BEFORE THE U.S. DEPARTMENT OF COMMERCE

INTERNATIONAL TRADE ADMINISTRATION

WRITTEN VIEWS

of the

COMMISSION OF THE EUROPEAN COMMUNITIES

with respect to the

PRELIMINARY DETERMINATIONS

in the

COUNTERVAILING DUTY INVESTIGATIONS

of

CERTAIN STEEL PRODUCTS FROM BELGIUM,
the FEDERAL REPUBLIC OF GERMANY, FRANCE,
ITALY, LUXEMBOURG, the NETHERLANDS,
and the UNITED KINGDOM

July 17, 1982

I. INTRODUCTION

The Commission of the European Communities is extremely concerned about certain aspects of the United States Department of Commerce (DOC) preliminary determinations in the countervailing duty investigations of Certain Steel Products from Belgium, France, the Federal Republic of Germany, Luxembourg, the Netherlands and the United Kingdom. Pursuant to section 355.34(a) of the DOC regulations (19 C.F.R. § 355.34(a) (1982)) and the specific instructions contained in the preliminary determinations published in the Federal Register on June 17, 1982, (47 Fed. Reg. 26300 et seq. (1982)) the Commission is filing these written views on the preliminary determinations with the DOC.

The Commission notes that it has also expressed many of its concerns about the DOC preliminary determinations during a special discussion in a meeting of the General Agreement on Tariffs and Trade (GATT) Committee on Subsidies and Countervailing Measures on July 15, 1982, in Geneva, Switzerland. The Commission is submitting to the DOC the memoranda which it has supplied to the GATT (Annexes A and B) to be included in the record of these investigations.

In submitting this document containing the GATT memoranda and additional views on the preliminary determinations, the Commission is acting on behalf of the

Community, which is a signatory to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT (Subsidies Code). Because the United States Government (USG) is also a signatory to GATT and the Code, it is obliged to adhere to the requirements of those instruments as a matter of international law.

The Commission arguments relating to the GATT and the Code are legally relevant to USG interpretation of its countervailing statute in Title VII of the Tariff Act of 1930. The United States legislation which enacted Title VII, the Trade Agreements Act of 1979 (TAA), states explicitly that it is intended to implement the Subsidies Code and other trade agreements negotiated under the Trade Act of 1974 (Section 1(c)(1) of the TAA; 19 U.S.C. § 2502) and explicitly approves the Code (Section 2(a), (c) of the TAA; 19 U.S.C. § 2503). Therefore, as a matter of international law and of domestic law, it is quite clear that the DOC is obliged to consider the obligations of the USG under the GATT and the Subsidies Code when it interprets the U.S. countervailing duty statute. Furthermore, the wording of the U.S. countervailing duty statute is such that DOC may administer that law in a manner which is consistent with the GATT and with the Code which the Congress explicitly approved and implemented in Title VII. DOC, therefore, is not compelled in its

administrative determinations under the countervailing duty statute to violate the international obligations of the USG by the narrowly drawn provisions of section 3(a) of the TAA (19 U.S.C. § 2504).

II. THE DOC PRELIMINARY DETERMINATIONS ON EUROPEAN COAL AND STEEL COMMUNITY (ECSC) LOANS ARE BASED ON ERRONEOUS ASSUMPTIONS.

In Appendix C to its notice of a preliminary determination relating to certain steel products imported from Belgium, published in the Federal Register on June 17, 1982, (47 Fed. Reg. 26300, 26309 (1982)) DOC erroneously stated that:

> With respect to ECSC borrowing, the ECSC enjoys a very high credit rating because of its quasi-governmental nature. It is therefore able to raise funds at interest rates lower than those which would be available to European steel companies. (46 Fed. Reg. 26309 (1982)).

Based on these erroneous assumptions, the DOC preliminarily determined that ECSC loans are countervailable insofar as they offer preferential interest rates to steel companies.[1]

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[1] As discussed in Annex A, pages 18-19, Annex B, page 3, and Legal Arguments of the Commission of the European Communities, pages 14-16, submitted to DOC on May 17, 1982, the DOC criteria for determining the benefit to a company which borrows from the ECSC are a clear violation of the Subsidies Code loan and loan guarantee requirements and, therefore, are not proper criteria under section 771(5)(B) (19 U.S.C. § 1677).

A. The Basis for the ECSC Credit Rating is the Levy

The credit rating of the ECSC, which is not higher than the credit rating of a number of European steel companies, is not based on the "quasi-governmental nature" of the ECSC. In all its steel industry related activities involving receipt and disbursement of monies, the ECSC operates on a commercial basis as the agent for European steel companies producing ECSC products. The ECSC, unlike the European Economic Community and the European Atomic Energy Community, has no legal power to require Member State governments to supply funds for ECSC programs. The ECSC has only one regular source of funds, i.e., contributions from European steel companies through the levy. Historically, all other ECSC funds are directly attributable to the use of levy funds.[2]

In the first few years of its existence, the ECSC was unable to borrow money on world capital markets precisely because it did not have the financial powers of a government or even a "quasi-government" to assure

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2 Since 1978, the ECSC has received relatively small (e.g., 4% of total revenue in 1980) contributions from Member State governments to make up deficits in the operating budgets. These contributions are specifically allocated to non-repayable rehabilitation aids to Member State governments for resettlement of unemployed steel workers and steel workers adjustment assistance. (See EC Questionnaire Response at 10, 29.)

repayment of loans. On the advice of its American bankers, the ECSC overcame this problem by demonstrating that it did, in fact, represent a cooperative financial endeavor of the European steel industry.

This was done by accumulation of a 100 million ECU ECSC reserve fund over three years. All of the monies allocated to this fund came from the steel industry levy contributions. The ECSC credit rating on world capital markets was established, and continues today, because of the existence of the levy reserve fund and the fact that the ECSC has demonstrated, through accumulation of the fund from the levy, that it does represent the financial resources of the European steel industry.

B. ECSC Programs Based on the Levy are Not Subsidies

Clearly, DOC's assumption that the basis for the ECSC's credit rating is its "quasi-governmental nature" is wrong. That credit rating is based directly on the existence of the levy contributions of the European steel industry. To the extent that some steel companies may borrow from the ECSC at a rate of interest which may be less than DOC's totally arbitrary benchmark rate, or even the rate actually available to the companies in their individual capacity, there is, under the Subsidies Code

criteria (See Annex A at 5; EC Legal Arguments at 7-9), no consequential adverse affect on conditions of normal competition,[3] i.e., under current DOC practice, no countervailable benefit for that company.

This is because the ECSC credit rating is based solely on the levy. Therefore, there can be no ECSC loan program without the levy. In those instances in which an ECSC loan rate is less than the rate otherwise actually available to a company in its individual capacity, the difference in interest rates is nothing more than a partial return to companies of resources they have contributed to the ECSC.

It is important to note the obvious fact that, under section 303 of the Tariff Act of 1930 (19 U.S.C. § 1303), not all foreign practices relating to an industry are bounties or grants. Zenith Radio Corp. v. United States, 437 U.S. 443, 455-457 (1978); See United States v. Hammond Lead Products, Inc., 440 F.2d 1024, 1030-1031 (C.C.P.A., cert. denied, 404 U.S. 1001 (1971); Cf. ASG Industries, Inc. v. United States, 610 F.2d 770, 778 (C.C.P.A.) (1979). Although administrative practice or

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[3] If the DOC applies the proper specific criteria for loans under the Subsidies Code and Title VII (see footnote 1 supra), the general criteria for countervailable domestic subsidies under the Code and, therefore, under Title VIII (i.e., adverse affect on conditions of normal competition), need not be reached.

judicial interpretation of the term "bounty or grant" in section 303 which is "inconsistent" with the countervailing duty statute, particularly section 771(5) of the Tariff Act of 1930, as enacted in the TAA, is not relevant to these investigations (S. Rep. No. 249, 96th Cong., 1st Sess. 84 (1979)), it is quite clear Congress intended this aspect of prior interpretation to continue under Title VII (S. Rep. No. 249, 96th Cong., 1st Sess. 84-85 (1979); H. Rep. No. 317, 96th Cong., 1st Sess. 74 (1979)). Any other approach would be absurd.

The fact that a practice exists cannot mean that practice is a "subsidy" within the meaning of section 771(5) of the Tariff Act of 1930. The threshold determination that DOC must make in any investigation of a practice under the countervailing duty statute in Title VII is whether that program is a "subsidy." Because the term "subsidy" is not defined generically in the GATT, the Subsidies Code, or domestic law, DOC must consider many factors when it applies the international legal criteria by which the USG is bound under GATT and Subsidies Code and those criteria as implemented in domestic law under Title VII. These factors include the precise nature and operation of the program, the "economic effect of the practice" (Zenith, 437 U.S. at 457), and the "substantial

reliance interests" arising from past international and USG practice which have arisen over the years. (Zenith, 437 U.S. at 458).[4]

DOC considered these complex factors and properly applied the international and, therefore, domestic legal criteria when it determined that ECSC programs for steel companies which exist solely by virtue of levy contributions from those companies, and are nothing more than a partial return to companies of their own funds, are not countervailable benefits. Quite clearly, the nature of the relationship between the levy and ECSC borrowing and lending activities requires the same conclusion with respect to ECSC loans to steel companies.

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[4] The Senate Report on the TAA explicitly explains that the so-called "offset" rules contained in the definition of "net subsidy" under section 771(6) of the Tariff Act of 1930 are not relevant to the DOC threshhold determination that a subsidy exists. DOC obviously cannot determine the net subsidy by subtracting amounts from a subsidy until it has determined that a "subsidy" exists in the first instance.

Because of some apparent confusion over the relationship between the threshhold decision that a bounty or grant exists and the necessarily subsequent determination of the "net amount of such bounty or grant" under section 303 of the Tariff Act of 1930 manifested in dicta in one court decision, ASG Industries Inc. v. United States, 610 F.2d 770, 777 (C.C.P.A. 1979), Congress, using the same example discussed by the court, explicitly described the proper relationship between the threshhold determination that a "subsidy" exists and subsequent application of the new "net subsidy" rules under Title VII:

(Footnote 4 continued on page 9.)

III. EUROPEAN COAL PROGRAMS ARE NOT DIRECT OR INDIRECT SUBSIDIES ON THE MANUFACTURE, PRODUCTION OR EXPORTATION OF STEEL

In Appendix B to its notice of a preliminary determination relating to Certain Steel Products from Belgium, published in the Federal Register on June 17, 1982 (47 Fed. Reg. 26300, 26307 (1982)), the DOC states, inter alia, that government assistance to the European

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Footnote 4 continued:

> The definition of "subsidy" is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term "bounty or grant" under section 303 of the Tariff Act of 1930, unless the practice or interpretation is inconsistent with the bill. In this regard, the restrictions on offsets contained in section 771(6) of the Tariff Act of 1930, as added by the bill, are not intended to prohibit the authority from determining that export payments are not subsidies ... (S. Rep. No. 249, 96th Cong., 1st Sess. 84-85 (1979)).

Furthermore, Congress clearly stated that its purpose in adopting section 771(6) was to prevent some, but not all, of the offsets allowed under administrative interpretation of the term "net amount" of a bounty or grant under section 303 from being adopted as a proper interpretation of the new "net subsidy" term in Title VII. The specific offsets prohibited were for "indirect taxes paid but not actually rebated" and "increased costs as a result of locating in an underdeveloped region" (S. Rep. No. 249, 96th Cong., 1st Sess. 86 (1979)). It must be noted that the proscription of an offset for increased costs in underdeveloped regions is a violation of the Subsidies Code obligations of the USG (See Annex A at 22; EC Legal Arguments at 18).

coal industry which does not reduce the price paid by the European steel industry for coking coal below the world price for coking coal provides no "measurable benefit" to the steel industry and is not a countervailable subsidy. This is a proper application of the international legal obligations of the USG and, therefore, of Title VII of the Tariff Act of 1930.

A. The Subsidies Code and Title VII Require Sufficient Positive Evidence of an Adverse Affect on Conditions of Normal Competition

Article 11(1) of the Subsidies Code expressly recognizes that signatories shall not be restricted in their right to use subsidies, other than export subsidies, to achieve important policy objectives, such as to facilitate the restructuring, under socially acceptable conditions, of certain sectors. Article 11(2) recognizes, on the other hand, that such subsidies may adversely affect the conditions of normal competition. Therefore, signatories are committed to seek to avoid causing such effects and to weigh, as far as practicable, possible adverse affects on competition in drawing up their policies.

When read together, these provisions of the Code provide a basis for determining whether programs are subsidies within the meaning of the Code. It is clear

from the Code provisions that the affect of programs on competition is of crucial importance to a determination as to whether a subsidy exists within the meaning of the Subsidies Code. Furthermore, judicial interpretation of the term "bounty or grant" under section 303 of the Tariff Act of 1930 also focused on the economic effect on competition. See Zenith, 437 U.S. at 456; Nicholas & Co. v. United States, 249 U.S. 34, 41 (1919).

The proposition that subsidies, within the meaning of the Subsidies Code and Title VI, must have a distorting affect on competition is reemphasized by the specific criteria in paragraph (d) of the Annex to the Code. This paragraph makes it clear that no subsidy exists, within the meaning of the Subsidies Code, when input factors are made available by governments on terms not more favorable than those commercially available on world markets. Furthermore, section 771(5) is replete with standards based on the concept of "normal competition", such as "commercial considerations" and "preferential rates", which clearly indicate that the standard intended by Congress is the standard under the Code, i.e., there must be an adverse affect on conditions of normal competition. These Code and statutory provisions reflect the traditional interpretation of the concept of subsidy under international law and U.S. law.

Therefore, it is necessary for DOC to establish that a program has an affect which distorts the conditions

of normal competition before that program can be considered to be a subsidy within the meaning of the Subsidies Code or Title VII. The supply of coking coal at or above world market prices cannot adversely affect normal conditions of competition in the steel industry. So long as European steel producers pay world prices for coking coal, their competitive position vis a vis other steel producers and other industries is not affected. The origin of that coal, the reasons that coking coal from a particular source is sold at a certain price, and the industry specific nature of a coking coal marketing program are irrelevant so long as that price is not below world market price. Absent positive evidence, i.e., substantial evidence on the record, that an input factor is supplied at a price below world market price, there can be no indirect subsidy on manufacture, production, or exportation.

It should be emphasized that the requirement that a subsidy, within the meaning of the Subsidies Code and section 771(5), adversely affect normal conditions of competition is a matter separate and distinct from the injury test in Article 6 of the Subsidies Code and section 771(7). The question of distorting competition is integral to the determination whether or not a particular program constitutes a subsidy. This question centers on

an analysis of the affect of the program on the foreign industry. Only after it has been determined that a particular program can be deemed a "subsidy" does the issue of injury to a domestic industry arise. That issue turns on analysis of the impact of the subsidized imports on the domestic industry.

DOC has established that European production assistance for all coal and marketing aids for coking coal do not result in coking coal prices below world market prices for the European steel industry. DOC has reached the only possible conclusion given such facts: European coal industry assistance is not a countervailable subsidy to the European steel industry.

B. The Subsidies Code and Title VII Prohibit Any Presumption that a Subsidy Exists

Appendix B contains a disturbing assertion:

> In the absence of special circumstances, a party receiving a benefit on the production of its merchandise is not assumed to share that benefit with an unrelated purchaser. (47 Fed. Reg. 26307, 26309 (1982); emphasis supplied)

The implication is that the existence of a countervailable subsidy, i.e., "benefit", can be assumed in certain circumstances, e.g., when suppliers and producers are "related." The Subsidies Code clearly requires investigating authorities to establish the existence of

elements necessary for imposition of countervailing duties by positive factual evidence. The only instance in which the Code permits any presumption is a presumption, in footnote 26, of nullification or impairment by the Committee on Subsidies and Countervailing Measures in dispute settlement procedures involving violations of specific Code obligations, such as the prohibition of export subsidies in Article 9. The only instance in which Title VII permits a presumption is under section 771(7)(E)(i) (relating to U.S. International Trade Commission (USITC) consideration of proscribed export subsidies and threat of injury) which is, arguably, based on Footnote 15 to the Code. Had the Code or the Title VII draftsmen intended any other derogations from the requirement that administering authorities, such as DOC and USITC, and the Committee consider only positive factual evidence, they would have included specific language as is contained in footnote 26 and section 771(7)(E)(i).

Therefore, DOC can never assume that a subsidy exists. More explicitly, DOC cannot assume a countervailable benefit exists merely because a supplier of an input is related to a producer of merchandise subject to investigation. Positive evidence, i.e., substantial evidence on the record, of the benefit to the producer must be produced.

IV. THE DOC DETERMINATIONS WITH RESPECT TO ECSC WORKERS' HOUSING LOANS ARE IMPROPER AS A MATTER OF LAW AND ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In Appendix C to its preliminary determination on Certain Steel Products from Belgium (47 Fed. Reg. 26300, 26309), the DOC erroneously states:

> The preferential ECSC housing loans provide benefits directly to steel workers. We believe they also indirectly benefit the employer steel companies by relieving them of certain labor wage costs. That is, if steel workers were unable to obtain housing loans at these highly advantageous rates, the companies which employ them would be required to pay higher wages.

The DOC based its decision to countervail against such programs merely on supposition and conjecture rather than on any evidence contained in the record. The DOC admits in its determination that it is countervailing against worker's housing loans only because it "believed" that in the absence of such aid the companies involved "would be required to pay higher wages." The only basis for this belief are unsupported assertions of the petitioners.

It is, in fact, inconceivable that any program as limited in scope and effect as the ECSC worker's housing program would have any impact on wage rates paid

by European steel companies. First, the amount of money available for loan to any individual is limited by regulation. Therefore, individuals must secure additional funds from commercial sources to purchase a home. Second, relatively few workers meet the eligibility criteria, including an income test, of the program. Third, few workers in any given company are eligible for the loans. Fourth, not all eligible workers use the loans.

The small amount of resources committed to this program and the small number of beneficiaries of the program, either as a percentage of the total European steel work force or of the work force of any individual company, makes the DOC speculation that companies would be forced, either as a matter of law or of general industrial relations, to increase their wage rates absent this program ludicrous at best.

Finally, the DOC preliminary determination is a dangerous expansion of the concept of indirect subsidy on manufacture, production, or exportation. The GATT Subsidies Code requires sufficient positive evidence that a practice "adversely affect conditions of normal competition" of the product being investigated. Under U.S. practice, this requirement is implemented by the requirement that there be substantial evidence of a

countervailable benefit on the manufacture, production or exportation of the merchandise being investigated. This test has not been met and, indeed, cannot be met by the ECSC workers' housing loan program.

V. THE DOC DETERMINATIONS ARE IMPROPER BECAUSE THE DOC SHOULD NOT HAVE USED THE METHODOLOGY BY WHICH THE SUBSIDY VALUES WERE CALCULATED

Section 516A(b) of the Tariff Act of 1930 (19 U.S.C. § 1516A(b)) sets forth the standards by which the subsidy determinations of the DOC are evaluated. Under this provision, a preliminary determination is invalid if it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. A final determination is invalid if it is not supported by "substantial evidence on the record or is not otherwise in accordance with law." It is a well established principle of law that an agency decision that is based on an improper methodology does not comport with these standards. See Sierra Club v. Costle 657 F.2d 298, 333 (D.C. Cir. 1981); Newsweek Inc. v. United States Postal Service 663 F.2d 1186, 1211 (2d Cir. 1981); Batterton v. Marshall, 648 F.2d 694, 711 (D.C. Cir. 1980).

A. Any Proposed Change in the DOC's Methodology for the Calculation of Subsidy Value was Subject to the Rulemaking Requirements of 5 U.S.C. § 551 et seq.

Pursuant to section 624 of the Tariff Act of 1930 (19 U.S.C. § 1624), and Reorganization Plan No. 3 of 1979, the DOC is authorized to make such rules as are necessary to implement the United States countervailing duty law. In the exercise of its rulemaking functions, the DOC is subject to the notice and comment and other rulemaking procedures of the "Administrative Procedure Act" (APA) (5 U.S.C. § 551 et seq.; See 45 Fed. Reg. 4932 (1980)). Although the DOC has not seen fit in the present case to acknowledge that its methodology is a "rule," it is clear that, under the APA, the DOC methodology is a rule and is subject to the notice and comment and other rulemaking procedures of the APA.

In Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980), the court held that modification of the Department of Labor's method of calculating unemployment statistics was a rulemaking within the meaning of 5 U.S.C. § 551 and subject to the notice and comment requirements of 5 U.S.C. § 553. The statistics were a critical factor in computations under a statutory formula for allocating monies under the Comprehensive Employment and Training Act (CETA) and the Labor Department's change in its methodology was first announced in the course of the proceedings during which the funds were allocated.

Similarly, in the present case, the methodology used in determining subsidy values has a direct substantial effect on the amount of the countervailing duty, and hence is a critical factor under the countervailing duty statute. Like the statistics in Batterton, the subsidy value methodology here serves more than merely informational purposes. 648 F.2d at 705. The methodology is not merely an interpretation of statutory language because it actually prescribes the regulatory structure through which the critical variable in the formula is attained. Id. at 705-06. Consequently, the DOC should not have adopted the new methodology in an adjudicatory proceeding but should have filed notice in the Federal Register and given interested parties opportunity to comment as specified in 5 U.S.C. § 553.

The impropriety of the DOC's attempt to avoid the notice and comment requirements of the APA is heightened in the present case because Congress specifically intended that any change in the methodology by which the value of subsidies are calculated be accomplished by rulemaking. Furthermore, the DOC has previously recognized the requirement for such rulemaking.

First, Congress was fully aware of the existing administrative practice with respect to the calculation of the value of subsidies when it passed the Trade Agreements Act of 1979. While Congress did not express an opinion directly with respect to the substantive methodology to be used by the DOC, it did manifest its intention as to how this methodology was to be implemented when it approved the Statement of Administrative Action which states:

> The Authority will develop guidelines with regard to the calculation of subsidies, building on existing case law consistent with the new legislation. (H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 433 (1979) (hereinafter as Statement)).

The Administration was required by section 102 of the Trade Act of 1974 to describe in the Statement of Administrative Action the manner in which the Trade Agreements Act was to be implemented. The Statement makes clear:

> In administering the new legislation, regulations will be promulgated ... [A]s experience is gained in administering the legislation, additional regulations may be issued. (Statement at 389).

Furthermore, the DOC itself has recognized its obligation to adopt regulations to implement any change in its methodology for the calculation of subsidy values. On October 3, 1979, the Customs Service issued, subject to the APA, a notice of proposed rulemaking to implement various provisions of the Trade Agreements Act. Among the

proposed regulations was 19 C.F.R. § 155.4 which specified the manner in which the value of a subsidy was to be calculated for purposes of the new countervailing duty law. On January 22, 1980, final regulations on these matters were issued by DOC, which had succeeded to the responsibilities of the Customs Service under Reorganization Plan No. 3 of 1979 and Executive Order No. 12188. These final regulations, however, did not include the proposed Section 155.4. Instead, the notice stated:

> The Department of Commerce is deferring publication of final regulations on issues covered by certain sections of the proposed regulations of the Customs Service published in the Federal Register of October 3, 1979; principally those provisions relating to the determination and calculation of net subsidy .... Final regulations on these issues are not necessary immediately for the conduct of the countervailing duty program.
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> Moreover, these issues are complex, and the Department prefers to gain as much experience as possible on these issues prior to publishing final regulations. (45 Fed. Reg. 4932 (1980) emphasis supplied).

Therefore, the DOC has explicitly acknowledged that any change in its methodology for the calculation of subsidy values should only be undertaken in the context of a rulemaking proceeding.

B. DOC Procedures Under the Countervailing Duty Statute in this Investigation Do Not Satisfy the Requirements of the APA

The publication of a brief description of its methodology as part of the preliminary determination and the subsequent hearings on the preliminary determination

provided by the DOC do not satisfy the requirements for notice and comment appropriate to regulations. Further, the respondents have been prejudiced by the adoption of the new methodology.

First, the APA requires a separate rulemaking apart from any adjudication, such as a countervailing duty proceeding, for the adoption of regulations. It is improper as a matter of law to attempt to circumvent the procedural requirements set by Congress for rulemaking, particularly where Congress has mandated, as it has in the present case, the adoption of regulations on a particular subject. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-5 (1969); Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981); Texaco, Inc. v. Federal Power Commission, 412 F.2d 740, 744 (3d Cir. 1969).

Second, even assuming the possibility of comment on the methodology at this time, the respondents have already suffered serious injury as the result of the DOC's action. A preliminary subsidy determination in a countervailing duty investigation results in the suspension of liquidation of imports and the requirement for the posting of bonds, premiums for which are not recovered even if the suspension of liquidation is subsequently terminated. Furthermore, the uncertainty resulting from DOC's preliminary determination has caused

American consumers to refuse to purchase respondent's products and, in some cases, resulted in these companies' effective exclusion from the United States market.

Third, the hearings provided by the DOC on the preliminary determinations are not comparable to the rulemaking procedures required by the APA. Congress itself recognized this fact when it provided that the hearings of the DOC in countervailing duty cases are not subject to the requirements of the APA. 19 U.S.C. § 1677c(b).

Further, the DOC hearings are limited to the participants in this case. As exemplified by the DOC's May 10, 1982 hearings on the administration of the countervailing duty law, many persons other than the participants in this case have an interest in the general procedures of the DOC with respect to the calculation of subsidies. The principal purpose of the rulemaking procedures of the APA is to permit such persons an opportunity to comment on rules that will be applied to them.

Fourth, the DOC is under a special obligation not to act precipitously to change its practices under the countervailing duty law. As the Supreme Court observed in respect to an argument that the Secretary of the Treasury

should have changed his longstanding practice with respect to the noncountervailability of nonexcessive tax remissions:

> At the same time, the Secretary's position has been incorporated into the General Agreement on Tariffs and Trade (GATT), which is followed by every major trading nation in the world; foreign tax systems and private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the longstanding administrative construction of the statute should not be disturbed except for cogent reasons. Zenith Radio Corp. v. U.S., 437 U.S. 443, 457 (1978) (footnotes and citation omitted)).

For the DOC to adopt unilaterally a methdology for the calculation of subsidies, in the face, as described in Annexes A and B, of USG international obligations to the contrary, clearly upsets the longstanding expectations of both private parties and foreign governments. Given the broad implications of such a major change in U.S. administrative practice with respect to the calculation of subsidy values, the DOC is under the obligation to solicit comments of all interested persons, not only those in these cases.

C. The Methodology Used by the DOC is Arbitrary, Capricious, an Abuse of Discretion and Otherwise not in Accordance with Law as a Means of Calculating the Value of a Subsidy under the Trade Agreements Act of 1979.

1. Present value methodology does not provide a "real" value.

The DOC has asserted that it adopted the present value methodology as a means of capturing the "time value of money" in the calculation of subsidy value. Even if one assumes it is proper to include the time value of money in the calculation of subsidies, the present value methodology is nevertheless an improper measure of this value. The present value methodology is an abstract construct the purpose of which is to compare hypothetical alternative uses of money, by holding constant various real world factors. It does not determine what the "real" or "actual" results of an investment will be in the future but rather provides an abstract value which can be compared with the abstract value of alternative investments.

2. The assumptions of the present value methodology do not reflect the realities of the present investigations.

The present value methodology provides a hypothetical comparison between alternative investments based upon certain static assumptions. Two of the principal assumptions of the present value methodology are

a constant interest rate and the ability of the person using the methodology to make the alternative investments. The assumption of a constant interest rate obviously does not comport with reality, but its use in the formula is analytically justified because the purpose of the methodology is merely to compare hypothetical alternatives. In any attempt determine the "real" value of money, as must be done under the countervailing duty statute, it is of course improper to make such a static assumption.

The present value methodology also assumes that alternative uses of money exist. The DOC assumes that this alternative use would be the investment of the money in a bank at the interest rate which is used in the methodology. This assumption is totally inappropriate in the present case. The monies provided by governments to industries in Europe are "tied" to a particular use, be it the making up of operating deficits or the purchase of capital assets. The companies receiving such funds do not have the option the DOC blithly assumed of investing such funds anywhere and receiving income. Further, the DOC has no evidence whatsoever that the provision of such monies by government has permitted companies to use other funds at their disposal for such purposes. Indeed, if the DOC

is to be believed, many companies could not have obtained such funds either from their own operations, because they were not making profits, or from other sources, because they were "uncreditworthy."

3. There is no justification, either in legislative, administrative or judicial precedent, for the use of the present value methodology.

The Department itself admits there is no administrative precedent for the use of the present value methodology. It states in Appendix B:

> In the past we have allocated the face value of the grant, in equal increments, over the appropriate time period ... [we] are now changing the methodology of grant subsidy calculation ... (47 Fed. Reg. 26307 (1982))

Similarly, there is no justification in the Tariff Act of 1930 for the present value methodology. Congress intended that the value of a net subsidy reflect the amounts bestowed "actually used" by the recipients (H. Rep. No. 317, 96th Cong., 1st Sess. 74 (1979)). The present value methodology is totally inconsistent with this requirement because, far from reflecting the amount of the subsidy used, it generates a hypothetical value of the subsidy in the future based on arbitrary and unrealistic assumptions. Such a value cannot be actually used by recipients.

4. The present value methodology is inconsistent with U.S. international obligations.

Under the Subsidies Code, it is impermissible for a signatory to impose a countervailing duty in excess of the amount of the subsidy found to "exist" (Article 4(2)). The word "exist" clearly means the nominal amount of assistance granted by a government, not an arbitrary estimate of a hypothetical future value. This approach was established in GATT and USG practice when the Code was adopted. As evidenced by footnote 15 of the Code, the Signatories agreed that, if any change in the criteria for calculating the amount of subsidies was to be made, it should be the subject of further international negotiations. For the DOC to implement a unilateral change in U.S. practice which results in the levying of duty in an amount which is as much as four times greater than the amount which actually exists is a clear breach of USG international legal obligations which nullifies or impairs benefits to other signatories to the Code and GATT.

ANNEX A

MEMORANDUM ON UNITED STATES PRELIMINARY COUNTERVAILING DUTY DETERMINATIONS CONCERNING EUROPEAN STEEL EXPORTS

(Submitted by the Commission of the European Communities to GATT Committee on Subsidies and Countervailing Measures, July 15, 1982)

INTRODUCTION

On 10 June 1982, the United States Department of Commerce (DOC) published the preliminary determinations of subsidization in the countervailing duty investigations in respect of certain steel products from the United Kingdom, Netherlands, France, Italy, Federal Republic of Germany, Belgium and Luxembourg. These investigations cover a volume of trade estimated at close to 3 million net tons, on the basis of 1981 import figures, with a value of 1.3 - 1.5 billion dollars.

Apart from the magnitude of the trade involved, these determinations raise important and novel issues under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code), such as:

Whether a subsidy should be calculated by reference in the cost to the government or to the hypothetical benefits to the recipient;

Whether it is legitimate to inflate the amount granted by taking account of a notional "time value of money";

In what circumstances can government participation in a company be counted as a subsidy and how should the amount of any such subsidy be calculated;

Does the Illustrative List annexed to the Subsidies Code apply to Part I of the Code or is its relevance restricted to Part II, with the result that a stricter discipline is applied to domestic subsidies under Part I than to export subsidies under Part II;

Should the subsidy element involved in any government loans or loan guarantees be assessed by analogy to the guidelines given in the Illustrative List annexed to the Subsidies Code;

Is it legitimate to countervail subsidies insofar as they have no trade distorting effect, such as regional aids which simply compensate for the industrial, economic and social disadvantages of certain regions; and

How can the principle that domestic subsidies which have no such trade distorting effect are recognized as important instruments for the promotion of social and economic policy objectives be reconciled with the fact that certain signatories to the Subsidies Code mandatorily countervail the full amount of any subsidy and thus do not

comply with the principle that countervailing duties should be less than the total amount of the subsidy if such lesser duty will be adequate to remove the injury to the domestic industry.

In some instances, the U.S. preliminary determinations represent a complete departure from hitherto undisputed interpretations of the General Agreement on Tariffs and Trade (GATT) and the Subsidies Code and are, in the Community's view, in direct conflict with the letter as well as the spirit of these agreements. In other cases, they are based on extreme and unilateral findings on issues never before decided, some of which had deliberately been left unresolved for further negotiations among signatories. They are also arbitrary or based on disputable economic premises or logic.

These determinations call into question the delicate balance of advantages reached during the Tokyo Round of Multilateral Trade Negotiations. They have implications for many countries and industries currently exporting to the United States. The Community has therefore asked for a special discussion of the DOC determinations in the GATT Committee on Subsidies and Countervailing Measures.

The attached note sets out - in summary form with relevant excerpts from the DOC notices - the DOC preliminary determinations and the counterarguments to the

legal construction and method followed by the DOC. The Community would welcome a thorough discussion by the signatories to the Code of the important issues involved, ideally with a view to reaching a consensus and thus avoiding further unilateral action which may affect the practices of all signatories, including subsidies granted by the United States.

ARGUMENT

I. GATT CONDITIONS FOR COUNTERVAILABILITY

Article VI of the GATT and the Subsidies Code lay down a certain number of criteria and conditions which must be met before countervailing duties can be imposed. These are as follows:

-- There must be a subsidy granted directly or indirectly on the production, manufacture or export of a product.[1] The text of the Code clearly implies that a subsidy must involve a charge on the public account.[2] Because countervailing duties may not exceed the amount of

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[1] GATT Article VI, paragraph 3.

[2] See Subsidies Code, in particular item (l) of the Annex.

the subsidy granted,[3] the calculation of this amount is of crucial importance. This is expressly recognized by footnote 15 of the Subsidies Code.

-- In addition, a subsidy must adversely affect the conditions of normal competition. In the absence of any such distortion, subsidies, other than export subsidies, are recognized as legitimate instruments for the promotion of social and economic policy objectives against which no action is envisaged by the Code.[4] It is fundamental, therefore, that the existence of such trade distortion must be established, especially where signatories do not comply with the GATT principle that the amount of any countervailing duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury.[5] This is of particular importance with respect to programs such as regional aids, research and development and coking coal programs.

-- There must be material injury to a domestic industry.[6]

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3 Article VI, supra note 1.

4 Subsidies Code, Article 11.

5 Subsidies Code, Article 4(1).

6 Subsidies Code, Article 2(1).

-- Finally it must be demonstrated that such injury is caused by the subsidized imports, through the effects of the subsidy.[7]

II. DETERMINATION OF AMOUNT OF SUBSIDY

A. DOC Determination

1. Summary

In determining the amount of subsidy involved in grants, preferential loans or loan guarantees, the DOC, instead of looking at the amount granted, took account of a notional "time value of money" on the basis that money received today is more valuable than money tomorrow. This approach concentrates on the alleged benefit to the recipient rather than the financial contribution of the government. Moreover, it results in a grant of 1000 allocated over 15 years at a discount rate of 15 percent being countervailed in an amount of 2565 at an annual rate of 171 instead of 66.6, or, even using the former U.S. "front-loading" technique, 133 over half the period.

2. Quotation from DOC Determinations

"It has been argued that $10 million [sic] today is much more valuable to a grant recipient than $100 million [sic] per year for the next 10 years, since the

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[7] Subsidies Code, Article 6(4).

present value of the latter is considerably less than $100 million. We agree, and are now changing our methodology of grant subsidy calculation to reflect this agreement. So long as the present value (in the year of grant receipt) of the amounts allocated over time does not exceed the face value of the grant, we are consistent with both our domestic law and international obligations because the amount countervailed will not exceed the total net subsidy.

"Present value is calculated using a discount rate. We considered using each company's weighted cost of capital at the time of the grant receipt as the appropriate measure of the time value of its funds. However, we lacked sufficient information to do so for these preliminary determinations. Instead we used the national cost of long-term corporate debt as a substitute measure of a company's discount rate. We welcome additional information or comments on this estimate between the preliminary and final determinations.

"For costly pieces of capital equipment, we believe that the appropriate time period over which to allocate the subsidy is its entire useful life. In the past, we allocated the subsidy over only half the useful life in order to front-load the countervailing duties in order to comply with the legislative intent of the Act.

However, so long as we allocate the subsidy in equal nominal increments over the entire useful life, it will still be effectively front loaded in real terms since money tomorrow is less valuable than money today."

B. Counterarguments

1. Article VI of the GATT provides that a countervailing duty may not exceed the amount of the subsidy "determined to have been granted." The use of the word "granted" rather than "received" and the absence of any reference to "value" or "benefit" indicates clearly that the countervailable amount is the financial contribution of the government rather than the much more nebulous benefit to the recipient.

The Illustrative List[8] annexed to the Subsidies Code sets out eleven specific types of export subsidy. The last item, item (l), refers to "any other charge on the public account constituting an export subsidy." The clear inference from this is that the preceding items on the list also involve a charge on the public account and that it is this charge which constitutes the subsidy. This is borne out by the wording

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[8] The relevance of the Illustrative List to national government countervailing duty laws is discussed in Annex B.

of the items themselves which repeatedly use such terms as "provision", "delivery", "remissions", "exemption", "grant" by governments. Accordingly the traditional interpretation of signatories, including the United States, has been that the amount countervailable is the amount of the financial contribution of the government.

2. It could be argued that the "opportunity cost" to the government should be taken into account. This, however, would be quite unrealistic, given the purpose and functions of government. The prime function of a government is not necessarily to place money at the highest possible return, although, in certain circumstances it may, of course, act in the same way as any other investor or shareholder. This is accepted by the Subsidy Code itself which, in Article 11, recognizes the right of signatories to use subsidies for the "promotion of social and economic policy objectives" including the elimination of regional disadvantages, facilitation of restructuring under socially acceptable conditions of certain sectors, and maintenance of employment.

Even if one were to accept the concept of an opportunity cost to the government, it would be necessary, in order to measure this cost, to look at the alternatives

available. The result of a laisser-faire attitude would, in many cases, be the exacerbation of regional disadvantages, allowing the steel industry to be restructured under totally unacceptable social conditions and dramatically increasing unemployment. In addition to social unrest, this would lead to the government expending on unemployment pay as much or more money as was used to aid the industry concerned.

3. The fact that the benefit to the recipient is not the correct way to measure a subsidy can also be demonstrated by looking at the problems involved in measuring the benefit. It is quite clear that the benefit does not automatically equal or exceed the rate of interest which could be realized by depositing the amount of the grant in a bank.

In the present cases, for example, the recipients did not have the alternative of depositing the grants at bank interest rates. The funds were provided specifically to allow the company to restructure in a socially acceptable way. Furthermore, because, according to the DOC, the recipients could not in many cases have raised money through the normal commercial channels, the benefit cannot be the hypothetical interest saved in not borrowing commercially.

It is clear, therefore, that the benefit of a grant to the recipient will vary according to the circumstances of the recipient at the time of receipt. There is no simple or constant measure of the benefit, and the difficulty of measuring it shows that, from a practical point of view, as well as from a theoretical point of view, the correct measure of a subsidy can only be the amount of the financial contribution of the government. The same arguments apply, mutatis mutandis, to loans to allegedly uncreditworthy companies.

III. SPECIFIC ISSUES

It is not intended in this paper to examine every objectionable aspect of the DOC preliminary determinations, such as the countervailing of aids to workers' housing. Rather, a few issues have been chosen for discussion which raise particularly important issues of GATT interpretation and which are of considerable importance in the context of these particular cases. The Community, however, reserves the right to take up any or all of the other points at an appropriate time.

A. Equity Infusions

1. DOC Determination

a. Summary

The DOC determinations recognize three different situations relating to government purchase of equity and come to the following conclusions:

-- Where the government buys a company's shares on the open market at market prices no subsidy exists;

-- Where a market exists for shares but the government buys the shares directly from the company, the DOC compares the price paid by the government with the market price some time before purchase; if the government paid a higher price than the market price at that earlier date, a subsidy exists in the amount of the difference in price; and

-- If no market exists for the shares, the rate of return to the government is compared with the average return on industrial investment; if the return to the government is less than the average, a subsidy exists in the amount of the difference in returns, even taking account of negative returns.

b. Quotation from DOC Determinations

"It is well settled that government equity ownership per se is not a subsidy. Such ownership is a subsidy only when it is on terms inconsistent with commercial considerations. An equity subsidy potentially arises when the government makes equity infusions into a company which is sustaining deep or significant continuing

losses. If such losses have been incurred, then we consider from whom the equity was purchased and at what price.

"If the government buys previously issued shares on the market and not directly from the company, there is no subsidy to the company. This is true no matter what price the government pays, since any overpayment benefits only the prior shareholders and not the company.

"If the government buys shares directly from the company (either a new issue or corporate treasury stock) and similar shares are traded in a market, a subsidy arises if the government pays more than the prevailing market price. To avoid any effect on the market price resulting from the government's purchase or speculation in anticipation of such purchase, we used for comparison a market price on a date sufficiently preceding the government's action. Any amount of overpayment is treated as a grant to the company.

"It is more difficult to judge the possible subsidy effects of direct government infusions of equity where there is no market price for the shares since they were untraded (as where, for example, the government is already sole owner of the company). As a matter of principle, government equity participation can be a legitimate commercial venture. Often, however, as in

many of these steel cases, equity infusions follow massive or sustained losses and are part of national government programs to sustain or rationalize an industry which otherwise would be non-competitive. We respect the government's characterization of its infusion as equity in a commercial venture. However, to the extent in any year that the government realizes a rate of return on its equity investment less than the average rate of return on equity investment for the country as a whole (thus including returns on both successful and unsuccessful investments), its equity infusion is considered a subsidy. Under no circumstances do we countervail an amount greater than that which is calculated treating the government's equity infusion as an outright grant."

2. Counterarguments

There is clearly no objection to the decision that there is no subsidy where the state buys the shares on the open market at market prices. Where government buys shares, which are also offered in the stock market, directly from the company, it is extremely arbitrary for determining the existence and amount of a subsidy to pick a market value over a short period some weeks before the government purchase.

In addition, this approach does not take account of the fact that the intrinsic value of the shares, based on asset value, may be more than their market price and

that an investor may, therefore, be prepared to pay a premium for control of the company and thus of its assets. It is quite normal also that a rational investor, such as a company making a tender offer in the United States, will pay a premium over the market price if he has reason to believe that new management and the infusion of capital will allow a rate of return greater than in the past and therefore greater than the stock market has anticipated.

Where the government buys shares for which there is no market price, it is totally arbitrary to look at average returns. It follows from GATT that the decisive criterion is the cost to the government and therefore the investment should be treated as a long-term loan by the government and the long-term return should be measured against the rate at which the government borrowed the money to make the investment.

B. Loans

1. DOC Determination

I. Summary

The DOC determinations distinguish between creditworthy and allegedly uncreditworthy companies. This distinction is based on the assumption that companies became uncreditworthy in the first year in which they made losses. Any subsequent loans are treated as equity infusions.

Where companies are regarded as creditworthy, the rate of interest charged for the loan is compared to the rate of interest which would have been charged to the company for a normal commercial loan, and, if lower, the difference is treated as a subsidy.

b. Quotation from U.S. Determinations

"In these investigations, various loan activities give rise to subsidies. The most common practice is the extension of a loan at a preferential interest rate where the government is either the actual lender or directs a private bank to lend at a preferential rate. The subsidy is computed by comparing what a company would pay a normal commercial lender in principal and interest in any given year with what the company actually pays on the preferential loan in that year. We determine what a company would pay a normal commercial lender by constructing a comparable commercial loan at the appropriate market rate (the "benchmark"). If the preferential loan is part of a broad, national lending program, we use a national average commercial interest rate as our benchmark. If the loan program is not generally available -- like most large loans to respondent steel companies -- the benchmark used instead, where available, is the company's actual commercial credit experience (e.g., a contemporaneous loan to the company

from a private commercial lender). If there were no similar loans, the national commercial rate is used as a second-best alternative.

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"After calculating the payment differential in each year of the loan, we then calculated the present value of this stream of benefits in the year the loan was made, using a national cost of long-term corporate debt in that year as the discount rate. In other words, we determine the subsidy value of a preferential loan as if the benefits had been bestowed as a lump-sum grant in the year the loan was given. We determine how much less valuable money tomorrow is than money today by applying a discount rate. We are using the national cost of long-term corporate debt for the year in which the loan was given as this discount rate. This amount is then allocated evenly over the life of the loan, with one exception. Where the loan was given expressly for the purchase of a costly piece of capital equipment, the present value of the payment differentials is allocated over the useful life of the capital equipment concerned.

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"When the company under investigation has a history of deep or significant continuing losses, and diminishing (if any) access to private lenders, we generally agree with petitioners. In these situations,

neither national nor company-specific market interest rates proved an appropriate benchmark since, by definition, an uncreditworthy company could not receive loans on these terms without government intervention. Nor have we been able to find any reasonable and practical basis for selecting a risk premium to be added to a national interest rate in order to establish an appropriate benchmark for companies considered uncreditworthy. Therefore, we have treated loans to an uncreditworthy company as an equity infusion by the government. We believe this treatment is justified by the treat [sic] risk, very junior status, and low probability of repayment of these loans. To the extent that principal and/or interest is actually paid on these loans, however, the subsidy (which is calculated using our equity methodology, infra) is reduced dollar for dollar in the year of repayment. Moreover, in no case do we countervail a loan subsidy to a creditworthy or uncreditworthy company more than if the government gave the principal as an outright grant."

2. Counterarguments

a. Distinction between creditworthy and allegedly uncreditworthy companies.

This distinction is a complete innovation which is not provided for anywhere in the GATT. Because the GATT criterion for the determination of the existence and

amount of a subsidy is the financial contribution of the government, the creditworthiness of the companies concerned is totally irrelevant.

It is clear from the GATT, and especially by analogy to item (k) of the Subsidies Code Illustrative List, that the proper test of a subsidy is a comparison between the rate of interest charged to the company and the rate at which the government borrowed the funds. It follows, therefore, that the measure of any subsidy is the difference between the rate at which the government borrows and the rate at which it lends to the company concerned.

b. Method of Determination of Creditworthiness

Even if the distinction between creditworthy and uncreditworthy companies was a valid one, the DOC determination of creditworthiness is based on a totally simplistic view taken with the benefit of hindsight. First, it ignores the fact that profitability is only one aspect of creditworthiness. Indeed, depending on circumstances, it may not even be a significant factor in assessing creditworthiness. If the company's asset value is sufficient, a loss-making company can still be absolutely creditworthy.

Second, even if profitability were the only measure of creditworthiness, it would be unrealistic to expect any investor, whether private or governmental, to

come to the same conclusion in making decisions as to its investment policy, as an outsider would come to, years later, with the benefit of hindsight. There may be a point of no return after which a company would cease to be creditworthy, but this point is clearly not the first year in which a company realizes a loss. It would be necessary to allow a reasonable grace period during which assessments could be made. An example of this approach is the loan guarantee of $1000 million given by the United States Government in 1980 to Chrylser to keep it in business although the company had been losing money since 1977 and, in fact, has continued to do so.

Furthermore, to the extent that the DOC has used debt/equity ratios to support its findings of uncreditworthiness, it has followed a method of calculating the debt/equity ratio which is completely inconsistent with its characterization of loans as infusions of equity for purposes of calculating the subsidy. The loan is treated as debt of the companies in evaluating its debt/equity ratio for purposes of determining uncreditworthiness, but such determination having been made, the subsidy value of such loan is then calculated as an infusion of equity for purposes of countervailing.

C. Loan Guarantees

1. DOC Determination

"A loan guarantee by the government constitutes a subsidy to the extent the guarantee assures more favorable loan terms than for an unguaranteed loan. The subsidy amount is quantified in the same manner as for a preferential loan."

2. Counterarguments

The DOC determinations distinguish incorrectly between creditworthy and uncreditworthy companies. They measure the amount of the subsidy by comparing the interest rate paid by the firms with the hypothetical interest rate which it is claimed they would have had to pay for an unguaranteed loan. For allegedly uncreditworthy firms the amount of the loan was treated as an equity infusion.

It is clear from the GATT, and especially by analogy with item (j) of the Subsidies Code Illustrative List, that the test of a subsidy in the case of loan guarantees and, thus, the measure of any subsidy, is whether the long-term operating costs of the loan-guarantee program are covered by the fees charged. It follows from this that no distinction should be made between creditworthy and allegedly uncreditworthy firms, because the reference to the long-term operating costs

only makes sense if it is assumed that some of the companies for which loans are guaranteed will subsequently prove not to be creditworthy.

D. Regional Aid

1. DOC Determination

Regional aid programs are considered countervailable without taking into consideration any disadvantages incurred by companies having to operate in economically retarded and remote areas. On the contrary, the determination that such programs are countervailable is expressly justified by their regional character on the dubious basis that otherwise the requirement of United States domestic law, that countervailable subsidies must be specific to a specific industry or groups of industries, would not be met.

2. Counterarguments

This approach does not take into account that, under GATT and the Subsidies Code, countervailable subsidies are only those which adversely affect the conditions of normal competition. Article 11(1) of the Subsidies Code states that signatories of the Code do not intend to restrict the right of signatories to use subsidies, other than export subsidies, to achieve certain social and economic policy objectives which they consider desirable, such as the elimination of industrial, economic

and social disadvantages of specific regions. In addition, Article 11(2) of the Subsidies Code states that signatories recognize that such subsidies may adversely affect the conditions of normal competition. Therefore, signatories are committed to seek to avoid causing such effects in drawing up their policies.

Aids granted to establish new industries or to maintain existing industries in remote regions suffering from industrial, economic and social disadvantages enter into the scope of infrastructure and social policy and are common practice throughout all industrialized countries. They are not countervailable subsidies insofar as they do not exceed the additional costs incurred by an industry situated in these distinct regions, within the particular country, as compared to what would be the cost in other locations offering a concrete alternative for industrial settlement.

RESERVATION

The Community reserves the right to amplify the above arguments at a later stage, in particular in the light of the discussions in the GATT Committee on Subsidies and Countervailing Measures.

ANNEX B

The assertion has been made by DOC that the Annex to the Subsidies Code merely contains illustrations of programs that are export subsidies prohibited under Article 9 of the Code, and, therefore is only relevant to proceedings under Part VI of the Code, before the Committee on Subsidies and Countervailing Measures. In response to this assertion, the Community is compelled to assert the obvious. The Code is a single document which must be read in its entirety.

Part I of the Code contains rules governing the procedures for imposition of countervailing duties by investigating authorities. Part II contains substantive rules relating to the definition of subsidy and to signatory government obligations with respect to programs benefitting their domestic industries. Part VI contains the dispute settlement procedures for resolution of issues arising under all these rules. None of these parts can be read independently of the other parts of the Code.

For example, the procedural rules in Part I refer to all forms of subsidy, including export subsidies prohibited under Article 9 and illustrated in the Annex. Article 5, paragraph 9, of Part I explicitly makes retroactive imposition of countervailing duties contingent on the existence of export subsidies prohibited under Article 9 of Part II.

Because of the text and the organization of the Code, and as a matter of logical policy, the Community stresses that parts I and II of the Code must be read together as part of a single body of rules.

The assertion has also been made that the Annex, assuming that it is relevant to the definition of a subsidy for purposes of countervailing duties, is merely illustrative. Clearly, the Annex contains a partial list of programs which, under the conditions prescribed in the Annex, are export subsidies. The Annex is illustrative only in the sense that programs not described in the list may also be export subsidies.

It was not the intention of the negotiators of the Code that the application of the rules in the Annex be left to the discretion of signatory governments. If a program is described in the Annex, then the rules in the Annex must apply for all purposes of the Code.

It follows from this that if a program is one described in the Annex, but the operation of that program does not meet the conditions prescribed in the Annex for that program to be a subsidy, then that program is not a subsidy for purposes of the Code. For example, item (g) of the Annex provides that exemption or remission of indirect taxes upon exportation in excess of such taxes actually levied is a subsidy. Clearly, then, exemption or

remission of indirect taxes that is not in excess of the amount levied is not a subsidy. Item (k) provides that government loans at rates below those that government pays to borrow money are subsidies. Therefore, government loans at or above the rate at which the government borrowed funds do not constitute a subsidy.

In instances where a program is not an export subsidy within the meaning of the Code but has a structure closely related to programs described in the Annex, common sense requires application of the rules in the Annex to such programs by analogy. If this approach is not followed, the absurd result would be that a program could be considered to be a subsidy within the meaning of the Code, if it was a domestic program, but would not be a subsidy, if it was an export program. To apply more rigorous standards to domestic programs than to export programs is clearly contrary to the Code and to the GATT.