include: (1) U.S. law defines what a subsidy is and does not articulate an effects requirement; (2) an effects test is inconsistent with effective (prophylactic) subsidy disciplines; and (3) requiring an analysis of effects would make the CVD law unadministrable.

In Softwood Lumber, the Department took the same view but was reversed by a binational FTA panel. The case is currently before an Extraordinary Challenge Commit-

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15/ Extruded Rubber Thread from Malaysia, 58 Fed. Reg. 41,084 (Dep't Comm. 1993) (final affirm. determ.).

16/ Article 1(a)(1)(iv), SCM Code.

tee. Meanwhile, in the legislative history for the NAFTA, Congress made clear that no effects test must or may be applied by the Department:

> From a policy perspective, the Committee believes that an "effects" analysis should not be required. First, "effects" analyses by nature are highly speculative. For purposes of administering the law, it is burdensome and unproductive for the Department of Commerce to attempt to trace the use and effect of a subsidy demonstrated to have been provided to producers of the subject merchandise. Second, a strict rule that the benefit received by foreign producers as a result of government action will be offset (or countervailed) acts as a deterrent to further subsidization.[17/]

While it is highly unlikely that a U.S. court would endorse an effects test, the implications of not studying effects are relevant to many CVD issues.

C. Specificity Issues

The Specificity Test requires the Department to find that a government program provides its benefit (not merely its use) de facto or de jure selectively to an industry, enterprise, or group of industries or enterprises.[18/]

Primarily, the Specificity Test is intended to prevent the "absurd" result of countervailing government "subsidization" of generally available benefits such as schools and roads.[19/] Similarly, subsidies that are truly used by sectors spread throughout an economy (see the long series of Mexican natural gas subsidy cases) are not countervailable. Beyond that, the provision is not meant to be interpreted narrowly. As Professor Hufbauer warned:

17/ S. Rep. No. 189, 103d Cong., 1st Sess. at 42-43 (1993). The Senate Committee Report cited Certain Flat-Rolled Carbon Steel Products from Austria (General Issues Appendix), 58 Fed. Reg. 37,225 (Dep't Comm. 1993) approvingly for its analysis of why an effects test is not required. See also ASG Indus., Inc. v. United States, 467 F. Supp. 1200, 1231 (Cust. Ct. 1979) ("whether or not their [subsidies'] economic effect is to distort international trade or to induce exports is immaterial. For . . . such a bounty or grant is within the reach of the countervailing duty without regard to its trade effects."); British Steel Corp. v. United States, 605 F. Supp. 286, 294-95 (Ct. Int'l Trade 1985) ("it is unnecessary to trace the use of such funds or to find that they directly related to enhanced product competitiveness.")

18/ For a lengthy discussion of the Specificity Test in theory and practice, see Ragosta and Shanker, "Specificity of Subsidy Benefits in U.S. Department of Commerce Countervailing Duty Determinations," 25 Geo. L. & Pol'y in Int'l Bus. 639 (1994).

19/ See Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834 (Ct. Int'l Trade 1983); see also, e.g., PPG Indus., Inc. v. United States, 662 F. Supp. 258, 265 (Ct. In'tl Trade 1987).

> [T]he generally available label should be used sparingly to excuse only those incentives that in practice and design are used by a broad range of industries and geographic areas. Otherwise, the international community risks taking countermeasures against little subsidies while big subsidies run free.[20]

The Department has not adopted any particular definition for industry, enterprise or "group" and tends to define them on a case-by-case basis. Recent cases do, however, contain some further learning on the topic. First, the number of industries benefitting from a program are not properly identified by the number of products produced by the beneficiaries.[21] Second, while integration or similarities in industries are not dispositive, they can contribute to a finding that a particular list of beneficiaries is a "group" of industries. Beyond this, the definition of industry or group is difficult. Perhaps it is not surprising that the Department has broad discretion in defining an industry or group and takes an expansive view of those terms.

The Department has repeatedly stressed that there is no precise formula for a finding of specificity and that such determinations must be made on a program-by-program basis. The Department can, however, consider at least four factors in determining whether benefits bestowed are specific. In particular, the Department considers: (i) the extent to which a government acts to limit the availability of a program; (ii) the number of industries or groups using the program; (iii) whether there are dominant or disproportionate beneficiaries of the program; and (iv) the extent to which a government exercises discretion in conferring benefits under the program.[22]

FTA panels established regarding subsidized Canadian swine and softwood lumber imports have held that Commerce must consider and balance all the factors listed in its proposed rules.[23] These rulings result from reliance on dicta in U.S. cases

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20/ Gary Hufbauer and Joanna Shelton Erb, Subsidies in International Trade 92 (1984).

21/ Thus, in the lumber case, the Department rejected the notion that hundreds of industries exist because the forest products industry makes hundreds of types of products (many of which are simply different types of boards or paper). Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22570, 22,580-86 (Dep't Comm. 1992) (final affirm. determ.). This is consistent with long-standing practice and will certainly continue to be the Department's methodology, although it is on appeal in the Lumber case.

22/ Proposed Regulations, 54 Fed. Reg. at 23,379 (proposed as 19 C.F.R. § 355.43(2)-(i) through (iv)).

23/ In the Matter of Live Swine from Canada, U.S.-Canada Free Trade Agreement Article 1904 Binational Panel, USA-91-1904-04, 13-14 (FTA Panel, Jun. 11, 1993);
(continued...)

which direct the Department to examine all of the factors before finding that a program is not specific.[24] The Department has always maintained that it need not examine each factor if it finds that any one of the four reasonably lead to a finding of specificity; there are a number of cases in which the Department found subsidies to be specific based on one factor alone.[25] In any case, as the Senate indicated:

> in conducting a specificity analysis, the Department correctly will find de facto specificity where one or more of the four factors typically considered by the Department supports a finding of specificity, without an analysis of whether, for example, the industry under investigation . . . is a dominant user of the benefits of that program. . . . If de facto specificity exists, the cause of the de facto specificity (e.g., the inherent characteristics of the subsidy) is irrelevant.[26]

An excellent analysis of this point is included in the FTA panel concerning Pure and Alloy Magnesium from Canada, which rejected the four factor analysis. Other than in FTA panel cases, it is unlikely that this position will be seriously challenged.

1. Government Action

With respect to the first of the four factors, the Department examines if there are legal or textual restrictions on the availability of a subsidy benefit.

An interesting issue has arisen as to whether this factor only encompasses de jure specificity (which has been the Department's position) or particular types of evidence of de facto specificity as well. In the lumber case, for example, the Panel originally ruled that de jure specificity of a particular subsidy could not be established by demonstrating that the terms of the statute and the regulations implicitly made it clear that there is a limited group of beneficiaries. The Panel termed this "far too great a leap for de jure

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23/(...continued)
In the Matter of Softwood Lumber from Canada, Decision of the Panel, USA-92-1904-01, 37, 39 (FTA Panel May 6, 1993).

24/ See, e.g., Roses II, 774 F. Supp. 1376 (Ct. Int'l Trade 1991); PPG I, 743 F. Supp. 871 (Ct. Int'l Trade 1990).

25/ In the Matter of Pure and Alloy Magnesium from Canada, USA-92-1904-03, Memorandum Opinion and order, 31 (FTA Panel Aug. 16, 1993), citing, Certain Fresh Cut Flowers from the Netherlands, 52 Fed. Reg. 3301 (Dep't Comm. 1987); Lime from Mexico, 49 Fed. Reg. 35,672 (Dep't Comm. 1984); Carbon Black from Mexico, 51 Fed. Reg. 30,385 (Dep't Comm. 1986).

26/ S. Rep. No. 189, 103d Cong., 1st Sess. at 43 (1993).

specificity."[27] The Panel went on, however, to order that the factor be considered in analyzing de facto specificity.

This approach makes sense. While there may be cases in which government action does not rise to the level of direct restrictions that are normally present in a de jure specificity case, less clear government restrictions might be useful in a de facto analysis.

2. Number of Users

The second factor applied by the Department has created a good deal of controversy. Implicitly the Department commonly examines (i) whether a "group of industries" exists within the statute's meaning and (ii) whether that group is sufficiently small (i.e. specific). This first point is rarely explicit as it is often clear, and the group need not be cohesive or related in any manner (although such a relationship might help to establish groupness). The real issue is whether the "group" represents sectors that are not spread broadly throughout an economy.

As stated by a U.S.-Canada Free Trade Agreement panel:

> A number, small or large, might be more or less indicative of specificity depending on the variety of types of industries or enterprises which receive the benefits: several thousand enterprises all producing onions might be indicative of specificity while a much smaller number producing widely dissimilar products might not.[28]

This is only to say that one cannot determine whether a specific group exists merely by knowing how many enterprises or industries (or even what percentage of an economy) uses a subsidy. At the same time, once the users have been properly identified as a group, the critical question is whether it is "small."

Perhaps the most contentious recent cases have dealt with the proposition that, both in analyzing the number of users and in dominance/disproportionality, it is irrelevant whether the actual beneficiaries are small in comparison to the "potential universe of users" or the subsidy's inherent characteristics. In Korea Steel, for example, it was argued that because the users of government capital were capital intensive industries (using capital at the rate that would have been expected), no specificity

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27/ In the Matter of Certain Softwood Lumber Products from Canada, USA-92-1904-01 at 74 (FTA Panel May 6, 1993).

28/ Live Swine from Canada, USA-91-1905-03 at 13 (FTA Panel Oct. 30, 1992).

existed. Use was consistent with the universe of users. This argument was properly rejected.[29]

As the Department has indicated, ultimately, the issue of specificity requires a comparison of the beneficiaries of a subsidy to the economy as a whole (or, in the case of agricultural subsidies, the agricultural economy as a whole):

> [A] comparison similar to that advocated by the GOQ [Government of Quebec] {to the universe of program of users} could be meaningful in the context of "a program in which virtually every segment of the economy (or the agricultural sector) in the market naturally participates to some extent." . . . That is not the case here, and it would not be meaningful to compare swine producers' share of FISI benefits to their proportionate share of FISI production coverage because FISI covered so few industries.[30]

3. Dominance and Disproportionality

The third factor considers whether there are dominant users and disproportionate beneficiaries to the program under examination.

Dominant use is a straight-forward analysis based solely on the share of the benefit of a program used by an industry or group. Disproportionate benefit analysis, while more complicated and less clearly developed, broadly involves analysis of the benefit provided to a specific industry by comparison to some neutral benchmark.

Interestingly, the Department also recently more clearly rejected one of the long-standing strawmen of specificity law -- the argument that dominance and disproportionality should be measured by comparing the extent to which a benefit provided to a particular industry benefits that industry. In other words, it has been long argued that if a benefit is particularly important to an industry (e.g. representing a high share of costs),

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29/ Certain Steel Products from Korea, 58 Fed. Reg. 37,338 (Dep't Comm. 1993) (final affirm. determ.).

30/ Live Swine form Canada, 59 Fed. Reg. 12,243, 12,254 (Dep't Comm. 1994) (final results). See also Certain Steel Products from Belgium, 58 Fed. Reg. 37,274, 37,290 (Dep't Comm. 1993):

> We based our specificity determination on the fact that the steel industry received a disproportionate share of SNCI loans compared to other users of the program. therefore, we did not need to address the question of whether the steel industry's share of SNCI loans was excessive with respect to its share of GNP.

it is disproportionate. This analysis, however, ignores the gravamen of specificity -- a comparison of beneficiaries to the economy to determine if economy-wide distortion is possible -- and has properly been rejected by the Department.[31/]

4. Discretion

Finally, under the fourth factor the Department considers whether the government exercises discretion to favor or "target" specific industries for benefits, even if the legislation underlying a program does not provide binding industry specific guidelines for the administering agency. While targeting is not a requirement for finding specificity, government targeting of an industry will often have the practical result of creating a dominant user of the benefits of a program.

D. Subject Merchandise Issues

The focus of the countervailing duty law is the merchandise that benefits from foreign government subsidies. This is where the law begins:

> If [there is] a subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation into the United States . . . then there shall be imposed on such merchandise a countervailing duty.[32/]

This fundamental concern with the merchandise is essential to resolving otherwise difficult questions in the administration of the countervailing duty law. In particular, the importance of the merchandise puts into context the role of three other aspects of subsidization in CVD administration: the *sale* of subsidized merchandise, the *company* receiving the countervailable subsidy, and the *owners* of either the company or the merchandise.

First, unlike antidumping, the sale and importation of the subject merchandise is not pertinent to the identification or measurement of the unfair act in question. Whereas in dumping the unfair act is the pricing of merchandise exported to the United States -- in other words the unfair act is embodied in the very action of exporting -- the unfair act in the CVD context requires the provision of a subsidy, which might have occurred years prior to the merchandise's export to the United States.

Second, the company which receives a subsidy is generally relevant only in that it is the vehicle by which the government subsidy benefits the subject merchandise. Such companies can be either producers of the subject merchandise or exporters of merchandise produced by another company. Although those involved in the enforcement of the

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31/ Magnesium from Canada, 57 Fed. Reg. at 30,953.

32/ 19 U.S.C. § 1671(a).

countervailing duty laws often refer to "countervailing company X," this is nothing more than shorthand for saying that company X's products (or exports) are subsidized and subject to countervailing duties. For example, if the producer of the subject merchandise receives a subsidy, the merchandise remains subject to countervailing duties even if it is finally exported to the United States by a party unrelated to the recipient of the subsidy.

Third, and as a corollary to the second point, owners of the subject merchandise -- regardless of whether they received the subsidy in question -- are not directly the concern of the countervailing duty law. For example, subsidized products that are bought by foreign wholesalers and re-exported to the United States remain subject to countervailing duties even though the wholesalers do not themselves receive subsidies directly from the government.

The same is true, in turn, of the owners of the company that received the subsidy. For example, consider a company, traded on the London stock exchange, that receives a non-recurring subsidy in 1990. Several years later, many of the current owners of the company bought shares after the subsidy and therefore are not themselves subsidized (because they pay the prior owners for whatever enhanced value the company experienced from the subsidy). Yet, the mere fact that the new owners do not enjoy any benefit from the subsidy does not mean that the countervailability of benefits previously provided to the merchandise produced by the company is somehow diminished. Whatever advantage the subject merchandise had (be it better equipment, worker training, goodwill, less debt, or however the subsidy might have manifested itself), it continues unabated. Generally, these propositions are accepted, but the principles have only become controversial in the context of privatization of government-owned companies, discussed below.

Even the manner in which countervailing duties are physically imposed demonstrates the importance of the focus on the merchandise itself: the entity liable for paying the offsetting countervailable duty is the importer[33/] -- which presumably paid fair market value for the merchandise -- not the producer or exporter.

II. Subsidy Calculations

Once a countervailable subsidy is identified, the Department must determine the magnitude of the subsidy benefit allocable to the review year of the investigation. Developments in the Department's calculation methodology since the 1989 proposed regulations have centered on four areas: (i) when to allocate subsidy benefits over time, (ii) the calculation of benefits arising from government equity infusions, (iii) measuring benefits from the preferential provision of goods and services, (iv) and the proper sales over which to spread the subsidy benefit (the "denominator" issue).

33/ 19 C.F.R. § 141.1(b).

A. Determining When to Allocate Benefits Over Time

The threshold question for CVD calculations is whether the subsidy benefits the merchandise only at the time the subsidy is provided to the company, or whether the benefit continues over a period of years. The Department has long recognized that while there is no "correct" answer to this question, the advantage that subsidies confer tend to persist beyond the moment at which they are provided:

> One can argue that theoretically, a subsidy benefits the firm forever, thereby rendering arbitrary any allocation period short of infinity.[34]

The benefits from many types of subsidy, however, are tied more closely to the subject merchandise being produced or sold at the time the subsidy is given. For example, subsidized export financing provided in a specific month provides a clear advantage to a company's exports during that month; should the financing cease it seems reasonable to assume that future exports are no longer advantaged. Although one could argue that the company used the period with export financing to build (unfairly) a customer base that facilitates future exports, or that the company was able to avoid taking on long-term debt, the Department has drawn the line at assigning such past subsidies to future exports on bases such as these.

This leads to the issue of where the Department should draw the line between subsidies that should be allocated only to current exports ("expensed" benefits) and subsidies the benefit of which should be amortized. The longstanding practice of the Department is to expense so-called "recurring" benefits, such as export financing and the periodic preferential provision of inputs, and amortize "non-recurring" benefits, such as large capital infusions. The benefits from subsidized loans are presumed to extend over the life of the loan, and ad valorem export subsides are assumed to benefit only those exports.

In an effort to be rigorous in distinguishing between recurring and non-recurring benefits, the Department stated in its 1989 proposed rules that it would look to three factors: (1) whether the subsidy program providing the benefit is exceptional, (2) whether the program is longstanding, and (3) whether there is any reason to believe that the program will not continue into the future.[35]

During the recent steel cases, however, this test for determining when to amortize benefits was criticized for, among other things, being imprecise and not reflecting the true duration of subsidy benefits. In particular, many respondents argued that subsidies

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34/ Proposed Regulations, 54 Fed. Reg. 23366, 23376.

35/ Proposed Regulations, 54 Fed. Reg. 23,378, 23,384 (proposed as 19 C.F.R. § 355.49).

used to cover operating losses should be expensed because such losses, and therefore the subsidy's use, were of limited duration.

In the steel cases, the Department rejected the operating-loss argument (as it had for more than a decade) as an improper attempt to consider subsidy's use in enforcement of the countervail laws.[36/] Further, even if one were to consider a subsidy's use, it is not at all clear that a subsidy that rescues a company from bankruptcy or relieves it from further borrowing to cover operating losses does not provide a continuing competitive advantage to the company's future production and sales.

The Department did, however, accept the criticism that the prior three-part test did not quite capture the intent of the recurring-nonrecurring construction, and reformulated the test in a series of determinations by outlining new criteria for identifying an amortizable subsidy. In the current language, a subsidy is nonrecurring (and therefore the benefit will be amortized) if "the recipient cannot expect to receive benefits on an ongoing basis from review period to review period and/or the provision of funds by the government must be approved every year."[37/]

There are two important aspects of this language that should be recognized. First, the new wording was intended to further clarify, rather than change, the intended objective of the recurring-nonrecurring test. Second, the Department is maintaining the critical distinction between a subsidy's provision and its use. The new language, as well as the old, considers only the manner in which the subsidy enters the company producing the subject merchandise, and does not engage in the philosophical and impossible task of tracing its use and effect.

The actual means of allocating the benefits -- a declining balance method based upon the average class-life of assets used in an industry as determined by the IRS -- has not changed, but is, again, being challenged. This is certainly a prime object for statutory clarification.

36/ See Certain Steel Products from Austria, General Issues Appendix, 58 Fed. Reg. 37,225 (Dep't Comm. 1993).

37/ Certain Flat-Rolled Carbon Steel Products from Austria (General Issues Appendix), 58 Fed. Reg. 37,225, 37,226 (Dep't Comm. 1993).

B. Measuring Benefits from Equity Infusions

1. Infusions into Unequityworthy Companies with Government Ownership

Prior to 1993, the method used to determine the annual benefit from government equity infusions[38] looked to the annual financial performance of the company to determine the annual benefit. This method, called the rate of return shortfall ("RORS") method, took the difference between the company's return on equity ("ROE") in a given year and the average ROE in the company's national economy, then applied this percentage-point difference to the amount of the equity infusion to determine the annual benefit. For example, if the company produced a 4 percent ROE in the review period and the national average ROE was 9 percent, then 5 percent of the equity infusion was considered to be the benefit in that year. This annual benefit was capped by the amount of benefit that would be implied if the equity infusion was a grant and allocated using the declining balance method.

Since its formulation, RORS had been challenged by petitioners and respondents alike. In the steel cases filed in the early 1980s, petitioners argued that the respondents' financial prospects were so poor that the companies were unlikely to generate any future returns, and therefore any equity infusions were tantamount to grants. The Department rejected this analysis, noting that companies may turn a profit at some future date. In their public comments to the 1989 proposed CVD rules, some respondents also criticized the RORS method, saying that annual countervailable benefits from a subsidy should be predictable and bear some relationship to the benefits arising from the infusion.

The controversy came to a head during the most recent steel cases, when petitioners argued that there was no difference from the perspective of a company producing the subject merchandise between a grant and an infusion of capital that the company could not obtain absent government intervention.[39] In either case, the funds received are identical, the dividends paid are identical, the affect on the company's worth are identical, and the obligation to return the funds (or even any return on the funds) are identical.

Respondents' rebuttal to this reasoning was twofold. First, they argued that there are differences between a grant and an equity infusion, including an economic return for the provider of the equity (which respondents claimed implied a cost to the company).

38/ As equity infusions constitute subsidies only if the company was "unequityworthy" at the time of the infusion, it is customary to assume that the phrase "into unequityworthy companies" is implicit in any reference to equity infusions in discussions of subsidy measurement.

39/ Companies with publicly-traded shares are treated differently. See discussion below.

Second, respondents maintained that the RORS method provided a reasonable "escape clause" as protection against an incorrect determination that the recipient was unequity-worthy in the first place; i.e., if the company did produce a normal market return in any future year, then the amount of the countervailable benefit should be mitigated.

The Department has abandoned the RORS method, recognizing that equity infusions benefit unequityworthy companies the same as do grants. In the General Issues Appendix, the Department stated that ". . . RORS has many flaws. We find six of these especially notable."40/ First, the Department noted that under the RORS method the company's return (profit) on equity included other subsidies: an old subsidy could therefore become non-countervailable because of new subsidies. Second, the RORS method only looks to profits in the review year: exports from a perennially-poor company with a single year of small profits could escape countervailing duties altogether. Third, the "return" that the RORS method considered was on all of the company's equity (at current values) rather than the equity infusion in question: if the company had done poorly for years, then the current equity value would be small and the implied ROE would be large even for small profits.

Fourth, the Department reiterated the very meaning of the "equityworthiness determination": private investors at the time of the infusion would not have provided the company with capital and, even if the company became profitable, such investors could not have known that the company would ultimately prove to be a good investment.

Fifth, the Department recognized that the RORS method, and the respondents' arguments, were dependent upon a cost-to-government, rather than a benefit-to-recipient, approach to subsidy valuation. In other words, even if equity infusions generated different returns to the government/investor than do grants (which can be true only if the government is not the sole shareholder), the proper inquiry is whether the company producing the merchandise benefits from an equity infusion in some way different than it would from a grant, to which the answer is that it does not.

Finally, the Department stressed that the proper method for measuring the benefit from equity cannot second-guess the equityworthiness determination -- to the benefit of respondents or petitioners. Primarily, the equityworthiness determination states that private investors would not have provided capital to this company because predicted profits were not adequate, not that these investors would have been proven correct by subsequent events. Moreover, any method used to second-guess an "incorrect" determination of unequityworthiness would also need to countervail those infusions originally found to be equityworthy yet which never actually produced adequate returns.

This issue has been appealed to the Court of International Trade as well as to the GATT. As a result, the controversy is likely to continue. Unlike most other points of

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40/ Certain Flat-Rolled Carbon Steel Products from Austria (General Issues Appendix), 58 Fed. Reg. 37,225, 37,240 (Dep't Comm. 1993).

dispute in CVD enforcement, however, there appears to be a record of dissatisfaction by all sides -- petitioners, respondents, and the Department -- to the Department's previous approach, namely the RORS method.

2. Measuring Benefits to Companies with Publicly Traded Shares

In a related issue, the Department clarified its position with respect to measuring the benefit from equity infusions into companies with publicly trade shares. The Department's practice in such cases was to forego an equityworthiness investigation and simply countervail the difference between the market price per share and the price per share paid by the government for newly issued shares .

Petitioners in the recent flat-rolled steel cases had argued that the Department was not taking the dilution of ownership that occurs when new shares are issued into account.[41/] Petitioners noted that the mere existence of outstanding, traded shares does not imply that companies could obtain new equity capital from private markets. Otherwise, nearly-bankrupt companies with traded shares could continue to raise unlimited amounts of capital simply by issuing new shares, thereby escaping outright bankruptcy. Moreover, the 1989 proposed rules implied that the Department would use this method for calculating equity benefits in the presence of traded shares only when private investors made similar equity investments into the same company at the same time, which appeared to be a reasonable substitute for an equityworthiness investigation.

The Department reaffirmed its practice of presuming that a company is equity-worthy if it has publicly trade shares and, specifically, its method of using the price of outstanding traded shares as a benchmark for new shares. The only evolution of CVD enforcement that emerged from this issue was the Department's restatement of its position to clarify that it does not require the presence of newly-issued shares to private parties to perform its publicly trade shares analysis. This approach -- which would find an equity subsidy to a publicly traded company only if the government takes back the wrong number of shares -- is also being challenged.

C. Preferential Provision of Goods and Services

There have been two interesting recent developments concerning the preferential provision of goods and services. First, the new GATT code recognizes that preferential provision is properly measured as the difference between market and non-market pricing (rather than just the difference in various government prices).[42/] This was certainly the

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41/ Compare Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 18,006, 18,023 (Dep't Comm. 1984) (final affirm. determ.) (recognizing that shares are diluted in a government investment, but failing to account properly for that problem).

42/ Article 14, SCM Code.

direction in which the Department had been moving, but the Department had continued to maintain the facade that preferentiality did not mean better than market.

Second, a comparison of the 1986 and 1992 lumber cases demonstrates an increased willingness on the part of the Department to make more complex adjustments in identifying and adjusting appropriate benchmarks for determining the magnitude of preferentiality.[43] Thus, in the 1992 case, the Department adjusted competitive timber prices to be used as a preferentiality benchmark by, inter alia, differences in quality and roadbuilding and silviculture obligations. While analyses will unfortunately continue to become more complex, this is a useful and necessary development. It is not appropriate to avoid countervailing injurious subsidies simply because of the difficulty of finding a perfect benchmark.

D. Allocation of Benefits Over Products

Three important developments have taken place over the last year with respect to the allocation of benefits from subsidies found to be countervailable.

1. Production Outside the Subsidizing Country: the Denominator Problem

In the case of subsidies to a multinational company with productive operations inside and outside the subsidizing country, the Department recently adopted a rebuttable presumption that countervailable domestic subsidies benefit only -- and thus are fully allocable to -- productive operations inside the subsidizing country. In Lead and Bismuth Steel from France, this presumption was first articulated, and in Flat Steel from France, it was amplified and more fully justified. Both decisions are on appeal.

Of course, if the Department should ever find that the presumption has been successfully rebutted, and should allocate the benefits from a domestic subsidy in whole or in part to merchandise produced outside the subsidizing country, it should have to countervail the benefits so allocated in a case brought against the third country. Otherwise, the Department would be acting inconsistently with its statutory responsibility to countervail the "net subsidy" found to have been provided to the subject merchandise. Respondents in the steel cases properly pointed out, however, that the Department's current practice (allegedly necessitated by the statute) is to countervail subsidies only against the products of the country providing the subsidies (except in narrow exceptions involving international consortia). This paradox would have to be addressed if the presumption is overcome.

43/ Compare Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Dep't Comm. 1986) (prelim. affirm. determ.) and Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (Dep't Comm. 1992) (final affirm. determ.).

2. Commercially Valuable By-Products

The second development relates to so-called "by-products" of subsidized production. In Softwood Lumber, the Department ruled that subsidy benefits were allocable to both the lumber and the commercially valuable wood chips produced by a sawmill which received subsidies. Previously, this issue had been in flux.[44/]

3. Tied Subsidies/Restructuring

Practitioners should be aware of an interesting interaction which developed between the Department's longstanding methodology regarding so-called "tied" subsidies and the new subsidy-repayment methodology that the Department now applies to companies, or elements of companies, that are sold. Normally, a subsidy is not considered to be tied and therefore all of the merchandise produced by the recipient company is deemed to benefit from the subsidy. If a division producing a certain product line of the company is then sold, the Department now uses its subsidy-repayment methodology to transfer some of the subsidy benefit (a portion of the division's purchase price) that was previously allocated to the division's goods back to the remaining merchandise of the original company.

If the subsidy was deemed "tied" to the products of the sold division, however, it appears that the Department would continue to countervail the division's products without change. For example, under the Department's repayment methodology, if a fruit grower had an orange-tree division and an apple-tree division and received a normal, untied subsidy which resulted in a 10 percent countervailing duty rate on both types of fruit, the sale of the company's apple division would increase the rate on the oranges and reduce the rate on the apples. If the entire subsidy was "tied" to apple product, the subsidy for apples would be unchanged after the division is sold (oranges remain unsubsidized as before the sale). Although the Department has yet to formalize this methodology, it appears to be the implication of its recent rulings.

44/ In the Lamb Meat cases, by comparison, the Department adopted varying approaches as to how subsidies should be allocated to various lamb by-products. See Lamb Meat from New Zealand, 47 Fed. Reg. 58,128 (Dept Comm. 1981); Lamb Meat from New Zealand, 50 Fed. Reg. 37,708 (Dep't Comm. 1985); Lamb Meat from New Zealand, 54 Fed. Reg. 1,402 (Dep't Comm. 1989) (prelim. determ.).

Significantly, allocation of subsidies to by-products does not affect the specificity of a subsidy. This is because industries for specificity purposes are not defined by products per se. For example, the beneficiary industry in Lamb Meat was the lamb "industry" -- not mutton, chamois, wool, dog food, fertilizer, etc. industries.

III. Other Strange Problems and Issues

A. Privatization

One of the most hotly argued issues in the recent flat-rolled steel cases is the issue of whether privatization eliminates the countervailability of previous subsidies. In one sense, the issue is fundamental, as basic concepts of countervailing duty law suggest that privatization is irrelevant -- the benefit allocated to the subject merchandise has not changed after privatization. The Department has agreed and ruled that privatization per se does not change countervailability. Ownership, per se, of either the subject merchandise or the company producing the merchandise does not change countervailability.[45/]

At the same time, if the courts ultimately rule in favor of respondents as the U.S. Court of International Trade ("CIT") has initially in a case sure to be appealed, and find that privatization wipes out the countervailability of previously provided subsidies, it is likely to be a narrow, albeit dangerous, ruling. It is highly unlikely that the courts will rule that a mere change in ownership of any company eliminates countervailability. At its extreme, this would mean that subsidies to a publicly-traded company could not be countervailed (as its ownership changes daily and, after a subsidy, the new owners are certainly not subsidized) nor could any merchandise be countervailed that was traded at arms-length through a wholesaler (which, of course, would not itself be subsidized). Such a broad ruling is not only unlikely but, if made, would certainly be corrected by Congress.

Nonetheless, even if the courts accept a very limited privatization exception, it could play serious mischief with the law. If nothing else, it will create a peculiar incentive to subsidize institutions and then nationalize and privatize those companies in order to avoid countervailing duty laws. This is hardly a sound policy.

Finally, in the course of analyzing privatization, the Department also expanded the concept of repayment of subsidies.[46/] This issue, too, is on appeal on at least two

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45/ A relatively little noticed provision of the new SCM Code also suggests that privatization, per se, does not affect countervailability. Article 27:12 notes that subsidies given during the course of privatization in less developed countries are not subject to the Code's serious prejudice provision. This suggests several things: (1) countervailability (as opposed to serious prejudice) is unaffected in the case of subsidies given in the course of privatization; (2) subsidies given prior to privatization are wholly unaffected (otherwise the provision would have been unneeded); and (3) any escape from the serious prejudice remedy only applies to less developed countries.

46/ As far as we are aware, the only case previously to acknowledge the repayment of subsidies was Magnesium from Canada, where a grant given to a company to (continued...)

grounds: 1) Can the Department read into the statute an implicit authority to reduce countervailable subsidies allocated to particular production when the statute recognizes a limited number of gross subsidy offsets that do not include repayment?[47/] 2) If a subsidy can be repaid, what are the conditions for repayment?[48/]

B. Greenlighting

The SCM Agreement greenlights, rendering non-countervailable, three categories of potentially injurious subsidies: research & development ("R&D"), regional, and environmental. This represented a shift in U.S. negotiating posture at end of Uruguay Round negotiations which will have significant effects in future CVD cases. The later surfacing of internal Administration analysis suggests that key policymakers may have run certain risks of expanding subsidies in order to ensure that certain programs favored by the Administration were not at risk.

Key Senators, in particular, have attacked the greenlighting provision, wondering whether United States will utilize the greenlight protection and, if so, how it will pay for new greenlighted subsides.[49/] Administration officials have responded that the R&D greenlight is needed for existing basic research programs such as DARPA, NIH grants, and the clean car consortium. Yet, U.S. research programs have never before been countervailed or acted against through the GATT, and it is not clear why they might suddenly have attracted additional attention if greenlighting had been kept out of the Code. In the end, the implications of the provision are likely to take several years to unravel.

C. Environmental "Subsidies"

The idea has gained currency in the last year or two that low environmental standards, or low levels of enforcement, result in subsidies that should be subject to trade

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46/(...continued)
perform a feasibility study -- repayable by its terms if production were commenced -- had in fact been fully repaid after production began and before the POI. Magnesium from Canada, 57 Fed. Reg. 30,948.

47/ 19 U.S.C. § 1677b. Compare Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398, 401 (1994).

48/ Petitioners argued that repayment can only occur, even in theory, when the producer of the subject merchandise, in effect, "subsidizes" the government by returning a benefit for nothing (or for less than adequate remuneration).

49/ 44 Republican Senators expressed this concern to U.S. Trade Representative Kantor in a letter dated January 31, 1994. See "Republican Senators Letter on Subsidies Code" in Inside U.S. Trade at 16-17 (Feb. 4, 1994). Key Democrats, too, have expressed serious reservation with the greenlighted category.

actions including countervailing duties. The issue was considered by environmental groups in the context of the lumber case, and it was a hotly debated one during NAFTA implementation, when it was feared that Mexico's relatively light enforcement would lead to an exodus of U.S. manufacturers seeking a "pollution haven."

A NAFTA side agreement allows complaints to be filed alleging persistent, targeted, and demonstrably trade-distorting under-enforcement of environmental laws. (Agreement on substantive environmental standards was not obtained.) The result is that under-enforcement is treated in a manner roughly analogous to subsidies, except that the authorized remedies are far weaker.

At the same time, the GATT "greenlighted" some subsidies to offset the cost of environmental compliance. Interestingly, the environmental community has opposed this provision as a violation of the basic tenet that polluters should pay for clean-up costs.

At this point, little else can be said. The entire issue of environmental subsidies might usefully be revisited in a GULC trade law seminar after the turn of the century.

D. Judicial Developments: Burden of Proof/Persuasion

One recent interesting Federal Circuit decision, Creswell Trading Co., Inc. v. United States, 15 F.3d 1054 (Fed. Cir. 1994), addresses the burdens of proof and persuasion in a countervailing duty proceeding. The case involved a Commerce Department determination to countervail certain rebates provided by the Indian government to exporters of Indian iron-metal castings. The issue before the court was whether the Department's determination that the rebates were countervailable was supported by "substantial evidence" on the administrative record and "otherwise in accordance" with the CVD law.

The applicable statutory provision, 19 U.S.C. § 1677(5)(A)(i), makes countervailable all the items on the Illustrative List of Export Subsidies in the 1979 GATT Subsidies Code. Item (d) of the Illustrative List, however, provides an exception under which a government's provision of goods or services is not countervailable if the terms of the provision are not more favorable than those "commercially available on world markets." In its final determination, the Department found that the respondents (the Indian government and the exporters) failed to meet their burden in establishing the terms and conditions that were available on world markets of pig iron -- which the Indian Government had provided to its domestic metal casting industry -- were not countervailable under the item (d) exception. Commerce contended that the respondents had to (and failed to) establish world-market prices prevalent at the time of the government provision, while the respondents argued that they needed only to establish "a" price available to Indian exporters on world markets, not necessarily a price prevalent at the time of the government provision.

The Federal Circuit held that the record evidence provided by the respondents satisfied the burden on them in connection with establishing that the item (d) exception

applied -- i.e., that the terms available on world markets for pig iron were as favorable as those made available to the Indian exporters. In reaching that decision, the court noted that Commerce bears the ultimate "burden of proof" (although not the initial burden of production) with respect to each element necessary to a finding of subsidy. If read broadly, this language in Creswell would effect a sea-change in CVD (and other administrative) practice. CVD investigations have long been assumed to begin from a neutral point, with determinations based on the weight of the evidence presented and the expert judgment of the investigating authority (e.g. ITC or Commerce). Given this, and since Creswell is probably limited to a situation where the Department seeks to presume an element of subsidy, such as this exception to a subsidy enumerated in the Illustrative List,[50/] the case is likely to be narrowly applied.

IV. Uruguay Round Subsidies Code: Key Developments

Under the new Subsidies Code, there are a number of modifications in the procedures of an investigation worthy of brief comment. These include the following:

A. CVD Investigations Under the New Code: Additional Hurdles

1. Standing

Under current U.S. practice, standing to bring a countervailing duty case is presumed to exist unless an interested party (generally, a respondent) successfully rebuts the petition's allegation that the case is brought "by or on behalf" of a domestic industry. The Subsidies Code, however, increases the standing burdens by requiring the agency to investigate and determine that the petition was filed "by or on behalf of the domestic industry." Moreover, the Code also requires that (i) there be more expressed support for, than opposition to, the petition, and (ii) no case may be initiated without the expressed support of producers accounting for at least 25% of domestic production.[51/]

2. Sunset

Under current U.S. law, countervailing duty orders continue in force unless a particular foreign exporter proves it has not received allocable subsidies for three consecutive years. Additionally, an order may be terminated whenever the domestic industry no longer wishes its continuation. The Subsidies Code, however, provides for termination -- or "sunsetting" -- of orders after five years, unless the administering authority has conducted a special "sunset review" and determined that subsidization (or injury) will recur unless the countervailing duty order is left in place.[52/]

50/ Compare 19 U.S.C. §§ 1677(5)(A)(i) (items on Illustrative List countervailable) and (ii) (identifying several additional categories of countervailable subsidies).

51/ Article 11, SCM Code.

52/ Article 21, SCM Code.

3. De Minimis Rates

Commerce Department regulations require the termination of a countervailing duty investigation if the calculated subsidy is considered negligible. Current regulations treat subsidies as negligible if the net benefit from all countervailable programs calculated for a given year is not at least 0.5% ad valorem.[53] The Subsidies Code raises this de minimis rate to at least 1% ad valorem.[54]

The Code provides an even larger exception for developing nations by setting the de minimis requirement at 2%; this is raised to 3% for developing nations which eliminate export subsidies ahead of an 8 year schedule created by the Code.[55]

4. GATT Appeals

Under the new World Trade Organization ("WTO") dispute-settlement process, U.S. countervailing duty determinations will likely be challenged more often for potential violations of the GATT.

A number of GATT members have argued that predecessor subsidy/CVD rules constituted a derogation to the GATT, i.e., an exception to the spirit of open and liberal trade which was the GATT's foundation. Consequently, these members called for a narrow interpretation of the GATT permission to offset subsidies. The United States has consistently opposed this view. It has always maintained that anti-subsidy disciplines were fundamental, not exceptional, as part of the GATT, and that they were more, not less important in a liberalized trading regime because nations opening their markets became increasingly vulnerable to the unfair trade practices of others. Within the WTO, the United States can be expected to continue arguing that the permission to impose countervailing duties is not a derogation if adoption of the new Subsidies Code does not effectively lay the matter to rest.

In this regard, the applicable standard of review in GATT/WTO appeals of CVD determinations is a related matter of great importance for the United States. While the new Antidumping Code has explicit provisions intended to preclude panels from inappropriately reversing factual and legal determinations reached by national authorities in antidumping duty cases, there is no analogous language in the new SCM Code. Instead, a Ministerial Declaration, included in the Uruguay Round Final Act, recognizes ". . . the need for consistent resolution of disputes arising from antidumping and countervailing duty measures." The U.S. Administration is correctly insisting that panels established under the SCM Code must apply the standard of review set out in the Anti-

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53/ 53 Fed. Reg. 52,357 (Dec. 27, 1988).

54/ Article 11, paragraph 9 and Article 15, paragraph 3 of the SCM Code.

55/ Article 27, paragraphs 9 and 10, SCM Code.

dumping Code. This standard is similar to that used by U.S. courts in reviewing AD/CVD determinations.

B. <u>GATT Cases: Serious Prejudice</u>

A party such as a U.S. domestic industry alleging harm from foreign subsidies has at least two avenues of redress under the GATT subsidies regime. Traditionally, the party would call for a domestic countervailing duty investigation because GATT Subsidies Committee remedies were considered wholly inadequate. A second option, however, is to bring a GATT case and try to prove that the subsidy provided violates the GATT. Proving a GATT violation requires evidence that the subsidies ares causing the complainant to suffer "adverse effects." "Adverse effects" is itself a term of art under the new GATT Subsidies Code which is defined as something causing "serious prejudice," "injury," or "nullification or impairment" of benefits to which other parties are entitled under the GATT.

Of these three definitions, focus under the SCM has largely fallen upon the first. "Serious prejudice," is injury, though not as injury is understood in U.S. trade law. Under U.S. countervailing duty and antidumping laws, the injury caused by imports must be to a domestic industry "in the United States." Under the Subsidies Code, by contrast, the injury may be -- but need not be -- sustained in the complainant's domestic market. A GATT violation may in theory found even where the injury is sustained in the market of the subsidizing government or a third country market altogether. Most significantly, the new Code adds a presumption of serious prejudice if subsidies exceed 5% <u>ad valorem</u> on a cost to government basis.

The United States position throughout the GATT negotiations has consistently called for stronger GATT disciplines. This position also helped place subsidy discipline within the framework of the new GATT, rather than relegating it to the separate code status which it enjoyed, with very limited success, under the predecessor GATT agreement. Presently, the USTR believes that the "serious prejudice" standard is in fact an effective international discipline. Time will tell.

V. <u>Conclusion</u>

The law of subsidies and countervailing duties will continue in flux for some time. Recent developments suggest both a recognition of the greater complexity of subsidies and an effort not to permit complexity to result in a subsidy being excused.

At the same time, the Department's subsidy methodology is still in need of numerous improvements and faces challenges even on basic points. Hopefully, this coming year will see at least some clarification of many of these issues.

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