

Subsidies and Privatization: Protectionism's Integral Role in United States Trade Law

TABLE OF CONTENTS

INTRODUCTION	486
I. THE LAW	489
A. <i>Definition of a Subsidy</i>	489
B. <i>U.S. Countervailing Duty Law</i>	491
C. <i>Applying U.S. CVD Law to Privatized Foreign Entities</i>	493
II. SAARSTAHL AG V. UNITED STATES.....	496
A. <i>The Facts</i>	496
B. <i>Saarstahl Procedure</i>	497
C. <i>The Federal Circuit's Decision</i>	499
III. THE CONGRESSIONAL CVD AMENDMENTS.....	499
IV. ANALYSIS OF SAARSTAHL AND THE CONGRESSIONAL AMENDMENTS	501
A. <i>Saarstahl and the Amendments Defy the Purpose of U.S. CVD Law</i>	502
1. Prior U.S. CVD Laws Required a Benefit for a Subsidy to be Countervailable.....	502
2. Current International Laws Require a Benefit for a Subsidy to be Countervailable.....	504
3. Economic Theory Shows that U.S. CVD Laws Unjustly Subsidize U.S. Industries	505
B. <i>Policy Ramifications of the Amendments</i>	507
1. The Amendments Discourage Privatization as a Means for Making a Transition to Market Economies	507
2. The Amendments Erect Significant Obstacles to Free Trade	509
CONCLUSION	511

INTRODUCTION

The fall of the Soviet Union in 1991 capped the demise of communism in Eastern Europe, which began with the fall of the Berlin Wall in 1989.¹ As part of the subsequent transition to capitalism, Eastern European governments have begun selling government-owned firms to private parties.² Similarly, governments in Latin America have privatized a significant number of government enterprises.³ In its support of free trade, the United States has encouraged this trend towards privatization.⁴

Prior to being sold, many of these firms had received government subsidies to increase their ability to compete in the world marketplace.⁵ To offset these subsidies' anticompetitive effects on

¹ See HEDRICK SMITH, *THE NEW RUSSIANS* 652 (1991); Serge Schmemmann, *The Border is Open; Joyous East Germans Pour Through Wall; Party Pledges Freedom and City Exults*, in *THE COLLAPSE OF COMMUNISM* 175, 175-80 (Bernard Gwertzman & Michael T. Kaufman eds., 1990) (discussing fall of Berlin Wall in November 1989); Craig R. Whitney, *Redefining Europe: As the Revelry Goes on Politicians Ponder the Ramifications of Changes in Germany*, in *THE COLLAPSE OF COMMUNISM* 180, 181 (1990) (discussing potential consequences of reform movements in East Germany).

² See Danny E. Reed, *Creating Competitive Market Economies in Poland and Hungary*, 48 *ADMIN. L. REV.* 515, 515-17 (1996) (discussing prominence of privatization as method of converting economies of Central and Eastern Europe to free market economies); Robert L. Harris, Note, *Goin' Down the Road Feeling Bad: U.S. Trade Laws' Discriminatory Treatment of the East European Economies in Transition to Capitalism*, 31 *COLUM. J. TRANSNAT'L L.* 403, 403 (1993) (noting trend among East-Central European governments to privatize state-owned operations in order to establish market economies). See generally PIERRE GUISLAIN, *DIVESTITURE OF STATE ENTERPRISES: AN OVERVIEW OF THE LEGAL FRAMEWORK* (World Bank Technical Paper No. 186, 1992) (providing overview of legal issues raised by privatization).

³ See Werner Baer & Melissa Birch, *Privatization and the Changing Role of the State in Latin America*, 25 *N.Y.U. J. INT'L L. & POL.* 1, 1-2, 14-16 (1992) (tracing movement of privatization through Latin America and methods of privatization process used in region); Mary M. Shirley, *Privatization and Performance*, 17 *HASTINGS INT'L & COMP. L. REV.* 669, 671-73 (1994) (discussing privatization in developing countries); Ricardo Hausmann, *Latin America Reaping Rewards of Privatization*, *HOUSTON CHRON.*, Dec. 17, 1996, at 23A (discussing privatization of oil, gas, and electricity sectors in Latin America); see also Matthew S.R. Palmer, *Privatization in Ukraine: Economics, Law, and Politics*, 16 *YALE J. INT'L L.* 453, 473-92 (1991) (discussing international movement toward private economies and describing privatization efforts in Ukraine, New Zealand, United Kingdom, Canada, Chile, and Poland); Wendy Cooper & Harvey D. Shapiro, *The Privatization of Privatization*, *INSTITUTIONAL INVESTOR*, Oct. 1991, at 87 (int'l ed.) (providing status report on privatizations worldwide). See generally *PRIVATIZATION OF PUBLIC ENTERPRISES IN LATIN AMERICA* (William Glade ed., 1991) (describing privatization process in individual Latin American countries). Free market countries such as France and Singapore have also begun privatizing government-owned firms. See David S. da Silva Cornell, *Maybe You Can Take It with You, After All: Subsidies and Privatization Under U.S. Countervailing Duty Law*, 25 *LAW & POL'Y INT'L BUS.* 1309, 1309 (1994).

⁴ See Cornell, *supra* note 3, at 1322; see also E. Kwaku Andoh, Note, *Countervailing Duties in a Not Quite Perfect World: An Economic Analysis*, 44 *STAN. L. REV.* 1515, 1515 (1992) (describing United States as greatest supporter of free trade in post-World War II period).

⁵ See Pamela L. Polevoy, Note, *Privatization in Vietnam: The Next Step in Vietnam's Transi-*

domestic firms, the United States Department of Commerce ("Commerce") imposes countervailing duties ("CVDs"),⁶ or taxes, on imports from these foreign firms.⁷ Following a privatization, governments usually terminate the subsidy.⁸ Unfortunately, recent developments in U.S. CVD law have cast doubt on the U.S. commitment to promote privatization and free trade.⁹

In 1994, Commerce determined that CVDs may be imposed on the products of newly privatized firms that had previously received government subsidies.¹⁰ A newly privatized German steel manufac-

tion from a Nonmarket to a Market Economy, 23 BROOK. J. INT'L L. 887, 892-94 (1998) (discussing "Big Bang" theory of privatization). The Big Bang theory, the most complete and widely used of the privatization methods, has several components, including terminating public subsidies. *See id.*

⁶ *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-57 (1978) (concluding that purpose of CVD law is to offset "unfair competitive advantage" conferred upon foreign firms by subsidies); Andoh, *supra* note 4, at 1522 (concluding that Congress intended to provide U.S. firms with protection from adverse impact of subsidized foreign competition).

⁷ *See* 19 U.S.C. § 1671(a) (1994) (authorizing imposition of duty equal to amount of subsidy received by foreign producer); Andoh, *supra* note 4, at 1516 (defining CVDs).

⁸ *See* Polevoy, *supra* note 5, at 892-93 (commenting that under popular Big Bang theory, government subsidies typically terminate upon privatization); *see also infra* notes 165-67 and accompanying text (arguing that United States acts hypocritically when it enacts CVD law that discourages transition to capitalist economies).

⁹ *See* David A. 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, 463-70 (1995) (arguing that Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, creates system of disincentives for privatization and reverses trend toward privatization of firms); *see also* Jeffery P. Bialos et al., *Trading with Central and Eastern Europe: The Application of the U.S. Unfair Trade Laws to Economies in Transition*, 7 INT'L L. PRACTICUM 69, 69 (1994) (describing dilemma of United States policy makers who seek to support economic reform in Eastern Europe and to protect U.S. industries from unfair foreign competition); Harris, *supra* note 2, at 405 (chronicling technical changes in Tariff Act of 1930 that give newly privatized sectors less favorable treatment than their state-controlled counterparts). *See generally*, Robert Kuttner, *Managed Trade and Economic Sovereignty*, in INTERNATIONAL TRADE: THE CHANGING ROLE OF THE UNITED STATES 37 (Frank J. Macchiarola ed., 1990) (probing implications of decreased foreign government control over markets on U.S. promoting ideal of liberal trade); David M. McPherson, Note, *Is the North American Free Trade Agreement Entitled to an Economically Rational Countervailing Duty Scheme?*, 73 B.U. L. REV. 47, 64-65 (1993) (discussing discontinuity between U.S. free trade ideology and protectionist application of CVD system).

¹⁰ *See, e.g.*, Certain Steel Products from Austria, 58 Fed. Reg. 37,217 (Dep't Commerce 1993) (final determination); Lime from Mexico, 54 Fed. Reg. 1753 (Dep't Commerce 1989) (prelim. admin. review); Oil Country Tubular Goods from Canada, 51 Fed. Reg. 15,037 (Dep't Commerce 1986) (final determination). Privatization has become increasingly popular and much of this privatization involves large industrial sectors. *See* Cornell, *supra* note 3, at 1310. Commerce, thus, needed to articulate an economically and legally rational methodology regarding the application of CVDs to large industrial sectors. *See id.* Commerce appended a General Issues Appendix to its final determination in *Certain Steel Products from Austria*. The General Issues Appendix was designed to summarize Commerce's position regarding the application of countervailing duties to privatized firms that had previously received subsidies while under government ownership. *See* General Issues Appendix, 58 Fed.

turer, Saarstahl AG, appealed Commerce's determination to the United States Court of International Trade ("CIT").¹¹ The CIT held that selling a government-owned business to a private party at fair market value extinguished all prior subsidies.¹² Congress disagreed.

In legislation purporting to implement agreements reached by the worlds trading partners during the Uruguay Round¹³ of the General Agreement on Tariffs and Trade ("GATT"),¹⁴ Congress amended U.S. CVD law. The amendments permit Commerce to impose CVDs on imports from newly privatized companies despite an arm's length sale. By permitting Commerce to countervail imports from newly privatized firms, Congress has overcompensated U.S. industry and has ultimately discouraged privatization efforts throughout the world.¹⁵ Although the amendments did not take

Reg. 37,225-73 (Dep't Commerce 1993) [hereinafter General Issues Appendix].

Commerce reasoned that even though the new entity no longer received subsidies, the transfer from public to private hands did not, per se, extinguish prior subsidies. *See* Certain Steel Products from Austria, 58 Fed. Reg. at 37,263. Thus, Commerce concluded that the entity continued to receive a competitive benefit from the subsidies. *See id.* at 37,217; *see also* British Steel PLC v. United States, 879 F. Supp. 1254, 1264-66 (Ct. Int'l Trade 1995) (describing Commerce's General Issues Appendix as applied to privatized steel companies); Saarstahl AG v. United States, 858 F. Supp. 187, 191 (Ct. Int'l Trade 1994) (discussing application of General Issues Appendix to German steel manufacturer).

¹¹ *See Saarstahl*, 858 F. Supp. at 189-90 (describing Saarstahl's argument).

¹² *See id.* at 195 (holding unlawful Commerce's finding that previously bestowed subsidies passed through to successor company sold in arm's length transaction). Commerce contended that so long as a subsidy is not repaid, it travels to each subsequent purchaser. *See id.* The CIT reasoned that if, as Commerce believed, a transfer at fair market value did not necessarily extinguish all prior subsidies, a free market transaction would cease to exist. *See id.* at 194. The court concluded that a CVD policy based on this reasoning would have a profound adverse impact on international commerce. *See id.* (describing impact on international commercial business as "immeasurable"). The CIT reached a similar conclusion when British Steel, a British steel manufacturer, appealed a similar Commerce determination that the newly privatized firm's imports were still countervailable. *See British Steel PLC*, 879 F. Supp. at 1272 (holding that if privatization of foreign government-owned producer is effected through arm's length transaction for fair market value in which subsidized corporate entity does not survive, Commerce's ability to countervail that entity ceases to exist).

¹³ *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round Agreement].

¹⁴ *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 251(a), 108 Stat. 4809, 4902 (1994) (codified at 19 U.S.C. § 1677(5)-(5B) (1994)).

¹⁵ *See* Mark D. Herlach & David A. Codevilla, *Major Changes in U.S. Countervailing Duty Law: A Guide to the Basics*, 722 PRAC. L. INST., COM. L. & PRAC. COURSE HANDBOOK SERIES 53, 58 (1995) (arguing that first substantial change in U.S. countervailing law discourages privatization); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 203-04 (1989) (discussing discouragement of trade distorting subsidies as justification for U.S. countervailing duty law); Codevilla, *supra* note 9, at 435 (explaining that purpose of trade laws is to discourage foreign governments from "trying to provide some competitive

effect until after the German government sold Saarstahl, the United States Court of Appeals for the Federal Circuit in *Saarstahl AG v. United States*¹⁶ followed Congress's lead and reversed the CIT's holding.¹⁷ The court held that Commerce had reached a reasonable conclusion, and reinstated Commerce's determination that CVDs may be imposed on newly privatized firms.¹⁸

This Note argues that the congressional amendments and the Federal Circuit's ruling run contrary to traditional U.S. CVD law, its legislative purpose, and the economic foundations for imposing CVDs. Part I defines a subsidy and discusses the original purpose of U.S. CVD law. Furthermore, Part I describes Commerce's methodology for determining whether subsidies run through to a private successor company. Part II discusses the Federal Circuit's holding in *Saarstahl*. Part III discusses the congressional amendments to U.S. CVD law. Finally, Part IV critically analyzes the Federal Circuit's *Saarstahl* opinion and the congressional CVD amendments.

I. THE LAW

A. Definition of a Subsidy

A subsidy is a financial benefit an industry or firm receives from its government.¹⁹ It is the financial equivalent of a negative

advantage in relation to the products of another country").

¹⁶ 78 F.3d 1539 (Fed. Cir. 1996).

¹⁷ See *id.* at 1544 (holding that CIT abused its discretion and that it should not have disturbed Commerce's reasonable determination). The Federal Circuit, created by Congress in 1982, is a specialized court that hears appeals from the Court of International Trade. See 28 U.S.C. § 1295(a)(5) (1994). Congress established federal appellate courts in 1891, organizing them into several circuits based on geography. See The Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826 (1891); see also 28 U.S.C. § 41 (1994) (describing current structure of federal appellate courts). Each circuit has an appellate court (a "circuit" court) that hears appeals from all federal district courts in that circuit. See *id.* § 43 (1994). By contrast, the Federal Circuit's jurisdiction is based on subject matter, not geography. See *id.* § 1295. Examples of the Federal Circuit's jurisdiction include appeals from the United States Court of Federal Claims, 28 U.S.C. § 1295(a)(3), appeals from the Board of Patent Appeals and Interferences of the Patent and Trademark Office, 28 U.S.C. § 1295(a)(4)(A), and appeals from the Merit Systems Protection Board, 28 U.S.C. § 1295(a)(9).

¹⁸ See *Saarstahl*, 78 F.3d at 1544.

¹⁹ See ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 112-13 (3d ed. 1989). United States and international law define two categories of subsidies. See Bialos, *supra* note 9, at 70 (analyzing subsidies based on two categories — domestic subsidies and export subsidies); Sykes, *supra* note 15, at 203-06 (comparing export subsidies with domestic subsidies). Export subsidies are government grants offered to promote a firm's export competitiveness.

tax.²⁰ The recipient simply adds to its revenue the amount of the subsidy.²¹ The total revenue of the recipient, therefore, is the revenue generated from sales to customers plus the subsidy.²² By increasing total revenue, the subsidy distorts the market by permitting the recipient to compete with more efficient foreign producers.²³ The increased competitiveness of subsidized foreign firms

See id. They usually take the form of discounted export financing, direct cash payments on the basis of export volume, or exchange rate controls. *See id.*

A domestic subsidy is any financial benefit a firm or industry receives regardless of export performance. *See* 19 U.S.C. § 1677(5) (1994). Under U.S. law, it has two requirements. *See id.* § 1677(5)(A); Sykes, *supra* note 15, at 204. First, the government practice must target a specific industry or firm. *See* 19 U.S.C. § 1677(5)(A). The specificity test properly excludes from this definition many common governmental actions. *See id.* § 1677(5)(B) (listing categories of noncountervailable subsidies). For example, national defense programs are not considered subsidies. *See* Sykes, *supra* note 15, at 204. The benefits of national defense programs are not limited to a particular industry and, instead, accrue to a wide range of industries. *See id.* Thus, these benefits do not qualify as subsidies. *See id.*

Second, a domestic subsidy must confer some advantage to the recipient which is otherwise unavailable in the marketplace. *See* 19 U.S.C. § 1677(5)(B); Sykes, *supra* note 15, at 205. This latter requirement helps actualize the subsidy. *See id.* For example, if a government provides a market rate loan, even if it is highly specific to one industry, this action is not a subsidy. *See* 19 U.S.C. § 1677(5)(E)(ii); Sykes, *supra* note 15, at 205. Under the statute, only if the government provides a loan at a lower interest rate than the market would command is the practice considered a subsidy. *See* 19 U.S.C. § 1677(5)(E)(ii); Sykes, *supra* note 15, at 205 (discussing creation of subsidy by government loan and valuing that subsidy as difference between actual interest rate and market rate).

Subsidies can take the form of "financial contributions," including a direct cash payment independent of export volume, tax concessions, or low interest loans. *See* 19 U.S.C. § 1677(5)(D) (providing requirements of domestic subsidies); CARBAUGH, *supra*, at 113-14 (providing examples of domestic subsidies). While governments generally grant domestic subsidies to producers that must compete with imports from abroad, these producers often also export. *See id.* at 112.

A subsidies agreement among the contracting parties to the General Agreement on Tariffs and Trade ("GATT") provides an illustrative list of export subsidies. *See* Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, 546-47, GATT B.I.S.D. 26th Supp. 56, 80-82 (1980) (entered into force Jan. 1, 1980) [hereinafter GATT Subsidies Code]. Later negotiations produced further subsidy examples. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IA, LEGAL INSTRUMENTS — RESULTS OF THE URUGUAY ROUND vol. 27; 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round Subsidies and Countervailing Measures Agreement]. The subsidies listed in the Uruguay Round Subsidies and Countervailing Measures Agreement include any government practice involving a direct transfer of funds, government revenue otherwise owed that is not collected, and government provision of goods and services other than general infrastructure. *See id.* art. 1.1(a)(1)(i)-(iii). U.S. CVD law includes in its definition of a subsidy any of those government practices enumerated in the Uruguay Round Subsidies and Countervailing Measures Agreement. *See* 19 U.S.C. § 1677(5)(B)(i)-(iii).

²⁰ *See* CARBAUGH, *supra* note 19, at 112-13.

²¹ *See id.* at 113.

²² *See id.*

²³ *See id.*

attracted the attention of Congress, which became concerned about the impact of subsidies on U.S. industry.²⁴

B. U.S. Countervailing Duty Law

Congress, recognizing that subsidies give foreign products a competitive advantage, passed the first CVD law in 1897.²⁵ Congress enacted CVD laws to offset the impact of this advantage and, thus, to protect domestic industry.²⁶ The Tariff Act of 1930, as amended, currently governs U.S. CVD law.²⁷ Under the statutory

²⁴ See Act of July 24, 1897, ch. 11, § 5, 30 Stat. 151, 205.

²⁵ See *id.* Congress originally targeted subsidized imported beet sugar. See 30 CONG. REC. 2203 (1897) (remarks by Sen. Gray) (discussing Wilson Bill of 1894). In 1897, Congress expanded the CVD bill to apply to all imported products. See *id.* at 2202 (reprinting Senate Finance Committee bill); see also Sykes, *supra* note 15, at 199 n.1 (discussing early use of CVD law). Among major trading nations, only the United States has used countervailing duties extensively. See *id.* at 202. The European Union and Japan virtually never use countervailing duties. See *id.* at 202 n.18. Chile, however, has used CVD laws on a regular basis. See *id.*; see also JOHN JACKSON & WILLIAM DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 727 (2d ed. 1986) (discussing use of CVD laws in international community).

²⁶ See Bialos, *supra* note 9, at 70 (concluding that Congress adopted CVD law to “offset any unfair competitive advantage” foreign producers receive from their governments). For early statements by members of Congress during CVD debates which echoed this sentiment, see 30 CONG. REC. 1674 (1897) (remarks by Sen. Allison), 30 CONG. REC. 2205 (1897) (remarks by Sen. Caffery), and 30 CONG. REC. 2225 (1897) (remarks by Sen. Lindsay). The Supreme Court recognized Congress’s underlying intent to use countervailing duties to offset advantages offered to foreign firms. See, e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-57 (1978) (holding that Congress intended CVDs as offset to subsidies granted by foreign governments).

The Federal Circuit agreed with the Supreme Court in 1986. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (concluding that Congress intended to protect American manufacturers from unfair advantage that foreign governments conferred upon foreign firms with subsidies). The court maintained that American firms competed effectively with foreign firms in the absence of foreign government intervention. See *id.* For example, a foreign firm would export to the United States only if it could earn a profit. See *id.* A subsidy permits the foreign government to absorb some of the costs of competing in United States. See *id.* Therefore, a subsidy that confers some advantage to the foreign firm would allow it to compete more effectively with American firms by allowing it to export more profitably. See *id.*

The *Georgetown Steel* court noted that a previous Commerce decision made a similar determination. See *id.* In *Polish Wire Rod*, Commerce defined a subsidy as government intervention that distorts the market and encourages inefficient production. See *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,374, 19,375 (Dep’t Commerce 1984) (final determination) (concluding that, without government intervention, supply and demand ensure that resources flow toward their most efficient and profitable use). This artificial competitive advantage is what Congress intended to negate when it enacted CVD law. See *Georgetown Steel*, 801 F.2d at 1315.

²⁷ See 19 U.S.C. §§ 1671-1677 (1994 & Supp. 1996); see also Herlach & Codevilla, *supra* note 15, at 73-78 (discussing changes in U.S. CVD law subsequent to Uruguay Round Subsidies and Countervailing Measures Agreement).

scheme, the executive branch administers CVD law.²⁸

The administration of U.S. CVD law is a multiagency, multistep process. The first step requires a U.S. industry that competes with an imported product to file a petition with Commerce.²⁹ Commerce's assessment of the petition involves two inquiries. Initially, the International Trade Administration ("ITA"), an agency within Commerce, determines whether a foreign government has granted a subsidy to the foreign producer.³⁰ If ITA determines that a subsidy has been granted, a separate government agency, the International Trade Commission ("ITC"), determines whether the subsidized imports have injured or threaten to injure the U.S. industry.³¹ Commerce may impose CVDs only if the ITA finds that a government has bestowed a subsidy and the ITC determines that the recipient's imports have injured or threaten to injure U.S. industry.³² The appropriate CVD equals the amount of the foreign govern-

²⁸ See 19 U.S.C. § 1677(1), (2) (1994) (delegating authority to Commerce and International Trade Commission to conduct CVD investigations).

²⁹ See *id.* § 1671a(b) (1994); see also Sykes, *supra* note 15, at 202-03 (describing how Commerce administers U.S. CVD law). CVD law defines "industry" as the domestic producers as a whole or those producers whose output comprises a significant proportion of domestic production. See 19 U.S.C. § 1677(4)(A) (1994). The power to initiate the review process is not limited to industry, as Commerce may begin a CVD investigation *sua sponte*. See *id.* § 1671a(a).

³⁰ See *id.* § 1671d(a)(1) (1994).

³¹ See *id.* § 1671d(b). This injury determination is a two step process. See *id.* §§ 1671b(a) (1994), 1671d(b). Before the ITA begins its investigation, the ITC makes a preliminary determination of whether there is a "reasonable indication" that the imported products are injuring U.S. industry. See *id.* § 1671b(a). In most cases, the ITC is able to find an injury under this standard. See *American Lamb Co. v. United States*, 785 F.2d 994, 999-1001 (Fed. Cir. 1986) (affirming ITC interpretation of statutory language "reasonable indication" as requiring ITC to issue negative determination only if clear and convincing evidence shows that there was no material injury or threat of injury and record shows it "extremely unlikely" that evidence of reasonable indication would surface in further investigation). If the ITC finds no injury in this preliminary investigation, the proceeding ends. See 19 U.S.C. § 1671b(a)(1). If the ITA finds a subsidy was bestowed, the ITC conducts its investigation. See *id.* §§ 1671b(b)(1), 1671d(a)(1). Should the ITA determine that no subsidy was bestowed, the investigation is terminated before the ITC's final injury finding. See *id.* In its final injury determination, the ITC looks to whether the imports were causing or threatening to cause material injury to the U.S. industry. See *id.* § 1671d(b)(1). The statute providing for the ITC's final injury determination excludes the "reasonable indication" language, suggesting a higher, more difficult standard for an affirmative finding. See *American Lamb*, 785 F.2d at 998-99 (noting that final determination is based on testimony given at trial-type hearing while preliminary decision is based on questionnaires). Compare 19 U.S.C. § 1671b(a) (requiring ITC preliminary injury investigation to decide whether there is reasonable indication that U.S. industry was injured), with *id.* § 1671d(b)(1) (providing for ITC final determination of whether industry was actually injured).

³² See 19 U.S.C. § 1671(a) (1994) (directing customs officers to collect tax).

ment's subsidy.³³ In this way, the CVD effectively eliminates the subsidy.

C. Applying U.S. CVD Law to Privatized Foreign Entities

In light of the growing international privatization trend, several U.S. industries have submitted petitions to Commerce requesting the assessment of CVDs on imports from newly privatized foreign firms.³⁴ Initially, Commerce had much difficulty determining whether the imports of newly privatized firms were countervailable because of prior subsidies.³⁵ This question first came before Commerce in 1989 in *Lime from Mexico*,³⁶ a dispute involving the Mexican government's privatization of a lime producer.³⁷ In *Lime from Mexico*, the Mexican government sold Sonocal, the lime producer, to Bomintzha, a private corporation.³⁸ The Mexican government subsidized Sonocal before the sale to Bomintzha, but ended its subsidization after the sale.³⁹

Commerce concluded that the Mexican subsidies did not pass from Sonocal to Bomintzha after the sale. Commerce reasoned as follows. The sale of Sonocal to Bomintzha was an arm's length transaction.⁴⁰ An arm's length transaction is one negotiated between independent parties acting for their own self-interest culminating in a purchase at fair market value.⁴¹ Thus, the purchase price accurately reflected Sonocal's fair market value.⁴² Commerce

³³ See *id.*

³⁴ See Sykes, *supra* note 15, at 200. The factual setting that Commerce generally confronts is a government that has provided a subsidy directly to a firm and a benefit accrues to the recipient industry. However, the privatization trend has added more complexity to the CVD inquiry. See, e.g., *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996); *Saarstahl AG v. United States*, 858 F. Supp. 187 (Ct. Int'l Trade 1994).

³⁵ See Codevilla, *supra* note 9, at 436 (framing debate on countervailing duties as argument over whether subsidies on goods should continue like restrictive covenants in property law which run with land).

³⁶ 54 Fed. Reg. 1753 (Dep't Commerce 1989) (prelim. admin. review).

³⁷ See *id.* at 1754-55 (describing transfer of lime producer to private entity).

³⁸ See *id.* In 1984, Commerce imposed countervailing duties on lime imported from Sonocal. See *id.* The Mexican government transferred full ownership of Sonocal to Bomintzha, a private Mexican firm. See *id.* Subsequently, the Mexican government asked Commerce to reconsider its countervailing duty order, arguing that circumstances had changed and Bomintzha no longer received the benefit of any previously bestowed subsidies. See *id.* at 1753-54.

³⁹ See *id.* at 1754. This transfer was part of a general privatization program. See *id.*

⁴⁰ See *id.*

⁴¹ See BLACK'S LAW DICTIONARY 109 (6th ed. 1991).

⁴² See *Lime from Mexico*, 54 Fed. Reg. at 1754.

concluded that an arm's length transaction extinguished past subsidies because the purchase price included that portion of Sonocal's fair market value attributable to past subsidies.⁴³

This issue arose again in 1991 when Commerce imposed CVDs on Swedish steel products in *Certain Carbon Steel Products from Sweden* ("Steel from Sweden").⁴⁴ In this case, the Swedish government sold part of its interest in SSAB, a steel producer, at its fair market value.⁴⁵ As with Sonocal, SSAB received no subsidies after the sale.⁴⁶ The petitioners, U.S. steel manufacturers, argued that the stock transfer simply represented a change of ownership and, thus, did not extinguish the effect of previously bestowed subsidies.⁴⁷ Commerce agreed with the U.S. steel manufacturers and imposed CVDs on SSAB's steel imports, apparently reversing its earlier *Lime from Mexico* determination.⁴⁸

In 1993, Commerce again considered the same issue in *Certain Steel Products from Brazil*, a consolidated petition brought by U.S. steel manufacturers against several foreign steel producers.⁴⁹ The U.S. steel industry requested that Commerce impose CVDs on imports from the newly privatized foreign companies. The foreign firms maintained that the arm's length privatizations extinguished the prior subsidies.⁵⁰ The U.S. steel industry argued that the privatizations were merely a transfer of ownership and did not extinguish the benefits conferred through past subsidies.⁵¹ Commerce agreed with the U.S. steel industry and concluded that the subsidies passed through to the successor entity.⁵² Accordingly, Com-

⁴³ See *id.* at 1755.

⁴⁴ 56 Fed. Reg. 47,185 (Dep't Commerce 1991) (final determination).

⁴⁵ See *id.* at 47,186 (providing arguments of SSAB purchaser); Cornell, *supra* note 3, at 1314-15 (describing SSAB transfer). Before the transfer, Commerce had imposed a countervailing duty order on SSAB exports to the United States. See *id.* at 1314. The Swedish government sold one-third of its share in SSAB to a private entity. See *id.* The petitioners urged Commerce to keep the CVD order intact. See *Certain Carbon Steel Products from Sweden*, 56 Fed. Reg. at 47,186.

⁴⁶ See Cornell, *supra* note 3, at 1314.

⁴⁷ See *Certain Carbon Steel Products from Sweden*, 56 Fed. Reg. at 47,186 (determining that SSAB continued to benefit from previous subsidies).

⁴⁸ See Cornell, *supra* note 3, at 1315-17 (comparing *Lime from Mexico* with *Certain Carbon Steel Products from Sweden*).

⁴⁹ 58 Fed. Reg. 37,295 (Dep't Commerce 1993) (final determination) (discussing privatization issue).

⁵⁰ See *id.* at 37,296 (describing arguments of various "interested parties").

⁵¹ See *id.* at 37,296, 37,297.

⁵² See *id.* at 37,297 (holding that purchase price reflected only partial repayment of subsidies).

merce announced that only a repayment of the subsidy, in full, by the privatized firm to the government would extinguish the countervailable subsidy.⁵³ This decision directly contravened Commerce's earlier determination in *Lime from Mexico*.⁵⁴

These conflicting methodologies led Commerce to revise its approach in 1993, when it investigated Austrian steel products in *Certain Steel Products from Austria* ("Steel from Austria").⁵⁵ Commerce set forth a new methodology in a General Issues Appendix which combined the determinations of *Lime from Mexico* and *Steel from Sweden*.⁵⁶ Commerce then applied this new approach to *Steel from Austria*.⁵⁷ Commerce concluded that the purchase price of a privatized government entity, arm's length or not, could extinguish some portion of the subsidy.⁵⁸ Commerce added, however, that an arm's length transaction would not necessarily extinguish the subsidy's entire value.⁵⁹ Commerce supported this conclusion by asserting, without explaining, that private purchasers sometimes do not take into account all relevant factors, such as subsidies, when determining price.⁶⁰ Commerce's General Issues Appendix represents a compromise between the opposing determinations of *Lime from Mexico* and *Steel from Sweden*.⁶¹ With its General Issues Appendix in place, Commerce then applied it to several privatizations, includ-

⁵³ See *id.* A Commerce decision memorandum detailed the different methodologies it used to determine whether subsidies pass through to the successor company. See also Cornell, *supra* note 3, at 1315 (discussing development of Commerce's methodology).

⁵⁴ Compare *Certain Steel Products from Brazil*, 58 Fed. Reg. at 37,297 (holding that privatization represented only partial repayment of past subsidies), with *Lime from Mexico*, 54 Fed. Reg. 1753, 1754 (Dep't Commerce 1989) (prelim. admin. review) (concluding that privatization fully extinguished benefit of previously bestowed subsidies).

⁵⁵ 58 Fed. Reg. 37,217 (Dep't Commerce 1993) (final determination).

⁵⁶ See General Issue Appendix, *supra* note 10, at 37,259-73 (discussing issues common to *Certain Steel Products* determinations).

⁵⁷ See *Certain Steel Products from Austria*, 58 Fed. Reg. at 37,219. The relevant sections of the General Issues Appendix are entitled "Privatization" and "Restructuring." See General Issues Appendix, *supra* note 10, at 37,259, 37,265.

⁵⁸ See General Issues Appendix, *supra* note 10, at 37,262-63 (deciding that purchase price could reflect repayment of subsidies to extent value of subsidies constitute value of company).

⁵⁹ See *id.* at 37,263.

⁶⁰ See *id.*; see also *Saarstahl AG v. United States*, 78 F.3d 1539, 1544 (Fed. Cir. 1996) (explaining Commerce's position).

⁶¹ See General Issues Appendix, *supra* note 10, at 37,263. Commerce refused to adopt its rationale in *Lime from Mexico*, based on two distinctions. See *id.* First, as a preliminary determination, *Lime from Mexico* did not represent Commerce's final thinking on privatization's effect on previous subsidies. See *id.* Second, *Lime from Mexico* involved a bankruptcy proceeding and did not involve the sale of a still-operating company. See *id.* Thus, Commerce concluded the issues in *Lime from Mexico* were unique. See *id.*

ing that of a newly privatized German steel manufacturer, Saarstahl AG.⁶²

II. SAARSTAHL AG V. UNITED STATES

Commerce determined that Saarstahl's subsidies were not extinguished in the privatization and its imports were, therefore, countervailable.⁶³ Saarstahl appealed Commerce's determination to the CIT. The CIT rejected Commerce's methodology, holding that if Commerce finds that the purchase price equals fair market value, then Commerce must necessarily conclude that the transaction extinguishes all prior subsidies.⁶⁴ Soon thereafter, Congress amended U.S. CVD law to permit Commerce to apply its General Issues Appendix to privatized firms.⁶⁵ Subsequently, upon Commerce's appeal, the Federal Circuit followed Congress's lead, deferred to Commerce's reasoning, and sanctioned its use of the General Issues Appendix.⁶⁶

A. The Facts

The Luxembourg government owned Arbed Luxembourg ("Arbed"), the parent company of Saarstahl Volklingen GmbH ("Saarstahl SVK"), a steel manufacturer.⁶⁷ Saarstahl SVK received subsidies from the West German federal government and from the Saarland state government from 1978 to 1985.⁶⁸ In 1986, Arbed sold

⁶² See Remand Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products from Germany 4-6 (Dep't Commerce Oct. 12, 1993) [hereinafter *Remand Determination*]. This remand determination modified Commerce's initial determination. See Certain Hot Rolled Lead and Bismuth Carbon Steel Products from Germany, 58 Fed. Reg. 6233 (Dep't Commerce 1993) (final determination). In its first determination, Commerce held that the government subsidies at issue benefited the new private company. See *id.* at 6236-37. Saarstahl then appealed to the CIT. See *Saarstahl AG v. United States*, 858 F. Supp. 187, 189 (Ct. Int'l Trade 1994). Commerce requested the CIT to remand the case so Commerce could reconsider the privatization issue. The CIT complied. See *id.* Upon remand, Commerce held that the subsidies initially benefited Saarstahl while under government ownership. See *Remand Determination, supra*, at 6. Commerce then applied its General Issues Appendix and concluded that the subsidies passed through to the newly privatized company. See *id.*

⁶³ See *Saarstahl*, 858 F. Supp. at 189 (describing administrative background of case).

⁶⁴ See *id.* at 195 (holding that Commerce's methodology was unreasonable).

⁶⁵ See 19 U.S.C. § 1677(5)(E), (F) (1994); see Codevilla, *supra* note 9, at 435.

⁶⁶ See *Saarstahl AG v. United States*, 78 F.3d 1539, 1540-41 (Fed. Cir. 1996).

⁶⁷ See *id.* at 1541.

⁶⁸ See *id.* These subsidies involved guaranteed loans, government payments, and loans that Saarstahl SVK would have to repay at face value (absent interest rates) if it became profitable. See *id.*

seventy-six percent of its ownership in Saarstahl SVK to the Saarland state government.⁶⁹ In 1989, Usinor-Sacilor ("Usinor"), a private French company, purchased Saarstahl SVK from both Arbed and the Saarland state government in an arm's length transaction and renamed it Saarstahl AG.⁷⁰ The governments forgave their loans to Saarstahl and assumed a portion of Saarstahl's private loans.⁷¹ The German government terminated its subsidy programs for Saarstahl after the privatization.⁷²

B. Saarstahl Procedure

Two U.S. manufacturers, Inland Steel and Bethlehem Steel, filed a petition with Commerce in 1993 requesting that Commerce impose CVDs on imports from Saarstahl AG.⁷³ Commerce first determined that the benefits of the debt forgiveness plan between Usinor, the German government, and the Saarland state government constituted a countervailable subsidy to Saarstahl SVK.⁷⁴ Commerce treated the forgiveness plan as an outright cash grant aimed at supporting the firm which was inconsistent with free market behavior.⁷⁵ After finding that the debt-forgiveness plan constituted a subsidy to Saarstahl SVK, Commerce applied its General Issues Appendix and determined that the benefit of the subsidy passed through to Saarstahl AG after the sale to Usinor and imposed CVDs on Saarstahl's imports.⁷⁶ Saarstahl appealed this determination to the CIT.⁷⁷

The CIT held that Commerce's determination was unlawful to the extent that it did not extinguish all past subsidies in an arm's

⁶⁹ *See id.*

⁷⁰ *See id.* Once Usinor approached the Saarland government about purchasing Saarstahl SVK, the West German and Saarland governments devised a plan to forgive Saarstahl SVK's loans from the governments and a portion of its loans from private banks. *See id.* In 1989, Saarstahl SVK became a stock company named Dillinger Hutte Saarstahl AG ("DHS"). *See id.* Usinor controlled 70% of DHS, the Saarland state government controlled 27.5%, and Arbed controlled 2.5%. *See id.* Shortly thereafter, the assets of DHS were transferred to a new company, Saarstahl AG. *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See* Certain Hot Rolled Lead and Bismuth Carbon Steel Products from Germany, 58 Fed. Reg. 6233, 6234 (Dep't Commerce 1993) (final determination).

⁷⁵ *See id.*

⁷⁶ *See Remand Determination, supra* note 62, at 6.

⁷⁷ *See* Saarstahl AG v. United States, 858 F. Supp. 187, 188 (Ct. Int'l Trade 1994).

length transaction.⁷⁸ The CIT explained that if the purchase price of a government entity equals the fair market value, then the buyer and seller necessarily negotiated with their respective self-interests in mind.⁷⁹ The CIT concluded that it was unreasonable for Commerce to determine that an independent party attempting to sell a firm and negotiating in its own self-interest would accept less than what the company was actually worth.⁸⁰ Moreover, the purchasing company negotiated based on what it believed was the fair market value for the entity.⁸¹ This value included the benefit of any previously bestowed subsidies.⁸² Therefore, the CIT determined that these subsidies neither passed through to the privatized company nor provided it with any competitive advantage, thus rendering Saarlühl's imports uncountervailable.⁸³

An additional basis for the court's decision was its belief that Commerce's methodology would adversely affect international privatizations.⁸⁴ The court noted that potential purchasers of these companies could no longer rely solely on free market considerations.⁸⁵ Rather, purchasers would have to consider whether the firm had received any subsidies and whether Commerce might find them actionable, thereby considerably increasing the risks associated with purchasing a company.⁸⁶ Such risks, the court reasoned, would have an immeasurable effect on international commerce.⁸⁷

⁷⁸ See *id.* at 192-94. The CIT reached the same conclusion in *British Steel PLC v. United States*, 879 F. Supp. 1254 (Ct. Int'l Trade 1995), where it held that Commerce's conclusion that arm's length transactions did not necessarily extinguish all prior subsidies was unreasonable. See *id.* at 1272. *British Steel* involved the privatization of steel manufacturers in four different countries. See *id.* at 1261-62. Commerce determined, as it did with Saarlühl, that the steel imports from the newly privatized companies in these four countries were subject to CVDs. See Certain Steel Products from United Kingdom, 58 Fed. Reg. 37,393, 37,394 (Dep't Commerce 1993) (final determination); Certain Steel Products from Brazil, 58 Fed. Reg. 37,295, 37,295-96 (Dep't Commerce 1993) (final determination); Certain Steel Products from Germany, 58 Fed. Reg. 37,315, 37,316 (Dep't Commerce 1993) (final determination); Certain Steel Products from Mexico, 58 Fed. Reg. 37,352, 37,355 (Dep't Commerce 1993) (final determination). The CIT held that when a government-owned firm is sold at arm's length for fair market value, subsidies are necessarily extinguished. See *British Steel*, 879 F. Supp. at 1272. However, a simple stock transfer may not constitute an arm's length transaction for fair market value. See *id.* at 1272-73.

⁷⁹ See *Saarlühl*, 858 F. Supp. at 193.

⁸⁰ See *id.* at 195.

⁸¹ See *id.* at 193.

⁸² See *id.*

⁸³ See *id.* at 193-94.

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

Dissatisfied with the CIT's decision, Commerce appealed to the Federal Circuit.

C. *The Federal Circuit's Decision*

The Federal Circuit examined the plain meaning of U.S. CVD law and concluded that the legislative scheme does not restrict CVDs to those subsidies that confer some benefit.⁸⁸ Similarly, the court found no such intent in the scheme's legislative history.⁸⁹ Rather, the legislative history indicated that Commerce should impose CVDs following a simple conclusion that a government has provided a subsidy.⁹⁰ The CIT erred, the court reasoned, because it assumed that the purchase price of a government entity bargained for at arm's length necessarily extinguishes previously bestowed subsidies.⁹¹ The court explained that the facts of each case indicate whether the purchase price included payment for past subsidies.⁹² Thus, the court concluded that Commerce's determination that the private purchaser repaid only a portion of the subsidies in the transaction was perfectly reasonable, conforming with the congressional amendments to CVD law.⁹³

III. THE CONGRESSIONAL CVD AMENDMENTS

In 1994, Congress enacted the Uruguay Round Agreements Act ("URAA") to implement U.S. obligations under the Uruguay Round of GATT.⁹⁴ As a result, U.S. CVD law now defines a subsidy

⁸⁸ See *Saarstahl AG v. United States*, 78 F.3d 1539, 1543 (Fed. Cir. 1996).

⁸⁹ See *id.* at 1543-44.

⁹⁰ See *id.*; see also S. REP. NO. 93-1298, at 184 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7319 (instructing Secretary of Treasury to impose CVDs once there is sufficient evidence to discern whether subsidy exists). But see 30 CONG. REC. 318 (1897) (statement of Rep. Meyer) (arguing that requirement to determine effect of subsidy would inject too much complication into CVD investigations).

⁹¹ See *Saarstahl*, 78 F.3d at 1544.

⁹² See *id.*

⁹³ See *id.*

⁹⁴ Uruguay Round Agreements Act, Pub. L. No. 103-465, sec. 251(a), § 5, 108 Stat. 4809, 4902-8 (striking 19 U.S.C. § 1677(5) and inserting § 5 of sec. 251(a)). The URAA, which implemented the results of the Uruguay Round negotiations, represents the first significant amendments to U.S. CVD provisions since the Tokyo Round of multilateral trade negotiations in 1979. See Herlach & Codevilla, *supra* note 15, at 57.

The Tokyo Round Subsidies Code, while more clearly defining international obligations regarding CVDs, did not address many important issues. See *id.* The Tokyo Round attempted to clarify the international treatment of subsidized imports. See *id.* The result was the GATT Subsidies Code, to which the United States is a signatory. See GATT Subsidies

as a financial contribution, income or price support from a government body, or any other payment from the government that confers some competitive advantage upon the recipient.⁹⁵

Although the amendments appear innocuous, the URAA significantly reduces the burden Commerce must meet to find an actionable subsidy. The amendments reduce this burden in two ways. First, Commerce can now presume that a subsidy confers a benefit.⁹⁶ Second, even for an arm's length privatization, Commerce is not required to find that the sale eliminates a previously countervailable subsidy.⁹⁷ Thus, Congress rejected the CIT's conclusion that an arm's length transaction necessarily extinguishes all previously bestowed subsidies.⁹⁸

In an era where amendments to trade regulations should conform with free trade principles and international obligations, Congress chose a different path.⁹⁹ This path runs contrary to economic

Code, *supra* note 19, at art. 1.1(a). The Uruguay Round attempted to fill in the blanks left by negotiators during the Tokyo Round. See Herlach & Codevilla, *supra* note 15, at 57.

⁹⁵ See 19 U.S.C. § 1677(5)(B) (1994).

⁹⁶ See *id.* § 1677(5)(E). The Clinton Administration did not want to require Commerce to consider the effect of government subsidies. See H.R. REP. NO. 103-826(I), at 109 (1994), reprinted in 1994 U.S.C.C.A.N. 3773, 3881.

⁹⁷ See 19 U.S.C. § 1677(5)(F). The CIT in *British Steel* held that Commerce's General Issues Appendix, to the extent that it failed to extinguish subsidies in arm's length transactions, was unlawful. See *British Steel PLC v. United States*, 879 F. Supp. 1254, 1273 & n.27 (Ct. Int'l Trade 1995). The court believed that this decision was consistent with 19 U.S.C. § 1677(5)(F) and its legislative history. See *id.* at 1276 n.34. This compatibility results from Commerce's failure to determine whether the transactions involved in *British Steel* were at arm's length. See *id.* Nevertheless, Congress apparently intended, with the change of ownership amendment, to give Commerce the freedom to apply the General Issues Appendix the CIT overturned in *Saarstahl*, and *British Steel*. See *id.*; *Saarstahl AG v. United States*, 858 F. Supp. 187, 194 (Ct. Int'l Trade 1994).

In June 1995, Commerce extended the General Issues Appendix to the purely private realm. See Catherine Curtiss, *Foreign Privatized Companies May Face Pitfalls if Exposed to U.S. Countervailing Duty Law*, N. AM. TRADE & INVESTMENT. REP., Sept. 30, 1996, at 1. Commerce determined that the sale of a privately owned producer of Italian pasta to another private enterprise, at arm's length, did not extinguish prior subsidies. See *Certain Pasta ("Pasta") from Italy*, 61 Fed. Reg. 30,288, 30,289-90 (Dep't Commerce 1996) (final determination).

⁹⁸ See Statement of Administrative Action, Pub. L. No. 103-465, 1974 U.S.C.C.A.N. 3773, 4241. A Statement of Administrative Action ("SAA") that accompanied the URAA described the idea that selling productive assets to an unrelated party would extinguish all prior subsidies as an "extreme interpretation." See *id.* The SAA does not explain why such an interpretation would be extreme. See *id.* The SAA also reserves for Commerce the right to consider each case on its own facts and to apply what it determines to be the most appropriate methodology. See *id.*

⁹⁹ See Codevilla, *supra* note 9, at 436-38, 461-62 (explaining Congress's approach to implementing new GATT definitions by including "change of ownership" amendment). This statutory amendment effectively reversed *Saarstahl AG v. United States* and *Inland Steel Bar Co. v. United States*. See *id.* at 462.

theory, case law, and the legislative intent of earlier CVD provisions.

IV. ANALYSIS OF SAARSTAHL AND THE CONGRESSIONAL AMENDMENTS

This Part argues that the Federal Circuit's reversal in *Saarstahl* and the congressional amendments to U.S. CVD law represent poor policy choices. The amendments are wholly contrary to the underlying purpose of CVD law.¹⁰⁰ The legislative history of early CVD statutes as well as traditional economic theory dictate that subsidies must confer some benefit to be countervailable.¹⁰¹ Congress frustrates this purpose by removing the benefit inquiry from the vast majority of CVD investigations.¹⁰²

Furthermore, Congress's amendments may actually discourage foreign governments from selling their interests in the private sector. Much of this activity is now occurring in the former Soviet bloc and in Latin America, two regions that traditionally have had centrally planned economies.¹⁰³ The transition from centrally planned to capitalist economies ensures freer trade by reducing government intervention in the marketplace.¹⁰⁴ Congress needs to encourage this transition to allow the United States to benefit from unimpeded international trade.¹⁰⁵ To facilitate this increase in free trade, privatized firms should have the opportunity to sell their products in the United States without undue burdens.¹⁰⁶

¹⁰⁰ See *infra* notes 112-14 and accompanying text (discussing purpose of CVD law).

¹⁰¹ See Charlene Barshefsky & Nancy B. Zucker, *Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitions Act of 1985*, 13 N.C.G. INT'L. & COM. REG. 251 (1988). See, e.g., 30 CONG. REC. 2203, 2225 (1897) (remarks by Sen. Caffery) (stating that natural advantages of one country should not be offset by artificial aids afforded by another); 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, 521-65 (1990) (critiquing basic principles and administration of CVD law as resting on economically flawed theories).

¹⁰² See, e.g., 19 U.S.C. § 1677(5)(E) (providing that Commerce shall "normally" treat benefit as conferred).

¹⁰³ See *infra* notes 145-51 and accompanying text (discussing privatization trend).

¹⁰⁴ See ECONOMIC REPORT OF THE PRESIDENT 279 (1993) (reporting benefits of liberal trade regime); see also, Robert H. Edwards, Jr. & Simon N. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures*, 33 STAN. J. INT'L L. 169, 175 (1997) (discussing market distortion caused by government intervention in free trade).

¹⁰⁵ See Edwards & Lester, *supra* note 104, at 175.

¹⁰⁶ See *id.*

A. Saarstahl and the Amendments Defy the Purpose of U.S. CVD Law

The purpose of United States CVD law is to offset the anticompetitive benefit a subsidy confers upon the foreign competitors of U.S. industries. *Saarstahl* and the congressional amendments run contrary to this underlying purpose for several reasons. Traditionally, U.S. CVD law has always required that a subsidy confer some benefit upon the recipient to be countervailable.¹⁰⁷ Also, international trade law requires the United States to impose CVDs only when a benefit has accrued to the recipient firm.¹⁰⁸ Moreover, economic theory dictates that the United States should only countervail those subsidies that confer some benefit to the recipient.¹⁰⁹ As the CIT persuasively explained in *Saarstahl*, an arm's length transaction extinguishes any benefits a previous subsidy may have conferred because the purchase price incorporates the present value of prior subsidies.¹¹⁰ It follows, therefore, that after an arm's length privatization, Commerce has nothing to offset and should not impose CVDs.

1. Prior U.S. CVD Laws Required a Benefit for a Subsidy to be Countervailable

The new amendments contravene the purpose of CVD law because the amendments dispense with the requirement that subsidies confer some benefit. Prior to the new amendments, CVD law permitted Commerce to countervail only those subsidies that bestowed a competitive benefit upon a firm.¹¹¹ This scheme was consonant with the purpose of the earliest CVD laws.¹¹² Congress originally passed CVD laws to offset the competitive advantage a foreign firm enjoyed when it received a subsidy from its govern-

¹⁰⁷ See *infra* notes 112-19 and accompanying text (discussing traditional notions of CVDs).

¹⁰⁸ See Uruguay Round Subsidies and Countervailing Measures Agreement, *supra* note 19, at art. 14.

¹⁰⁹ See *infra* notes 131-42 and accompanying text (demonstrating that applying CVDs to privatized firms overcompensates U.S. industry).

¹¹⁰ See *Saarstahl AG v. United States*, 858 F. Supp. 187, 194 (Ct. Int'l Trade 1994).

¹¹¹ See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (holding that subsidy must harm U.S. industry in order to be countervailable); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314 (Fed. Cir. 1986) (citing *Zenith Radio*, 437 U.S. at 448).

¹¹² See 30 CONG. REC. 2203, 2225-26 (1897) (remarks by Sen. Caffery) (stating "natural conditions among men and nations ought not to be interfered with by legislative action; that natural advantages possessed by one country ought not to be offset by artificial aids afforded by another").

ment.¹¹³ Congress believed that foreign subsidies should not impair the natural advantage of U.S. firms.¹¹⁴ This implies that if a subsidy does not achieve such results, Commerce need not countervail that action.¹¹⁵

The Supreme Court endorsed this view in 1978 in *Zenith Radio Corp. v. United States*, holding that a countervailable subsidy must confer some benefit.¹¹⁶ The *Zenith* Court reasoned that this re-

¹¹³ See *id.*; see also S. REP. NO. 96-249, at 37 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 423.

¹¹⁴ See 30 CONG. REC. 2203, 2225-26. The Senate Report accompanying the 1979 Trade Act, which amended U.S. CVD law, stated that Congress wanted to protect firms from foreign governments' attempts to boost the competitiveness of their own firms by artificial means. See S. Rep. No. 96-249, at 37; see also Andoh, *supra* note 4, at 1522 (concluding that legislative history confirms that Congress intended to protect U.S. producers from adverse foreign competitors that benefit from subsidies). This theory is known as the entitlement theory and was first proposed by Charles Goetz, Lloyd Granet, and Warren Schwartz. See Charles Goetz et al., *The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17, 26-29 (1986). Richard Diamond further developed the theory. See Diamond, *supra* note 101, at 533-42. The entitlement model refers to the theory that Congress, in passing countervailing duty laws, granted an entitlement to American producers to be free from the harmful affects of subsidized foreign competition. See *id.* at 534. The model begins with the fundamental premise that a countervailable subsidy adversely affects the position of an American producer. See *id.* at 533-34. A subsidized foreign firm increases its sales to the United States, causing the American firm to sell less. See *id.* at 535-36. For the subsidized firm to accomplish this, the subsidy must lower its marginal cost or increase marginal revenue. See *id.* at 538-39.

The model involves a causation chain containing two steps. See *id.* at 541. The subsidy must cause the recipient to increase sales. See *id.* The increase in the recipient's sales must then cause the American industry's sales to fall. See *id.* Professor Diamond concludes that unless these two elements exist, Commerce can determine neither the subsidy's effect nor the magnitude of the duty required to offset it. See *id.*

Because Commerce does not determine whether the subsidy changed the behavior of the recipient and reduced sales of the American firm, it can, and often does, impose countervailing duties when the American firm has incurred no injury. See *id.* Moreover, where a subsidy affects sales of the American firm, Commerce fails to impose an accurate duty because it does not follow this causation analysis. See *id.* at 542. For example, suppose a subsidy permits a firm to purchase better technology, thereby reducing its marginal costs. The new technology, therefore, allows the recipient of the subsidy to export more product to the United States, causing U.S. sales to erode. See *id.* Commerce will not quantify the reduction in the recipient's costs as a result of its better technology. See *id.* Instead, it determines this benefit to be the increased cash flow from the subsidy. See *id.* Commerce's preferred remedy is forcing the recipient to repay the subsidy's full value to the government, rather than imposing a duty to raise the firm's marginal costs to their pre-subsidy levels, as Diamond suggests. See *id.*

¹¹⁵ See, e.g., *Zenith Radio*, 437 U.S. at 443 (holding that Commerce shall not countervail subsidy that confers no benefit).

¹¹⁶ See *id.* at 455-57 (citing testimony of members of Congress during debates indicating purpose of CVD law was to offset competitive advantage enjoyed by firm receiving subsidy). Several commentators argue that the whole scheme of Commerce's CVD determinations, not just this particular factual setting, fails to give meaning to the legislative purpose of CVD law. See Diamond, *supra* note 101, at 533-41 (suggesting that Commerce's administration of CVD law fails to accurately determine magnitude of CVD required to offset subsidy).

quirement exists because CVDs were intended to counteract the competitive advantage a foreign firm would enjoy from government subsidies.¹¹⁷ Similarly, in 1986, the Federal Circuit in *Georgetown Steel Corp. v. United States* required Commerce to find that a subsidy provides a benefit before it can impose CVDs.¹¹⁸ By ruling to the contrary, the majority in *Saarstahl* neglected both Supreme Court and Federal Circuit precedent.¹¹⁹

2. Current International Laws Require a Benefit for a Subsidy to be Countervailable

The international legal community has also embraced the requirement that a government may impose CVDs on subsidized imports only if the subsidy confers a benefit.¹²⁰ The 1994 GATT Subsidies Agreement (“Subsidies Agreement”) definition of a subsidy requires that some benefit accrue to the recipient.¹²¹ By not requiring a benefit, the U.S. amendments are contrary to U.S. obligations under this agreement.

Congress claims that its amendments are consistent with the obligations of the Subsidies Agreement.¹²² However, the language of the URAA amendments permits Commerce, once it finds a government subsidy, to “normally” treat the practice as conferring a

¹¹⁷ See *Zenith Radio*, 437 U.S. at 456.

¹¹⁸ See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986) (holding that Congress sought to shield American firms from what it viewed as unfair competitive advantage that foreign producer would have in America if that producer’s government assumed portion of producer’s sales expenses in United States).

¹¹⁹ See *Saarstahl AG v. United States*, 78 F.3d 1539, 1547 (Fed. Cir. 1996) (Plager, J. dissenting) (citing *Zenith Radio*, 437 U.S. at 456, and *Georgetown Steel*, 801 F.2d at 1315, as binding precedent).

¹²⁰ See Uruguay Round Subsidies and Countervailing Measures Agreement, *supra* note 19, art. 14(a).

¹²¹ See *id.* art. 1.1(b).

¹²² See 19 U.S.C. § 1677(5)(E) (1994). The Uruguay Round Subsidies and Countervailing Measures Agreement states that unless a benefit has been conferred, a subsidy is not countervailable. See Uruguay Round Subsidies and Countervailing Measures Agreement, *supra* note 19, art. 1.1(b). Article 14 of the Uruguay Round Subsidies and Countervailing Measures Agreement also states that any determination of whether a benefit is conferred must comply with four guidelines. See *id.* First, providing capital does not confer a benefit unless the firm would not otherwise have made the investment decision. See *id.* art. 14(a). Second, government loans confer no benefit unless they are provided at less than the prevailing market rate. See *id.* art. 14(b). Third, a loan guarantee from the government confers no benefit unless a commercial loan would be more expensive absent this guarantee. See *id.* art. 14(c). Fourth, transactions involving goods and services do not confer a benefit unless the firm purchases the goods or services at less than market value or sells them for greater than market value. See *id.* art. 14(d).

benefit.¹²⁵ This shifts the burden to the firm under investigation to demonstrate that no benefit has accrued.¹²⁴ Because Congress now permits Commerce to presume that a benefit has accrued to the foreign firm, Commerce may apply its methodology to imports from newly privatized firms purchased at arm's length.¹²⁵ In effect, Congress has considerably lowered the threshold Commerce uses to determine whether to impose CVDs by permitting it to counter-vail a government practice without determining the effect of that practice.¹²⁶ By lowering this threshold, Commerce may impose CVDs on imports from foreign firms that have not benefited from any subsidies. The Subsidies Agreement explicitly prohibits imposing CVDs when no benefit accrues to the foreign firm.¹²⁷

3. Economic Theory Shows that U.S. CVD Laws Unjustly Subsidize U.S. Industries

Economic theory also contradicts the Federal Circuit's decision and the congressional amendments. Economists consider the granting of subsidies to be market-distorting conduct that unfairly benefits the recipient firm.¹²⁸ A subsidy allows a firm to reduce its production costs or sell its product below fair market value.¹²⁹ However, the benefit fully disappears when the firm is privatized and no longer receives any subsidies.¹³⁰

Under the following reasoning, an arm's length transaction extinguishes the benefit of all prior subsidies. When negotiating a purchase price, the buyer has estimated what it believes is the fair market value of the government company.¹³¹ The buyer considers all relevant factors when assessing the value of the company.¹³² A

¹²⁵ See 19 U.S.C. § 1677(5)(E).

¹²⁴ See *id.*; Codevilla, *supra* note 9, at 459 & n.158.

¹²⁵ See Codevilla, *supra* note 9, at 459.

¹²⁶ See 19 U.S.C. § 1677(5)(E); Codevilla, *supra* note 9, at 459-60.

¹²⁷ See Uruguay Round Subsidies and Countervailing Measures Agreement, *supra* note 19, art. 14.

¹²⁸ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, § 1.1, at 10-11 (4th ed. 1992) (discussing market distortions resulting from subsidies); Sykes, *supra* note 15, at 203 (defining export subsidy as government program that increases profitability of recipient firm). See generally GARY HUFBAUER & JOHN ERB, *SUBSIDIES IN INTERNATIONAL TRADE* (1983) (discussing different types of subsidies).

¹²⁹ See POSNER, *supra* note 128, at 19; see also Diamond, *supra* note 101, at 537-38 (discussing relationship between marginal cost and impact of subsidy).

¹³⁰ See *Saarstahl AG v. United States*, 858 F. Supp. 187, 193-94 (Ct. Int'l Trade 1994).

¹³¹ See *id.*

¹³² See *id.*

subsidy is one such factor. By reducing the costs of production of the government company, a subsidy boosts the overall value of that company.¹³³ A buyer will raise the purchase price to reflect the subsidy's contribution to value.¹³⁴ Therefore, the purchase price reimburses the government for the increase in the value of the company attributable to the subsidy.¹³⁵ Because the privatized firm ceases to benefit from previous subsidies, applying CVDs in such a setting unduly punishes the privatized firm for benefits it no longer receives.

Commerce should presume that a subsidy confers a benefit on a recipient firm only when a foreign government provides the firm with a direct subsidy.¹³⁶ This presumption is harder to justify when applying CVDs to newly privatized firms that no longer receive subsidies.¹³⁷ When a subsidy no longer confers a benefit, U.S. industry incurs no further injury and Commerce has no reason to compensate. A CVD in this factual setting would contravene the economic justification for U.S. CVD law.

Imposing CVDs where there is nothing to countervail is equivalent to conferring a benefit on domestic industries. A subsidy, by its very nature, provides its recipient with a competitive advantage.¹³⁸ By assessing countervailing duties on a foreign firm that receives no such advantage, Commerce essentially confers a benefit on the U.S. industry that competes with the foreign firm. Commerce thereby provides the U.S. industry with an advantage it otherwise would not enjoy.¹³⁹ Thus, when Commerce assesses a

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.* The CIT persuasively presented this argument in *Saarstahl*. *See id.* The CIT concluded that the presumption that a benefit normally accrues to the recipient is not applicable when a private entity pays fair market value for a government firm. *See id.* at 193.

Ironically, Commerce reasoned similarly when it first considered the privatization issue. *See Lime from Mexico*, 54 Fed. Reg. 1753, 1754-55 (Dep't Commerce 1989) (prelim. admin. review) (concluding that arm's length transaction would extinguish past subsidies). Commerce reasoned that a prospective buyer would consider many factors, including current market demand for the company's product, value of the company's physical assets, state of the company's technology, and the past and expected financial performance of the company. *See id.* Subsidies will affect one or more of these factors, Commerce reasoned. *See id.* at 1755. A prospective buyer, thus, accounts for subsidies in its purchase price. *See id.* at 1754.

¹³⁶ *See Saorstahl*, 858 F. Supp. at 192-93.

¹³⁷ *See POSNER, supra* note 128, at 310 (arguing that CVDs are inappropriate when subsidies do not harm U.S. industry).

¹³⁸ *See supra* notes 19-21 and accompanying text (discussing requirement that, by definition, subsidy confer some benefit).

¹³⁹ *See POSNER, supra* note 128, at 310.

duty on such a foreign firm, it grants a de facto subsidy to American industry.

Furthermore, by imposing CVDs on imports from privatized firms, Commerce encourages consumers to purchase the products of less efficient domestic producers, thereby shifting consumption away from the more competitive foreign products.¹⁴⁰ CVDs applied to imports from firms sold in arm's length transactions, in which prior benefits from subsidies no longer exist, overcompensate U.S. firms.¹⁴¹ Therefore, the amendments run contrary to the purpose of CVD law and permit Commerce to engage in the same type of protectionist conduct that U.S. CVD law seeks to discourage.¹⁴²

B. Policy Ramifications of the Amendments

In addition to defying the purpose and economic justification for CVD laws, the congressional amendments to U.S. CVD law are also contrary to several salient U.S. trade policy interests. Although the United States encourages the transition to capitalism in Eastern Europe and Latin America, the congressional amendments to CVD law provide significant disincentives to privatization, a key aspect of this transition.¹⁴³ Additionally, the amendments impede economic development. Finally, the amendments erect significant obstacles to free trade.¹⁴⁴

1. The Amendments Discourage Privatization as a Means for Making a Transition to Market Economies

Privatization has proven beneficial to those governments attempting to make the transition from socialist to market oriented economies. In fact, privatization programs are the most common

¹⁴⁰ See *id.* Note that "consumers" in this context refers both to individual and commercial or business consumers. See James Bovard, *U.S. Trade Laws Harm U.S. Industries*, REGULATION, Vol. 16, No. 4, 1994, at 47-58 (giving examples of Commerce's and ITC's use of trade laws to discriminate against foreign competition). Commerce injures individuals and businesses when it enforces trade laws in an economically unreasonable fashion. See *id.*

¹⁴¹ See, e.g., Diamond, *supra* note 101, at 541 (noting that Commerce imposes CVDs to offset subsidies that have no effect on U.S. industry).

¹⁴² See Sykes, *supra* note 15, at 214-15 (explaining that theory behind CVD law is to deter subsidization).

¹⁴³ See Andoh, *supra* note 4, at 1527-39.

¹⁴⁴ See *Saarstahl AG v. United States*, 858 F. Supp. 187, 194 (Ct. Int'l Trade 1994) (arguing that General Issues Appendix, which Congress has condoned, will have "immeasurable" effect on international commerce).

and efficient way for governments to make the transition from centrally planned economies to capitalism.¹⁴⁵ Poland, for example, has had a privatization program since 1990.¹⁴⁶ This privatization program led to increased sales to Western countries.¹⁴⁷ Ukraine has also enacted a broad economic reform plan utilizing privatizations.¹⁴⁸

Governments of less developed countries are also implementing privatization programs. Recognizing the failure of central planning, these countries are attempting to make the transition to free market economies.¹⁴⁹ The Mexican government began privatizing its firms in the mid-1980s.¹⁵⁰ As a result of these efforts, the number of government-owned enterprises has declined dramatically.¹⁵¹

The congressional amendments to U.S. CVD law, which ultimately punish newly privatized firms, unnecessarily impede transition efforts.¹⁵² Similarly, the amendments oppose U.S. policies designed to encourage developing countries to adopt free market principles.¹⁵³ The congressional amendments to CVD law will un-

¹⁴⁵ See *id.*

¹⁴⁶ See Harris, *supra* note 2, at 419.

¹⁴⁷ See Stephen Engelberg, *21 Months of 'Shock Therapy' Resuscitates Polish Economy*, N.Y. TIMES, Dec. 17, 1992, at A1. Privatization fueled a trade surplus of \$1 billion during the first six months of 1992. See *id.*

¹⁴⁸ See Anna Reid, *Ukrainian Leader Outlines Broad Free Market Reform Plan*, WASH. POST, Oct 12, 1994, at A29. Ukrainian President Leonid Kuchma presented an economic plan that included mass privatization of state-owned properties, arguing that without these reforms "we have got only the symbols of statehood" and that privatization measures were critical as "[p]rivate property rights are the basis of all civilized economies." *Id.* Privatization efforts in the Czech Republic and Slovakia have also been considerable. See Sarah Andrus, Note, *The Czech Republic and Slovakia: Foreign Participation in Changing Economies*, 17 HASTINGS INT'L & COMP. L. REV. 611, 613-16 (1994) (outlining process by which Czech Republic and Slovakia have implemented privatization efforts).

¹⁴⁹ See George Melloan, *A GOP Challenge: How to De-Invent Government*, WALL ST. J., Nov. 14, 1994, at A11 (discussing capitalist trends in Europe).

¹⁵⁰ See Edgardo Buscaglia, Jr., *Legal and Economic Development in Mexico: The Steps Ahead*, J. INTERAMERICAN STUD. & WORLD AFF., Summer 1994, at 191, 192-93 (1994).

¹⁵¹ See *id.* Mexico had 1155 government-owned firms in 1982. See *id.* That number fell to 220 by 1992. See *id.* Argentina has also implemented a privatization plan, helping to significantly reduce inflation. See Chris Kraul, *International Business: Rail Privatization in Argentina Helps Fuel Economic Recovery*, L.A. TIMES, Oct. 6, 1994, at D5. Inflation fell from 5000% in 1989 to 3.5% in 1994. See *id.*; see also Juanita Darling, *The Melding Americas Economy: Business Breaks Through Old Barriers of Fear Latin Governments in the Past Have Been Suspicious of Foreign Investment, U.S. Firms Wary of Corruption — But Times Are Changing*, L.A. TIMES, Sept. 27, 1994, World Report, at 6 (noting U.S. investment of \$1.5 billion into Argentine privatization program from 1990 to 1994).

¹⁵² See *infra* notes 158-67 and accompanying text (discussing effect of URAA amendments on privatization efforts).

¹⁵³ See Codevilla, *supra* note 9, at 464.

doubtedly inhibit the free trade movement in Latin America. Private companies in Latin America, concerned about the imposition of CVDs on their products, will be less likely to purchase government-owned (and previously subsidized) firms.

The congressional amendments to CVD law will also impose an obstacle to economic development. Most countries, including the United States, view privatization as an important part of economic development.¹⁵⁴ Imposing CVDs will hamper the efforts of newly privatized enterprises to sell their products to the United States, the largest consumer economy in the world.¹⁵⁵ The amendments, thus, will stifle the success of privatization programs.¹⁵⁶ By leaving the impression that newly privatized firms will face obstacles when competing in the United States, the congressional amendments discourage economic development.¹⁵⁷

2. The Amendments Erect Significant Obstacles to Free Trade

Government intervention based on noneconomic policies, common in centrally planned economies, unnecessarily impedes free trade.¹⁵⁸ By encouraging privatization, thereby decreasing government interference in the marketplace, Congress can promote freer trade.¹⁵⁹ Free international trade boosts the welfare of all participants, including the United States, for several reasons.¹⁶⁰ First, free trade provides producers with access to a large global market.¹⁶¹ Second, free trade forces inefficient producers out of the market, allowing the remaining producers to sell higher quality products at lower prices.¹⁶² Finally, free trade creates incentives for investment, which fosters additional economic growth.¹⁶³ All coun-

¹⁵⁴ See, e.g., Andrew J. Ritten, Comment, *Perspectives on Privatization and Plant-Level Industrial Relations: Great Britain in the 1980s, Germany in the 1990s*, 12 NW. J. INT'L L. & BUS. 216 (1991) (discussing effect of privatization on British and German economies).

¹⁵⁵ See Codevilla, *supra* note 9, at 438.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See ECONOMIC REPORT OF THE PRESIDENT, *supra* note 104, at 279.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.* One commentator argues that promoting free trade, in addition to its economic benefits, disseminates U.S. moral and cultural values to the rest of the world. See Alan S. Greenspan, *Thoughts About the Transitioning Market Economies of Eastern Europe and the Former Soviet Union*, 6 DEPAUL BUS. L.J. 1 (1993). See generally Robert Wuthnow, *The Moral Crisis in American Capitalism*, HARV. BUS. REV., Mar. 1982, at 76 (discussing relation between social

tries benefit from the free market flow of goods and services.¹⁶⁴ Accordingly, supporting free trade is in the United States's best interests. By contrast, the United States suppresses free trade with its current CVD laws.

At least rhetorically, the United States has been a proponent of free trade.¹⁶⁵ But here, the United States has enacted protectionist legislation under the guise of implementing U.S. obligations under the Uruguay Round of GATT. By pressuring its trading partners to open their markets while simultaneously imposing CVDs on newly privatized firms, the United States has acted hypocritically.¹⁶⁶ By penalizing privatization, the U.S. government has imposed an unnecessary obstacle along the road toward free trade.¹⁶⁷

and economic values). The market influences everyday life for most Americans, Wuthnow argues. *See id.* Americans see in the market a certain moral importance that is closely related to the American world view such that any values opposing free trade threaten not only the U.S. standard of living but also the foundation of American society. *See id.*

¹⁶⁴ *See* Sykes, *supra* note 15, at 209 (explaining that unimpeded competition leads to more efficient production and lower consumer prices).

¹⁶⁵ *See* ECONOMIC REPORT OF THE PRESIDENT 203 (1995) (arguing that United States has been most vocal supporter of free trade since World War II).

¹⁶⁶ *See, e.g.,* David M. McPherson, *Is the North American Free Trade Agreement Entitled to an Economically Rational Countervailing Duty Scheme?*, 73 B.U. L. REV. 47, 64-65 (1993) (arguing that U.S. CVD law is economically irrational as long as United States simultaneously pressures its trading partners to sign international agreements based on economic necessity).

¹⁶⁷ *See* Alan O. Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 LAW & POL'Y INT'L BUS. 699, 708 (1990). The greatest danger to the United States is the likelihood that its trading partners, realizing the protectionist nature of U.S. CVD law, will enact similarly protectionist regimes in retaliation. *See id.* Because the United States has not traditionally provided subsidies to its industries, the available vehicle for retaliation is antidumping law. *See id.*

The two main weapons in the U.S. arsenal of trade laws are countervailing duties and antidumping laws. *See id.* In enacting antidumping laws, Congress intended to protect American firms from injury from foreign competitors who sell their products in the United States at prices less than in their home market. *See* Harvey M. Applebaum, *The Antidumping Laws — Impact on the Competitive Process*, 43 ANTITRUST L.J. 590, 591 (1974). Antidumping laws have recently become the subject of an intense debate, with opponents concluding that they are protectionist in nature, hurt American consumers, and weaken producers. *See, e.g.,* Richard A. Clarida, *Dumping: In Theory, in Policy, and in Practice*, in FAIR TRADE AND HARMONIZATION, VOL. 1: ECONOMIC ANALYSIS 357 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (arguing that antidumping laws have inflicted substantial costs on U.S. consumers and downstream producers); Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 561 (1993) (concluding that administration of U.S. antidumping laws is criminal and advocating their repeal). *See generally* A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies Be Resolved?*, 15 N.Y.U. J. INT'L L. & POL'Y 339, (1983) (discussing tension between U.S. ideal promoting competition among all sources, foreign and domestic, and its protectionist impulse, as this tension is manifested in Antidumping Act of 1916 and 1921 Antidumping Act).

CONCLUSION

The Federal Circuit's decision in *Saarstahl* and the congressional amendments to countervailing duty law undercut the very purpose of U.S. CVD law.¹⁶⁸ Traditional CVD law has always required that a subsidy confer some benefit upon the recipient firm before that firm's imports become countervailable. In an arm's length sale of a government-owned firm, the purchase price accounts for prior subsidies and the benefit is extinguished. Because the benefit does not accrue to the newly privatized firm, imposing CVDs overcompensates U.S. industry.

The amendments to U.S. CVD law, which purport to implement U.S. obligations under the WTO, embrace a Commerce methodology the CIT correctly discredited as unreasonable. The amendments are economically irrational and ultimately promote U.S. industry to the detriment of legitimately competitive foreign producers. Moreover, Congress must encourage privatization to further U.S. trade policy interests. Free market theory dominates this age.¹⁶⁹ Developing countries around the world are striving to subscribe to free trade principles and develop market economies.¹⁷⁰ The United States must not allow its CVD law to undermine the free trade movement and discourage the development it ostensibly champions.

David Rushford

¹⁶⁸ See *supra* notes 107-19 and accompanying text (discussing how Commerce's determinations in subsidy and privatization cases were unreasonable).

¹⁶⁹ See, e.g., Codevilla, *supra* note 9, at 464 (noting that many formerly communist countries, including Poland, China, and Czech Republic, are in midst of transitions to capitalist economies).

¹⁷⁰ See *id.* (noting trend toward capitalism in countries such as Brazil and Mexico).

