

## **The Robert E. Hudec Article on Global Trade**

### **The Pitfalls of the (Perfect) Market Benchmark: the Case of Countervailing Duty Law**

**Wentong Zheng\***

#### ABSTRACT

Markets have long been used as benchmarks for economic value in various areas of law. However, a crucial question has received less than adequate attention: what type of market should be used in the market benchmark? More specifically, given all the imperfections one typically finds in day-to-day markets, how perfect does a market have to be in order to qualify as a benchmark for economic value? This Article discusses this question using countervailing duty law as a case study. Countervailing duty law allows the United States to impose countervailing duties on imported merchandise to offset subsidies conferred by foreign governments upon such merchandise. In identifying and measuring subsidies, countervailing duty law utilizes a market benchmark, i.e., whether the government action under investigation is on terms more favorable than those available in the market. After tracing the evolution of the market benchmark analysis in countervailing duty law, I demonstrate that the market benchmark analysis, as currently formulated in countervailing duty law, envisions a perfect or near-perfect market, i.e., a market that is undistorted by the government action under investigation. I further demonstrate the pitfalls of this perfect-market approach by critiquing the basis on which a market is rejected as distorted, the manner in which alternative

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\* Associate Professor of Law, University at Buffalo Law School, The State University of New York.

benchmarks are selected, and the fundamental disconnect between the perfect-market approach and the purpose of countervailing duty law.

## I. INTRODUCTION

The assessment of economic value figures prominently in law. In almost every area of law, after all rights are ascertained and all wrongs assigned, redress entails compensating the wronged party in accordance with a judicially or legislatively determined economic value of the damages in question. In certain areas of law, not only does the assessment of economic value provide a measure of damages, but this assessment defines the substantive rights the law protects in the first instance. The law of eminent domain, for example, assesses the economic value of the property being condemned by the government in order to arrive at the amount of just compensation the government is required to pay to the owner of the property.<sup>1</sup> As has been argued convincingly elsewhere, the choice of a valuation mechanism for takings compensation purposes implicates not only the extent of a property owner's recovery but more importantly the substantive constitutional rights afforded to property owners against government takings.<sup>2</sup>

Although there are different schools of thought on the theory of economic value, the one that has gained the widest acceptance equates economic value with exchange value or market value.<sup>3</sup> In this view, intrinsic economic value does not

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1. U.S. CONST. amend. V, § 4.

2. See Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) ("Valuing just compensation turns out to be largely unstudied but essential for defining the extent of constitutional protection for private property.")

3. This notion of economic value is called "value in exchange" by Adam Smith, often considered the founder of modern economics. Smith contrasted "value in exchange" with "value in use" as follows:

The things which have the greatest value in use have frequently little or no value in exchange; and on the contrary, those which have the greatest value in exchange have frequently little or no value in use. Nothing is more useful than water: but it will purchase scarce any thing; scarce any thing can be had in exchange for it. A diamond, on the contrary, has scarce any value in use; but a very great quantity of other goods may frequently be had in exchange for it.

JOSEPH E. STIGLITZ & CARL E. WALSH, *PRINCIPLES OF MICROECONOMICS* 70 (4th ed. 2006) (quoting ADAM SMITH, *THE WEALTH OF NATIONS* (1776), Book One, Chapter IV).

Besides "value in exchange" and "value in use," another notion of economic value

exist; the value of a good or service is nothing but the price it would fetch in the market, determined by the subjective valuation of buyers and sellers.<sup>4</sup> The market, according to this view, is the only yardstick against which value should be measured.

Similarly, using markets as benchmarks for economic value has been a routine practice in law. Returning to the eminent domain example, the default measure of the amount of “just compensation” the government is required to pay to the owner of the condemned property has been held to be the “fair market value” of the property.<sup>5</sup> Other examples of the use of market benchmarks in law abound.<sup>6</sup>

However, the markets one typically finds in the day-to-day world may not all possess the same qualities as those of the perfect market contemplated in standard economics textbooks.<sup>7</sup>

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is the labor theory of value. The labor theory of value, first espoused by David Ricardo and later fully developed by Karl Marx, assumes that what gives value to a commodity is the total quantity of labor required for its production. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 679, 714–15 (McGraw-Hill, Inc. 1995) (1948).

Of all the different notions of economic value, exchange value has since become the building block of modern economics thanks to the works of neoclassical or marginalist economists. Neoclassical economists showed that demand depends upon marginal utility and thereby provided the missing link in a complete theory of the market mechanism. See *id.* at 534–37.

4. See Henry W. Stuart, *Subjective and Exchange Value*, 4 J. OF POL. ECON. 208, 210 (1896) (“The whole process of the determination of exchange value is, as [the Austrian school economists] maintain, from beginning to end a psychological one, and the elements in this process are the subjective valuation of both the buyers and the sellers, in terms of marginal utility.”).

5. See *United States v. Miller*, 317 U.S. 369, 374 (1943); *accord.* *City of New York v. Sage*, 239 U.S. 57, 61 (1915); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 633 (1961); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973).

6. See, e.g., *Janis v. Comm’r*, 469 F.3d 256, 263 (2d Cir. 2005) (holding that the fair market value of a property on the date of an individual’s death determines the cost basis to his heirs when the income tax due on its subsequent sale is calculated); *Kanematsu-Gosho Ltd. v. M/T Messiniaki Aigli*, 814 F.2d 115, 118–19 (2d Cir. 1987) (holding that the presumptive measure of damages in a suit brought under the Carriage of Goods by Sea Act is the difference between the fair market value of the goods at their destination in the condition in which they should have arrived and the fair market value in the condition in which they actually did arrive). *But see* *United States v. Shugart*, 176 F.3d 1373, 1375–76 (11th Cir. 1999) (holding that replacement cost is a better measure of value than fair market value under 18 U.S.C. § 3663A when actual cash value is difficult to ascertain); *Ex parte Barron Services, Inc.*, 874 So.2d 545, 551 (Ala. 2003) (holding that the fair value of the stock of a close corporation should not be equated with the company’s fair market value).

7. See SAMUELSON & NORDHAUS, *supra* note 3, at 271 (“Our discussion [of the invisible-hand theory] has proceeded on the basis of some unrealistic assumptions: no monopolies, no spillovers or externalities, no government policy failures, and so

Price (and thus market value) is an outcome of the supply and demand conditions of a market, and different market conditions invariably lead to different prices (and thus different market values). For example, the sale price reached in a transaction in which the seller faces impending financial troubles will very likely be different from the sale price reached in a transaction in which the seller is unpressured. Therefore, when using markets as benchmarks for economic value, a question arises as to what type of market should be used. More specifically, how perfect does a market have to be in order to qualify as a benchmark for economic value?

To some degree, the question of what type of market is to be used as the market benchmark is more revealing than the question of whether to use the market benchmark in the first place. Market price is often the default choice for a value benchmark, and that choice usually requires no justification unless and until the law is forced to choose among different types of markets for the market benchmark. When choosing among different types of markets, the law must identify and scrutinize the underlying purpose for which the market benchmark is utilized before making a decision as to what type of market best suits that purpose.

This Article examines how that decision is made—and the pitfalls associated with that decision in one particular area of the law: countervailing duty law.<sup>8</sup> As a major component of trade remedy laws, countervailing duty law provides remedies against subsidies conferred by foreign governments on imported merchandise.<sup>9</sup> In the United States, the United States Department of Commerce (DOC) and the United States International Trade Commission (ITC) administer countervailing duty law. The DOC determines the existence and magnitude of countervailable subsidies,<sup>10</sup> whereas the ITC determines whether subsidized imports cause material injury or

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forth.”).

8. 19 U.S.C. §§ 1671–1671h (2000).

9. See *id.* § 1671(a) (“If the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, . . . then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.”); see also David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT’L & COMP. L. 7, 11 (1995) (explaining how U.S. countervailing duties function as checks on foreign subsidies in international trade).

10. See 19 U.S.C. § 1671(a)(1); Gantz, *supra* note 9, at 27.

threats of material injury to U.S. industries.<sup>11</sup> Upon petition by domestic producers and affirmative government findings with respect to subsidy and injury, countervailing duty law allows the imposition of countervailing duties equal to the amount of the net subsidy conferred.<sup>12</sup> At the international level, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) of the World Trade Organization (WTO) govern countervailing duty laws.<sup>13</sup>

Governments give subsidies of various fashions to advance economic or non-economic goals, sometimes at the expense of trading partners. The adverse effect of subsidies on international trade calls for disciplining the use of them.<sup>14</sup> However, not everything that governments do should be considered an illegitimate subsidy. In modern times, governments participate or intervene in the economy in a myriad of ways. Governments own natural resources<sup>15</sup> and corporations,<sup>16</sup> provide loans<sup>17</sup> or loan guarantees, buy and sell

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11. See 19 U.S.C. § 1671(a)(2); Gantz, *supra* note 9, at 28.

12. 19 U.S.C. § 1671(a).

13. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125 (1994), reprinted in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 264, 268 (World Trade Organization 1995) [hereinafter SCM Agreement].

14. Under the SCM Agreement, a subsidy must cause adverse effects to the interests of other members in order for it to be actionable. SCM Agreement, art. 5. See generally MARC BENITAH, THE LAW OF SUBSIDIES UNDER THE GATT/WTO SYSTEM (2001) (analogizing the adverse effect of subsidies on international trade to that of pollution in the context of domestic law).

15. In the United States, for example, state governments own natural resources within three nautical miles of the coastline, while the federal government owns natural resources seaward of state coastal waters. See Elizabeth A. Ransom, *Wind Power Development on the United States Outer Continental Shelf: Balancing Efficient Development and Environmental Risks in the Shadow of the OCSLA*, 31 B.C. ENVTL. AFF. L. REV. 465, 474 (2004).

16. Government-owned corporations are common even in Western countries. For a history of state-owned-enterprises in Western countries, see PIER ANGELO TONINELLI, *The Rise and Fall of Public Enterprise: The Framework*, in THE RISE AND FALL OF STATE-OWNED ENTERPRISE IN THE WESTERN WORLD 3 (Pier Angelo Toninelli ed., Cambridge University Press 2000). A recent example of government ownership in a major corporation in the United States is the 60% ownership taken by the United States federal government in General Motors as part of the latter's government-orchestrated bankruptcy process. See Neil King Jr. & Sharon Terlep, *GM Collapses Into Government's Arms*, WALL ST. J., June 2, 2009, at A1.

17. For example, the U.S. federal government provides direct student loans through the William D. Ford Federal Direct Loan Program and provides student loan guarantees through the Federal Family Education Loan Program. See SAR A. LEVITAN ET AL., PROGRAMS IN AID OF THE POOR 202 (8th ed. 2003). From 1995 through 2000, the direct loan program provided \$72 million in loans to postsecondary students and their parents, while the loan guarantee program

goods and services in the marketplace,<sup>18</sup> and regulate the economy through macroeconomic<sup>19</sup> and regulatory policies.<sup>20</sup> So the central task for countervailing duty law is to decide what kinds of government actions should be considered subsidies that need to be countervailed. This is where the market benchmark comes into play.

Under countervailing duty law, for a government action to be considered a countervailable subsidy, the action must confer a benefit on the recipient of the government action.<sup>21</sup> In determining the existence of a benefit, countervailing duty law compares the terms of the government action to the terms available in the market.<sup>22</sup> A benefit is deemed to exist if the terms of a government action are more favorable than those available in the market, with the amount of benefit—and thus subsidy—being the difference between the government terms and the market terms.<sup>23</sup>

Using a market benchmark in identifying and measuring subsidies becomes more complicated, however, when there are allegations that the government has distorted the market by virtue of the subsidy under investigation, and the market price should not be relied on as the subsidy benchmark. In the face of

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provided more than \$300 million in loans over the same period. *Id.* Short-term emergency loans are sometimes made by governments in the form of bridge loans to companies that are in financial troubles. One notable example of such bridge loans in the United States is the \$85 billion loan made by the Federal Reserve to insurance giant American International Group in September 2008 at the onset of the financial crisis. See Edmund L. Andrews, Michael J. de la Merced & Mary Williams Walsh, *Fed in an \$85 Billion Rescue of an Insurer Near Failure*, N.Y. TIMES, September 17, 2008, at A1.

18. The U.S. federal government is, once again, an example: the U.S. federal government is the world's largest buyer of goods and services, with purchases totaling more than \$425 billion per year. See U.S. Small Business Administration, *Contracting Opportunities*, <http://www.sba.gov/contractingopportunities/index.html> (last visited Oct. 7, 2009).

19. Modern governments routinely employ fiscal and monetary policies to achieve macroeconomic goals with respect to unemployment and inflation. For an introduction to governments' macroeconomic tools, see SAMUELSON & NORDHAUS, *supra* note 3, at 381–401.

20. According to Samuelson and Nordhaus, government regulations are imposed through laws or rules designed to change the behavior of firms. The major kinds of government regulations are economic regulations, which affect the prices, entry, or service of a single industry, and social regulations, which attempt to correct externalities that prevail across a number of industries. See *id.* at 322. For a more detailed discussion of government regulations, see CLARKE E. COCHRAN, ET AL., *AMERICAN PUBLIC POLICY: AN INTRODUCTION* 53–56 (Michael Rosenberg 9th ed. 2008).

21. SCM Agreement art. 1.1(b), *supra* note 3, at 264.

22. See *infra* Part II.C.

23. See *infra* Part II.C.

such allegations, countervailing duty law has to decide how to determine whether a market is distorted, and if it is distorted, what type of market should be used in its place as the subsidy benchmark.

This Article discusses how these decisions are made in countervailing duty law. After tracing the evolution of the market benchmark in countervailing duty law, I demonstrate that countervailing duty law, as currently interpreted by the WTO and implemented by the DOC, envisions a perfect or near-perfect market, i.e., a market that is undistorted by the government action under investigation. I further demonstrate the pitfalls of this perfect-market approach by critiquing the basis on which the DOC rejects a market as distorted, challenging the manner in which the DOC replicates the counterfactual perfect market, and identifying a fundamental disconnect between the perfect-market approach and the purpose of the countervailing duty law.

This Article studies countervailing duty law, which is one example of the misapplication of market benchmark analysis in law. It does not, however, systemically tackle issues with market benchmarks that arise in other areas of law. Although the market benchmark analysis—as well as its pitfalls—is a common theme running through various areas of law, market benchmarks are used differently under different circumstances, and the mechanics of various market benchmark analyses necessarily vary in different areas of law. To borrow physics parlance, a “string theory” of market benchmark analyses simply does not exist.

That being said, this Article’s analysis of the market benchmark in countervailing duty law is nevertheless relevant in other market benchmark contexts for the following two reasons. First, the market benchmark analysis in countervailing duty law is a prime illustration of the preference given to a perfect, yet non-existent, market over an imperfect, yet real, market. To the extent that other areas of law look to perfect markets as the benchmark for economic value, the lessons learned from countervailing duty law will prove useful. Second, the two types of markets countervailing duty law chooses between for its market benchmark analysis are perhaps as far apart as could be: one entails significant government intervention, while the other does not. In the face of the recent global financial crisis, governments worldwide have an unprecedented stake in their economies, and government intervention in many market sectors is only expected to grow.

As a result, it is conceivable that in certain areas of law the propriety of using a market as a benchmark for economic value, which may have been taken for granted so far, will come under renewed scrutiny now that the markets are seeing persistent government intervention. The lessons learned from countervailing duty law regarding the choice between a market with government intervention and a market without may prove useful for other areas of law as these areas respond to evolving circumstances.

## II. THE EVOLUTION OF THE MARKET BENCHMARK ANALYSIS IN COUNTERVAILING DUTY LAW

If the market traditionally has been presumed to be the default benchmark for economic value in certain areas of the law, that has not been the case in countervailing duty law historically. As evident from the discussions below, the acceptance of a market benchmark in countervailing duty law has a long, tortuous history. The history of the adoption of the market benchmark in countervailing duty law reveals the rationale offered for the market benchmark.

### A. 1890–1978: THE EARLY YEARS

Congress enacted the first countervailing duty provision in the Tariff Act of 1890<sup>24</sup> in response to the “bounties” granted by several European nations on exports of beet sugar.<sup>25</sup> In 1897, the countervailing duty provision generally applied to all export subsidies on all products.<sup>26</sup> The Tariff Act of 1922 further expanded the reach of countervailing duty law to both export and domestic subsidies.<sup>27</sup> None of these early countervailing duty provisions, however, defined the government measures that would fall within the meaning of the term bounty.

The statutory framework of modern countervailing duty law was laid out in the Tariff Act of 1930,<sup>28</sup> which, similar to earlier countervailing duty provisions, provided for the imposition of

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24. See Tariff Act of 1890, ch. 1244, § 237, 26 Stat. 584.

25. See 30 Cong. Rec. 2203 (1897) (remarks of Sen. Gray) (discussing Wilson Bill of 1894).

26. See Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205.

27. The Tariff Act of 1922 makes the countervailing duty provisions applicable to subsidies not only on the exportation of merchandise, but also on the manufacture or production of merchandise. See Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935; see also S. REP. NO. 67-595, 2d Sess. 250–51 (1922).

28. See Tariff Act of 1930, 19 U.S.C. § 1303 (1982).



countervailing duties to offset any “bounty or grant” paid or bestowed upon the imports under investigation.<sup>29</sup> Like previous countervailing duty legislation, however, the Tariff Act of 1930 did not define the meaning of the phrase “bounty or grant.” Nor did it include any criteria for identifying and measuring “bounties or grants.”<sup>30</sup>

The adoption of the multilateral trading regime, the General Agreement on Tariffs and Trade (GATT),<sup>31</sup> in 1947 did not alleviate the problems stemming from this lack of definition. The GATT allows member countries to impose countervailing duties on imported merchandise to offset a subsidy determined to have been granted on the manufacture, production, or export of such merchandise,<sup>32</sup> and it requires member countries to provide notification of any subsidy that operates to increase exports or reduce imports.<sup>33</sup> But nowhere in the GATT is the term “subsidy” defined.<sup>34</sup>

#### B. 1979–1993: THE ADVENT OF THE MARKET BENCHMARK

Since its adoption in 1947, the GATT was expanded by a series of additional agreements reached in subsequent trade negotiating rounds conducted under the auspices of the GATT.<sup>35</sup> Of those GATT negotiating rounds, the Tokyo Round (1973–1979) focused on subsidies and resulted in the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade in 1979, commonly known as the “Subsidies Code.”<sup>36</sup>

The Subsidies Code represents a significant step in strengthening multilateral discipline on the use of subsidies and countervailing measures in world trade.<sup>37</sup> However, like the

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29. *See id.* § 1303(a)(1).

30. *See id.* § 1303.

31. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

32. *See id.* pt. 1, art. VI.3.

33. *See id.* pt. 1, art. XVI.1.

34. *See id.*; *see also* GARY CLYDE HUFBAUER & JOANNA SHELTON ERB, *SUBSIDIES IN INTERNATIONAL TRADE* 12–13 (1984).

35. *See* World Trade Organization, *The GATT Years: from Havana to Marrakesh*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Sept. 27, 2009).

36. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 1186 U.N.T.S. 204 [hereinafter Subsidies Code].

37. Among the many achievements of the Subsidies Code is the requirement of an injury test before a countervailing measure could be imposed. *See id.* art. 4(4), at 212.

previous GATT provisions, the Subsidies Code also lacks a clear definition of what exactly constitutes a subsidy. To be sure, the Subsidies Code provides an “Illustrative List of Export Subsidies,”<sup>38</sup> but that list, as its name suggests, is only illustrative and not exhaustive. In terms of domestic subsidies, the Subsidies Code also provides an example list of “possible forms of such subsidies,”<sup>39</sup> but falls short of declaring that those domestic subsidies would be actionable.<sup>40</sup>

Congress implemented the Subsidies Code by enacting the Trade Agreements Act of 1979,<sup>41</sup> which added new sections to the Tariff Act of 1930.<sup>42</sup> The new set of countervailing duty provisions provides a non-exhaustive list of subsidies through incorporating by reference the Illustrative List of Export Subsidies contained in the Subsidies Code.<sup>43</sup> The Act also provides its own “Illustrative List of Domestic Subsidies.”<sup>44</sup>

From the Illustrative List of Domestic Subsidies emerged the prototype for what would later become the basis for identifying and measuring subsidies in countervailing duty law: the market benchmark. The Illustrative List of Domestic Subsidies in the Trade Agreements Act of 1979 includes:

- (i.) the provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations;
- (ii.) the provision of goods or services at preferential rates;
- (iii.) the grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry;

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38. *See id.* Annex: Illustrative List of Export Subsidies, at 240.

39. *Id.* art. 11(3). The domestic subsidies enumerated in Art. 11(3) of the Subsidies Code are: “government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital.” *Id.*

40. *See id.* art. 11(4).

41. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

42. *See generally* 19 U.S.C.A. §§ 1671–1677 (West 1980). The new provisions were applicable only to signatories of the Subsidies Code and countries that had accepted equivalent obligations. Previous countervailing duty provisions, contained in section 303 of the Tariff Act of 1930, still applied to countries that were not members of the GATT and did not accept the obligations under the Subsidies Code. *See* 19 U.S.C. § 1303 (1982). The two sets of countervailing duty provisions, however, share the same definition of subsidy: the new set of countervailing duty provisions defines subsidy as “hav[ing] the same meaning as the term ‘bounty or grant’ as that term is used in [section 303 of Tariff Act of 1930].” *Id.* § 1677(5).

43. 19 U.S.C. § 1677(5)(A)(i) (West 1980 & Supp. 4 Dec. 1988).

44. *Id.* § 1677(A)(ii).

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(iv.) the assumption of any costs or expenses of manufacture, production, or distribution.<sup>45</sup>

The first item on the list embodies a market benchmark. When determining whether the government provision of capital, loans, or loan guarantees confers a subsidy, the criterion is whether the government provision is consistent with commercial considerations. Logically, if the terms on which capital, loans, and loan guarantees are provided by the government differ from what would be justified by commercial considerations, recipients of such financial transfers must have received an advantage. Otherwise, they would have to turn to the private market to seek the same capital, loans, or loan guarantees on less favorable terms. As can be seen in the following discussion, this market benchmark would later take many different forms, depending on the type of government action in question.

Considered in this light, the third and fourth items on the illustrative list can be seen as implicitly adopting the market benchmark approach as well. No entities operating on market principles would grant funds or forgive debts to cover the operating losses of other entities without a *quid pro quo*. The “grant of funds or forgiveness of debt to cover operating losses”<sup>46</sup> and the “assumption of . . . costs or expenses of manufacture, production, or distribution”<sup>47</sup> are therefore considered subsidies because, at least in part, they are not actions that would occur in the market.

The embrace of the market benchmark by the Trade Agreements Act of 1979, however, is incomplete. The Act reserves a place for a competing benchmark, the preferentiality benchmark. The second item on the Illustrative List of Domestic Subsidies states that when assessing whether the government provision of a good or service constitutes a subsidy, the criterion is whether the government provision is at “preferential rates.”<sup>48</sup> But this provision is silent on a key question: preferential to what?

In 1983,<sup>49</sup> the DOC articulated its standard for determining

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45. *Id.* This list of domestic subsidies is preceded by a requirement that such subsidies be provided to a specific enterprise or industry or group of enterprises or industries to be considered subsidies. *See id.* The specificity requirement is outside the scope of this Article and will not be discussed here in detail.

46. *Id.* § 1677(5)(A)(ii)(III).

47. *Id.* § 1677(5)(A)(ii)(IV).

48. *Id.* § 1677(5)(A)(ii).

49. The Trade Agreements Act of 1979 transferred the authority for administering the countervailing duty law from the Department of The Treasury to

preferentiality in subsidy investigations involving government provisions of goods or services in *Certain Softwood Products from Canada*.<sup>50</sup> The DOC stated that preferentiality “normally means only more favorable to some within the relevant jurisdiction than to others within that jurisdiction”<sup>51</sup> and “it does not mean ‘inconsistent with commercial considerations.’”<sup>52</sup> In other words, according to the DOC, the standard for determining preferentiality is preferential to “others,” not preferential to the “market.”

Despite the co-existence of two seemingly incompatible benchmarks under the Trade Agreements Act of 1979, the DOC, in its administration of the countervailing duty statute subsequent to the enactment of the Trade Agreements Act of 1979, noticeably nudged the balance between the two benchmarks in favor of the market benchmark. As discussed below, the DOC shifted the relative weight of the two benchmarks through a complete acceptance of the concept of market distortion as the *raison d'être* of countervailing duty law when deciding not to apply countervailing duty law to non-market economy (NME) countries.

The DOC first confronted the issue of whether a subsidy can be found in a NME in *Carbon Steel Wire Rod from Poland* in 1984.<sup>53</sup> In that case, steel producers in the United States petitioned the DOC to impose countervailing duties on imports of carbon steel wire rod from Poland, alleging that steel producers and exporters in Poland had received “bounties or grants” within the meaning of the countervailing duty statute through a variety of government programs.<sup>54</sup> The DOC rejected the petitioners’ claims, holding that subsidies cannot be meaningfully identified and measured in a NME.<sup>55</sup> In the course of explaining its decision, the DOC ventured a sweeping definition of subsidy:

In a market economy, scarce resources are channeled to their most

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the Department of Commerce. Pub.L. No. 96-39, section 101, 93 Stat. 144, 169-70 (1979).

50. See Final Negative Countervailing Duty Determinations; Certain Softwood Products from Canada, 48 Fed. Reg. 24159 (Dep’t of Commerce May 31, 1983).

51. *Id.* at 24167.

52. *Id.*

53. See Carbon Steel Wire Rod from Poland; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19374 (Dep’t of Commerce May 7, 1984).

54. *Id.* at 19375.

55. *Id.* at 19374 (“We determine that bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act), cannot be found in nonmarket economies.”).

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profitable and efficient uses by the market forces of supply and demand. *We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.*<sup>56</sup>

Under this definition, markets become the ultimate criterion for determining whether a subsidy exists. The DOC further elaborated on why markets serve this role:

In the absence of government intervention, market economies are characterized by flexible prices determined through interaction of supply and demand. In response to these prices, resources flow to their most profitable and efficient uses. To identify subsidies in this pure market economy, we would look to the treatment a firm or sector would receive absent government action. In the absence of the bounty or grant, the firm would experience market-determined costs for its inputs and receive a market-determined price for its output. The subsidy received by the firm would be the difference between the special treatment and the market treatment.<sup>57</sup>

This is the first time the DOC set out, though implicitly, the rationale for using the market as the subsidy benchmark. According to the DOC, a market allocates resources most efficiently. Furthermore, subsidies cause deviation from the market-determined optimum by altering the costs and prices faced by firms. Under this rationale, the market benchmark takes on a value judgment. Not only is the market the only alternative to government favoritism, but it is also a virtuous

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56. *Id.* at 19375 (emphasis added).

57. *Id.* The DOC went on to state that because resources are not allocated by a market in NMEs, "it is obviously meaningless to look for a misallocation of resources caused by subsidies." *Id.* Therefore, the DOC stated, "subsidies have no meaning outside the context of a market economy." *Id.* Note that in 2007, the DOC reversed its position of not applying the countervailing duty law to a country officially designated as an NME, by finding that China provided countervailable subsidies to Chinese producers and exporters of coated free sheet (CFS) paper. *See* Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60645 (Dep't of Commerce Oct. 25, 2007). However, the DOC's decision to find countervailable subsidies in China does not signify a change in its view that market distortion is the basis for determining subsidies. The justification offered for applying the countervailing duty law to China is not that the countervailing duty law should now be applicable to NMEs, but that China is no longer the same type of NME as the one under consideration in *Carbon Steel Wire Rod from Poland*. *See* Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Policy, Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, for Countervailing Duty Investigation of Coated Free Sheet Paper from People's Republic of China (March 29, 2007) (discussing "Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy"), available at <http://ia.ita.doc.gov/download/nme-sep-rates/prc-cfsp/china-cfs-georgetown-applicability.pdf>.

alternative. Seen in this light, the preferentiality benchmark is completely value-neutral. What matters under the preferentiality benchmark is whether the government treats individual buyers or users differently, regardless of whether the differential treatment has efficiency consequences or consequences from the standpoint of any other normative standards.

If the significance of the economic model set out in *Carbon Steel Wire Rod from Poland* is somewhat discounted by the narrowness of the context in which it was announced, the DOC's subsequent reiteration of the model is more revealing. In the preamble to the countervailing duty regulations proposed in 1989,<sup>58</sup> the DOC left no doubt that it intended for that economic model to be its entire approach to countervailing duty regulations. The DOC opened its introduction to the proposed countervailing duty regulations with the following statement:

Conceptually, the regulations are based upon the economic model articulated by the Department in its final determination[] in . . . *Carbon Steel Wire Rod from Poland* . . . . This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, *underlies the Department's entire CVD methodology*.<sup>59</sup>

Because the economic model in *Carbon Steel Wire Rod from Poland*, as analyzed above, calls for the use of the market benchmark, it appears that the DOC was suggesting that market benchmark analyses are the basis for its entire proposed countervailing duty regulations.

The specific provisions of the proposed 1989 regulations largely support this suggestion. The criteria set forth in the proposed regulations for identifying and measuring subsidies in a variety of government programs embody the market benchmark.<sup>60</sup> However, consistent with the Trade Agreement

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58. See Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 54 Fed. Reg. 23366 (Dept of Commerce May 31, 1989) [hereinafter 1989 Proposed CVD Regulations].

59. *Id.* at 23367 (emphasis added).

60. Common to all of these subsidy criteria is the difference between the treatment a firm receives from the government and the treatment it receives in the market—a hallmark of the market benchmark. For example, in the case of a government grant, a countervailable benefit exists in the amount of the grant, *id.* at 23380 (citing proposed rule §355.44(a)), presumably because a grant would never have been provided by the market. In the case of a loan, a countervailable benefit exists when the amount paid by a firm for a government loan is less than what the firm would pay for a benchmark loan, generally defined as a loan the firm actually obtained or would have obtained in the market. *Id.* at 23380 (citing proposed rule § 355.44(b)). In the case of a loan guarantee, a countervailable benefit exists when

Act of 1979, the proposed 1989 regulations revert to the preferential benchmark when determining whether a subsidy exists with respect to the government's provision of goods or services.<sup>61</sup>

In sum, it appears that the DOC was technically incorrect in arguing that the economic model set out in *Carbon Steel Wire Rod from Poland* was the basis for its entire countervailing duty methodology. That economic model calls for the use of the market benchmark in identifying and measuring subsidies, yet the proposed countervailing duty regulations contain a competing benchmark—the preferential benchmark. As discussed above, the obstacle posed by the preferential benchmark to the dominance of the market benchmark is not substantial. Indeed, as discussed below, the last vestiges of the preferential benchmark completely faded away after a new international agreement on subsidies and countervailing measures was reached upon the establishment of the WTO.

### C. AFTER 1994: THE DOMINANCE OF THE MARKET BENCHMARK

As a result of the Uruguay Round negotiations conducted between 1986 and 1994, members of the GATT signed twenty trade agreements and agreed to transform the GATT into the WTO in 1994.<sup>62</sup> The Agreement on Subsidies and Countervailing Measures (SCM Agreement) was among the twenty agreements signed.<sup>63</sup>

The SCM Agreement represents a breakthrough in the multilateral discipline of subsidies and countervailing measures. One of the greatest accomplishments of the SCM Agreement is that it offers a definition of subsidy for the first time.<sup>64</sup> Under the SCM Agreement, a subsidy exists if: (1) there

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the price paid by a firm for the government guarantee is less than what the firm would have paid for a comparable commercial guarantee. *Id.* at 23381 (citing proposed rule § 355.44(c)). Finally, in the case of an equity infusion, a countervailable benefit exists when the market-determined price for equity purchased directly from the firm is less than the price paid by the government. *Id.* at 23381 (citing proposed rule § 355.44(e)).

61. The criterion for identifying and measuring a subsidy in the government's provision of goods or services is whether the government provision is at preferential rates. *Id.* at 23381 (citing proposed rule § 355.44(f)).

62. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

63. SCM Agreement, *supra* note 13.

64. See Terence P. Stewart et al., *Opportunities in the WTO for Increased Liberalization of Goods: Making Sure the Rules Work for All and that Special Needs are Addressed*, 24 FORDHAM INT'L L.J. 652, 693 (2000).

is a “financial contribution by a government or any public body;”<sup>65</sup> (2) a “benefit is thereby conferred;”<sup>66</sup> and (3) the subsidy is “specific to an enterprise or industry or a group of enterprises or industries.”<sup>67</sup>

Although the term “benefit” is a central element of the definition of subsidy, the SCM Agreement does not specify how to determine its existence.<sup>68</sup> Instead, in Article 14, the SCM Agreement offers several “guidelines” on the “calculation of the amount of a subsidy in terms of the benefit to the recipient.”<sup>69</sup>

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65. SCM Agreement, *supra* note 13, art. 1.1(a)(1).

66. *Id.* art. 1.1(b).

67. *Id.* art. 2.1.

68. “Financial contribution” and “specificity” are also important limitations on what government actions could be countervailed under the SCM Agreement and have each spawned a large body of WTO jurisprudence. A detailed treatment of the financial contribution and specificity requirements is beyond the scope of this Article and will not be conducted here.

69. Article 14 of the SCM Agreement states:

Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient

... [A]ny method used by the investigating authority to calculate the benefit to the recipient ... shall be consistent with the following guidelines:

(a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).



All four guidelines on identifying and measuring subsidies as specified in Article 14 of the SCM Agreement embody a market benchmark. The first three guidelines are straightforward. When determining whether government-provided equity confers a benefit, the criterion is whether the government provision of equity is “inconsistent with the usual investment practice . . . of private investors . . .”<sup>70</sup> When determining whether a government-provided loan confers a benefit, the criterion is whether the borrowing firm pays the same amount on the government loan as it “would pay on a comparable commercial loan which the firm could actually obtain on the market.”<sup>71</sup> When determining whether a government-provided loan guarantee confers a benefit, the criterion is whether the firm receiving the government guarantee pays the same amount on the government guarantee as it “would pay on a comparable commercial loan absent the government guarantee.”<sup>72</sup> In each case, the treatment a firm receives or would receive in the private market is used as the benchmark for judging whether the treatment afforded by the government confers a benefit.

The fourth guideline set forth in Article 14(d) of the SCM Agreement is a bit complicated and requires closer analysis. When determining whether the government provision (or purchase) of goods or services confers a benefit, the criterion is whether the government provision (or purchase) is made for less than (or more than) “adequate” remuneration.<sup>73</sup> Standing alone, the term “adequate” is ambiguous in its indication of the nature of the benchmark contemplated under it. The definition begs the key question: adequate by what standard?<sup>74</sup>

The second sentence of Article 14(d) answers this question. Article 14(d) states that when measuring “adequacy of remuneration,” the benchmark finally chosen must be “in

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SCM Agreement, *supra* note 13, art. 14.

70. *Id.* art. 14(a).

71. *Id.* art. 14(b).

72. *Id.* art. 14(c).

73. *Id.* art. 14(d).

74. Nor does the WTO case law provide a clearer interpretation of the word adequate. In the only WTO case that has addressed Article 14(d) of the SCM Agreement so far, the Appellate Body of the WTO stated that “adequate” in the context of Article 14(d) of the SCM Agreement means “sufficient, satisfactory.” See Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶84, WT/DS257/AB/R (Jan. 19, 2004). But as with the term adequate itself, the terms sufficient and satisfactory are equally ambiguous as to the criterion by which sufficient and satisfactory are judged.

relation to prevailing market conditions for the good or service in question in the country of provision or purchase.”<sup>75</sup> It is clear that by referring to “prevailing market conditions,” Article 14(d) contemplates a market benchmark, although its language is different from what is typically used when describing a market benchmark.<sup>76</sup>

Following the adoption of the WTO agreements, Congress enacted the Uruguay Round Agreements Act (URAA) in 1994 to bring U.S. trade laws into compliance with the new world trade rules under the WTO.<sup>77</sup> Among the most notable changes in countervailing duty law prompted by the URAA is the addition of the definition of subsidy, which in all practical ways tracks the language of the definition of subsidy found in the SCM Agreement.<sup>78</sup> Furthermore, the URAA sets forth a set of guidelines for determining the existence of countervailable benefits.<sup>79</sup> Those guidelines repeat, almost verbatim, the

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75. SCM Agreement, *supra* note 13, art. 14(d).

76. Article 14 of the SCM Agreement proves to be significant not only for what it says, but also for what it omits to say, compared with its earlier drafts. During the Uruguay Round negotiations on the SCM Agreement, the earlier drafts of Article 14 of the SCM Agreement always contained a fifth guideline for calculating the amount of a subsidy, after the four guidelines that made their way to the final text. The fifth guideline, applicable when the government is the sole provider or purchaser of a good or service, states:

[A]ny method used by the investigating authority to calculate the benefit to the recipient . . . shall be consistent with the following guidelines:

. . .

(e) When the government is the sole provider or purchaser of the good or service in question, the provision or purchase of such good or service shall not be considered as conferring a benefit, unless the government discriminates among users or providers of the good or service. Discrimination shall not include differences in treatment between users or providers of such goods or services due to normal commercial considerations.

Draft Text on Subsidies and Countervailing Measures, MTN.GNG/NG10/23, at 15 (Nov. 7, 1990).

This draft Article 14(e), if approved, would have preserved a role for the preferential benchmark under the SCM Agreement. However, by the time the final text of the SCM Agreement was signed, section (e) was deleted from Article 14, leaving the market benchmark as the only benchmark standing.

77. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

78. See 19 U.S.C. § 1677(5)(2000).

79. The guidelines for identifying countervailable benefits under the SCM Agreement are:

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including—

(i) in the case of an equity infusion, if the investment decision is

guidelines found in Article 14 of the SCM Agreement and espouse the market benchmark as the only subsidy benchmark.

To implement the new countervailing duty provisions of the URAA, the DOC promulgated a new set of countervailing duty regulations in 1998.<sup>80</sup> Consistent with the SCM Agreement and the URAA, the 1998 countervailing duty regulations adopt the market benchmark analysis in identifying and measuring subsidies with respect to a variety of government actions, such as government provision of grants, loans, loan guarantees, and equity.<sup>81</sup> When it comes to the government provision of goods or services, the 1998 countervailing duty regulations set forth a three-tiered hierarchy of benchmarks for determining whether the government provides a good or service for less than adequate remuneration. The benchmarks, in order of preference, are: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles.<sup>82</sup> All three benchmarks are market based, seemingly leaving no place for

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inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made,

(ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market,

(iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and

(iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

*Id.* § 1677(5)(E).

80. See Countervailing Duty; Final Rule, 63 Fed. Reg. 65348 (Dep't of Commerce Nov. 25, 1998) [hereinafter Preamble to 1998 CVD Regulations].

81. See 19 C.F.R. § 351.511(a) (2008).

82. See *id.* § 351.511.

the preferentiality benchmark.<sup>83</sup>

However, the text of the SCM Agreement alone does not rule out the preferentiality benchmark. Although the SCM Agreement does not have a provision allowing the preferentiality benchmark, it does not have a provision prohibiting it either. It was not until the Appellate Body's decision in *Canada—Measures Affecting the Export of Civilian Aircraft*<sup>84</sup> that the Appellate Body made clear that the SCM Agreement adopts the market benchmark as the sole benchmark for identifying and measuring subsidies. In that case, the Appellate Body of the WTO held that when deciding whether a government action confers a benefit within the meaning of Article 1.1(b) of the SCM Agreement, the

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83. However, in the preamble to the 1998 countervailing duty regulations, the DOC leaves open the possibility of using the preferentiality benchmark under limited circumstances, i.e., when the government is the sole provider of a good or service. The DOC states:

Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or *possible price discrimination*. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely.

Preamble to 1998 CVD Regulations, *supra* note 80, at 65,378 (emphasis added). Therefore, the DOC makes it clear that price discrimination—i.e., preferentiality—may be part of its analysis under a third-tier benchmark. But the DOC is noncommittal about when it will turn to preferentiality, rather than the other factors it says it will consider, in choosing a third-tier benchmark. The DOC states:

Although we do not have enough experience with the adequate remuneration standard to state when a price discrimination analysis may be appropriate, we believe there may be instances where government prices are the most reasonable surrogate for market-determined prices. We would only rely on a price discrimination analysis if the government good or service is provided to more than a specific enterprise or industry, or group thereof.

*Id.* Note that this preferentiality benchmark is exactly the concept called for in the draft Article 14(e) of the SCM Agreement but rejected in the final text of the SCM Agreement. See *supra* note 76 and accompanying text. Apparently, the DOC is trying to preserve a role for the preferentiality benchmark, not in its regulations, but in the preamble to its regulations, despite the deletion of the same benchmark in the final text of the SCM Agreement. The legal force of a statement in the preamble to agency regulations, however, is dubious, and it remains to be seen whether the DOC will indeed use preferentiality as a third-tier benchmark.

84. Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (Aug. 2, 1999) [hereinafter *Canada—Aircraft*].

appropriate basis for comparison is the marketplace:

We also believe that the word “benefit”, as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no “benefit” to the recipient unless the “financial contribution” makes the recipient “better off” than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a “benefit” has been “conferred”, because the trade-distorting potential of a “financial contribution” can be identified by determining whether the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market.<sup>85</sup>

By reading the market benchmark analysis into the term “benefit,” which is a factor in identifying all subsidies, this interpretation essentially rules out the preferentiality benchmark.

More than one hundred years after the inception of countervailing duty law, the market benchmark has become the only officially recognized benchmark for identifying and measuring subsidies. Its triumph over the preferentiality benchmark shows countervailing duty law’s reliance on the market’s allocative efficiency as a justification for its use as a benchmark. We will return to this justification later when we examine how it squares with the purpose of the countervailing duty law.

### III. DEFINING THE MARKET: MARKET-AS-IS VERSUS UNDISTORTED MARKET

As discussed above, under the market benchmark analysis in countervailing duty law, if a financial contribution by the government is made on terms more favorable than those available in the market, then the government will have conferred a subsidy. And the difference between the terms of the financial contribution and the terms available in the market will be the measurement of the subsidy. This seemingly simple and intuitive formulation of the market benchmark analysis, however, masks a far more complicated question: what kind of market is the “market” in the market benchmark? Is it the market currently in place in the country under investigation, or is it a market free of the influence of the government’s financial contribution in question? The former takes a “market-as-is” approach, while the latter takes an “undistorted-market” approach. The two different approaches have starkly different

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85. *Id.* ¶ 157.

implications for the market benchmark analysis. The market-as-is approach looks to the actual prices in the existing market, regardless of whether the existing market is distorted by government subsidies or not. The undistorted-market approach, by contrast, looks to prices that *would* prevail in an undistorted market. If the existing market happens to be undistorted, then actual market prices would be used as benchmarks, but if the existing market is considered distorted, that market would be discarded in favor of a hypothetical, counterfactual undistorted market. In the analysis below, I demonstrate that countervailing duty law adopts the undistorted-market approach to the market benchmark analysis.

A. UNITED STATES—FINAL COUNTERVAILING DUTY  
DETERMINATION WITH RESPECT TO CERTAIN SOFTWOOD LUMBER  
FROM CANADA

The texts of the SCM Agreement, the countervailing duty statute, and the countervailing duty regulations give ambiguous hints about what kind of market they have in mind when they refer to “market” as the subsidy benchmark. The benchmarks utilized under the SCM Agreement, the statute, and the regulations for different government actions seem to allow for the market-as-is approach, the undistorted-market approach, or both. For example, with respect to government provision of equity, the criterion under the SCM Agreement for identifying and measuring subsidies is the “usual investment practice” of private investors in the exporting country.<sup>86</sup> Whether this usual investment practice is a practice typically found in an undistorted free market is immaterial. This benchmark, therefore, is a market-as-is benchmark. Furthermore, with respect to loans and loan guarantees, the criterion for identifying and measuring subsidies under the SCM Agreement is whether the recipient of a government-provided loan or loan guarantee pays the same amount as it would pay on a “comparable commercial” loan or loan guarantee that it “could actually obtain on the market.”<sup>87</sup> This benchmark could be interpreted as a market-as-is benchmark, an undistorted-market benchmark, or both. While the phrase “could actually obtain on the market” shows that what transpires in the existing market will serve as the subsidy benchmark, the phrase “comparable commercial” leaves open the possibility that what

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86. SCM Agreement, *supra* note 13, art. 14(a).

87. *Id.* arts. 14(b) & (c).

transpires in the existing market may be rejected as a benchmark if it is not deemed “comparable” or “commercial.” Finally, the benchmark for government provision or purchase of goods or services under the SCM Agreement is “adequate remuneration” determined “in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.”<sup>88</sup> Again, this benchmark sends conflicting signals. While the phrase “adequate remuneration” does not denote in any meaningful manner the standard by which “adequate” is to be judged, the phrase “in relation to prevailing market conditions” appears to refer to the market as it exists, indicating support for the market-as-is approach.

The foregoing analysis demonstrates the textual inconsistency and ambiguity of the SCM Agreement with respect to the nature of the market in the market benchmark analysis. That is the backdrop against which the WTO Appellate Body ruled in *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, holding that, at least in the context of Article 14(d) of the SCM Agreement, the market in the market benchmark analysis, as espoused by the SCM Agreement, is an undistorted market.<sup>89</sup>

Now, a brief introduction to the underlying dispute in that case. The dispute, commonly known as *Lumber IV*, is the fourth iteration of a long-running trade dispute between the United States and Canada concerning softwood lumber.<sup>90</sup> At the heart of the dispute is the way Canada sets the fees charged for harvesting timber from government-owned timberland. In Canada, most timber is owned by provincial governments that grant timber harvesting rights to integrated softwood lumber producers.<sup>91</sup> The fees charged for harvesting timber, or the “stumpage fees,” are set administratively.<sup>92</sup> The United States softwood lumber industry alleged, *inter alia*, that Canada

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88. *Id.* art. 14(d).

89. Appellate Body Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R (January 19, 2004) [hereinafter Appellate Body Report WT/DS257/AB/R].

90. For a summary of the history of the U.S.-Canada softwood lumber dispute, see Jeffrey L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 ALTA. L. REV. 319 (2007).

91. In Canada, approximately 94% of forests are owned by either federal or provincial governments. See *id.* at 322 (citing DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY 130 (2003)).

92. See *id.*

provided timber for less than adequate remuneration through below-market stumpage fees and thereby conferred countervailable subsidies upon Canadian softwood lumber producers.<sup>93</sup>

In *Lumber IV*, the DOC applied its three-tiered benchmark hierarchy for evaluating adequate remuneration in the government provision of goods or services, using stumpage prices from the United States as a second-tier benchmark.<sup>94</sup> The DOC first determined that there were no actual market prices from within Canada that could serve as a first-tier benchmark for Canada's stumpage fees.<sup>95</sup> The DOC based its determination on the fact that the Canadian provincial governments "constituted a majority or, in certain circumstances, a substantial portion of the market."<sup>96</sup> Such dominance, according to the DOC, "will distort the market as a whole if the government itself does not sell at market-determined prices."<sup>97</sup> Since "there is substantial evidence that Provincial government stumpage fees are not set to reflect market prices," using private stumpage prices as benchmarks "would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect."<sup>98</sup> After rejecting Canadian private stumpage prices as a first-tier benchmark, the DOC held that U.S. stumpage prices are appropriate second-tier benchmarks because U.S. stumpage is available to Canadian producers and U.S. timber stands are comparable to Canadian timber stands.<sup>99</sup> Accordingly, the DOC used U.S. data as a benchmark for comparison to Canadian provincial stumpage fees.<sup>100</sup>

Canada filed a request for consultation with the United States at the WTO and contested, *inter alia*, the United States' use of out-of-country stumpage prices as a benchmark for

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93. *See id.*

94. *See* Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada, 33–43 (April 2, 2002) [hereinafter *Lumber IV CVD I&D Memo*].

95. *See id.* at 34–38.

96. The DOC stated that during the period of investigation, total softwood lumber harvested from government-owned timber lands accounted for between approximately 83%–99% of all softwood lumber harvested in each of the provinces under investigation. *Id.* at 35.

97. *Id.*

98. *Id.*

99. *Id.* at 38–43.

100. The DOC used selected short-term auction prices for the right to cut standing timber on specific tracts of public lands in the United States, *id.* at 43, or, in the case of Québec, prices from private timber sales in Maine. *Id.* at 57–59.



determining adequacy of remuneration with respect to Canadian stumpage.<sup>101</sup> Canada's main argument before the dispute settlement panel was textual. It argued that the phrase "in relation to" in Article 14(d) of the SCM Agreement means "in comparison with," rather than "taking account of" as advocated by the United States,<sup>102</sup> and therefore requires the U.S. to use "in-country benchmarks" to determine the existence and measurement of any alleged benefit.<sup>103</sup> The Panel agreed with Canada, holding that a strict textual reading of Article 14(d) of the SCM Agreement required that "prevailing market conditions in the country of provision" be used as the benchmark against which to judge the adequacy of the remuneration received by the government for the stumpage.<sup>104</sup> The Panel further held that "as long as there are prices determined by independent operators following the principle of supply and demand, even if supply or demand are [sic] affected by the government's presence in the market, there is a 'market' in the sense of Article 14(d) SCM Agreement."<sup>105</sup> Essentially, the Panel endorsed the market-as-is approach by upholding any in-country prices as viable subsidy benchmarks, whether affected by government presence or not.

On appeal by the United States, the Appellate Body

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101. See Request for Consultations by Canada, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/1 (May 13, 2002).

102. Panel Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*, WT/DS257/R, ¶ 4.20 (August 29, 2003) (citing Panel Report, *United States—Preliminary Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2002)).

103. *Id.* ¶ 4.16.

104. *Id.* ¶ 7.48. The Panel further pointed out that "[t]he text of Article 14 (d) SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark." *Id.* ¶ 7.51. As such, the text does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value.' *Id.*

105. *Id.* ¶ 7.60 (citing Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/1 (May 13, 2002)).

While holding a strict textual view of Article 14(d), the Panel was not unaware of the economic implications of its view. The Panel acknowledged that "there could be cases in which [government] influence is substantial or even determinative of conditions in the private market." *Id.* ¶ 7.58. In such cases, the Panel said, using the prevailing market conditions in the country of provision as the subsidy benchmark "would not fully capture the extent of the distortion arising from the government financial contribution, a result that in our view would not necessarily be the most sensible one from the perspective of economic logic." *Id.* However, despite this concern, the Panel concluded that it would not be appropriate "for this Panel to substitute its economic judgment for that of the drafters." *Id.* ¶ 7.59.

reversed the Panel's holding that Article 14(d) of the SCM Agreement requires the use of in-country benchmarks for determining adequacy of remuneration.<sup>106</sup> In so doing, the Appellate Body adopted its own textual reading of Article 14(d) of the SCM Agreement, rejecting that of the WTO Panel. The Appellate Body first agreed with the Panel that "the text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the 'market' conditions which are to be used as the benchmark . . ." <sup>107</sup> However, the Appellate Body held that the phrase "in relation to" "has a meaning similar to the phrases 'as regards' and 'with respect to'" <sup>108</sup> Therefore, the Appellate Body said, "the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision." <sup>109</sup> Instead, investigating authorities may use prices other than in-country private prices as a benchmark, as long as the chosen benchmark "relate[s] or refer[s] to, or [is] connected with" the prevailing market conditions in the country of provision. <sup>110</sup>

Therefore, it appears that the Appellate Body was arguing that Article 14(d) of the SCM Agreement allows the use of both in-country and out-of-country benchmarks. However, the two benchmarks are not created equal under Article 14(d). The Appellate Body stated that Article 14(d) "emphasize[s] by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration." <sup>111</sup> "[I]nvestigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods." <sup>112</sup>

Upon closer examination, the Appellate Body paid lip service to the idea that the term market in Article 14(d) of the

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106. Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 167(b), WT/DS257/AB/R (January 19, 2004).

107. *Id.* ¶ 87 (citations omitted) (citing Appellate Body Report WT/DS257/AB/R, *supra* note 89).

108. *Id.* ¶ 89 (citing TRUMBLE A. STEVENSON, *SHORTER OXFORD ENGLISH DICTIONARY* 2512 (Oxford University Press 5th ed. 2002)).

109. *See id.*

110. *Id.* ¶ 96.

111. *Id.* ¶ 90.

112. *Id.* (citing *id.* ¶ 103).

SCM Agreement does not exclude situations in which there is government involvement. What the Appellate Body aimed for in Article 14(d) is an undistorted-market benchmark. According to the Appellate Body, although in-country private market prices are not excluded from being considered as benchmarks under Article 14(d), they nonetheless will be discarded if it can be established that they are distorted because of the government's predominant role in the market. In other words, in-country real market prices are to be used as benchmarks only if they are not distorted (i.e., perfect).

The undistorted-market approach to the market benchmark analysis begs the question of where to draw the line when judging whether the market that exists in the real world is undistorted or perfect enough to be used as a subsidy benchmark. Unfortunately, the Appellate Body offered no guidance on this question, other than stating, "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited."<sup>113</sup> The Appellate Body acknowledged that "an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision."<sup>114</sup> However, the Appellate Body stopped short of pointing out what additional evidence would be required to show that the market in the country under investigation is indeed distorted. The Appellate Body only said that a decision on market distortion in the country under investigation has to be made "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."<sup>115</sup>

Nor did the Appellate Body answer the question of what alternative benchmarks would be available to serve as proxies for the hypothetical undistorted market if the existing market in the country under investigation is rejected as distorted. The Appellate Body claimed that it was not called upon to decide that issue.<sup>116</sup> The only question on appeal, it said, was the "specific alternative method used by [the DOC] in the underlying countervailing duty investigation."<sup>117</sup> The Appellate Body noted that the Panel's decision striking down the out-of-country stumpage price benchmark used to determine adequacy

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113. *Id.* ¶ 102.

114. *See id.*

115. *Id.*

116. *Id.* ¶ 106.

117. *Id.* ¶ 107.

of remuneration was predicated “exclusively on *its* interpretation of Article 14(d), which we have already reversed above.”<sup>118</sup> Since it “made no findings of fact relating to the alleged distortive effect on prices of the provincial governments’ participation in the market for standing timber,”<sup>119</sup> the Panel concluded that there were insufficient findings or facts in the record to justify the use of “a benchmark other than private prices in Canada, on the basis that prices of private stumpage in Canada were distorted by the Canadian provinces’ predominant participation in the market as providers of standing timber.”<sup>120</sup>

In sum, despite the textual inconsistency and ambiguity of the SCM Agreement regarding the nature of the market in its market benchmark analysis, the Appellate Body’s decision in *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* implicitly espoused the undistorted-market approach to the market benchmark analysis. The SCM Agreement allows investigating authorities to discard in-country private market prices in favor of out-of-country price benchmarks if it can be shown that in-country private market prices are distorted and the alternative out-of-country benchmarks are in relation to prevailing market conditions in the country under investigation. But the Appellate Body did not specify the evidentiary standards that must be met before investigating authorities can reject in-country private market prices. Nor did it set out the evidentiary standards for alternative benchmarks to be considered in relation to prevailing market conditions in the country under investigation. At least for now, the Appellate Body leaves those two important decisions completely to the discretion of the investigating authorities.

#### B. THE FLOODGATE IS OPEN: SUBSEQUENT “MARKET DISTORTION” CASES

Once the Appellate Body recognized the use of something other than existing in-country market prices as the subsidy benchmark, delegating the selection of alternative benchmarks to the discretion of investigation authorities, the DOC wasted no time in exercising that discretion. In a slew of market distortion cases following *Lumber IV*,<sup>121</sup> the DOC disqualified in-country

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118. *Id.* ¶ 112.

119. *Id.* ¶ 115.

120. *Id.*

121. See *infra* notes 122, 123, 127, 135, 136, 137, and 138 and accompanying

prices as distorted and chose out-of-country prices as alternative benchmarks. These cases, discussed below, cover a wide range of government programs, including stumpage, loan, steel input, petrochemical input, and land. The selection of out-of-country benchmarks in these cases plays a significant role in determining the outcomes of the cases. In each case, a majority portion of the countervailing duty rate imposed by the DOC is attributable to programs for which the DOC has rejected in-country prices and selected out-of-country prices as benchmarks.

*Stumpage Subsidies* — Subsequent to *Lumber IV*, the DOC dealt with the stumpage subsidy issue again in two countervailing duty cases concerning imports of paper products from Indonesia: *Certain Lined Paper Products from Indonesia (Indonesia CLPP)*<sup>122</sup> and *Coated Free Sheet Paper from Indonesia (Indonesia CFS Paper)*.<sup>123</sup> In both cases the central subsidy program investigated by the DOC was the subsidy that the Government of Indonesia allegedly conferred on Indonesian producers of paper products through the provision of stumpage for less than adequate remuneration.<sup>124</sup> And in both cases the DOC applied the three-tiered hierarchy of benchmarks from 19 C.F.R. § 351.511(a)(2) in evaluating the adequacy of the remuneration for Indonesian stumpage, and rejected the use of in-country prices from Indonesia as the subsidy benchmark on the grounds that the Government of Indonesia provided all or nearly all of Indonesia's stumpage.<sup>125</sup> The DOC, then, in both

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text.

122. See Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia, 71 Fed. Reg. 47174 (Dep't of Commerce Aug. 16, 2006); Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Lined Paper Products from Indonesia, Aug. 9, 2006 [hereinafter Indonesia CLPP I&D Memo].

123. See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60642 (Dep't of Commerce Oct. 25, 2007); Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia (Oct. 17, 2007) [hereinafter Indonesia CFS Paper I&D Memo].

124. See Certain Lined Paper Products from Indonesia, 71 Fed. Reg. 7524, 7531 (Dep't of Commerce Feb. 13, 2006) (notice of prelim. determination); Coated Free Sheet Paper from Indonesia, 72 Fed. Reg. 17498, 17502 (Dep't of Commerce Apr. 9, 2007) (notice of prelim. determination).

125. In *Indonesia CLPP*, the DOC found that there were no market-determined prices in Indonesia upon which to base a first-tier benchmark, citing the facts that the GOI "owned all harvestable forest land" and there was "no indication of any private sales of standing timber in Indonesia." Indonesia CLPP I&D Memo, *supra* note 18, at 5. In *Indonesia CFS Paper*, the DOC rejected the use of a first-tier benchmark, citing the fact that the GOI "had not provided any information on the sale of either privately-owned standing timber in Indonesia, or the stumpage fees

cases opted for an out of country benchmark based on log export prices from Malaysia.<sup>126</sup>

*Loan Subsidies* — In 2007, the DOC applied its out-of-country benchmark analysis first enunciated in *Lumber IV* to loan subsidies in *Coated Free Sheet Paper from China (China CFS Paper)*.<sup>127</sup> In that case, the petitioner alleged, *inter alia*, that the interest paid by Chinese producers of CFS paper on loans provided by China's state-owned commercial banks was subsidized because the interest rates were below what the commercial interest rates for such loans would otherwise be.<sup>128</sup> In evaluating loans made by Chinese state-owned commercial banks, the DOC rejected as subsidy benchmarks not only interest rates of loans from private and foreign banks in China, but also the Chinese national interest rates, pointing to the distortions created by the Chinese government's intervention in the Chinese loan market.<sup>129</sup> The DOC's arguments for

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charged by private timber companies." Indonesia CFS Paper I&D Memo, *supra* note 19, at 19. The DOC further pointed out that even if the GOI provided data on private stumpage prices, it would not have relied on it anyway because of the "insignificant percentage of harvestable private land in Indonesia." *Id.*

126. In *Indonesia CLPP*, the DOC chose a third-tier benchmark based on the price of pulp log exports from Malaysia. Indonesia CLPP I&D Memo, *supra* note 18, at 5. It deducted the Indonesian logging operation's extraction costs and profits from the Malaysian log export prices to arrive at a derived market stumpage price in Indonesia. *Id.* In *Indonesia CFS Paper*, the DOC again chose the same Malaysian pulpwood export prices as the benchmark for the Indonesian stumpage because of the "geographic proximity and the similarities of forest conditions, climate, and tree species between Indonesia and Malaysia." Indonesia CFS Paper I&D Memo, *supra* note 19, at 20. As it did in *Indonesia CLPP*, the DOC adjusted the Malaysian log export prices by deducting Indonesian extraction costs and profits. *Id.*

127. See *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 60645 (Dep't of Commerce Oct. 25, 2007) (final affirmative determination); Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China (Oct. 17, 2007) (on file with Int'l Trade Admin.) [hereinafter *China CFS Paper I&D Memo*]. Note that the United States International Trade Commission made a negative final determination regarding injury. See *Coated Free Sheet Paper from China, Indonesia, and Korea*, 72 Fed. Reg. 70892 (U.S. Int'l Trade Comm. Dec. 13, 2007) (final negative determination). As a result, the DOC's affirmative countervailing duty determination did not result in the imposition of countervailing duties.

128. See *Coated Free Sheet Paper from the People's Republic of China*, 72 Fed. Reg. 17484, 17487 (Dep't of Commerce Apr. 9, 2007) (affirmative prelim. determination).

129. The DOC first noted that the statutory criterion for judging loan subsidies is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." See *China CFS Paper I&D Memo*, *supra* note 127, at 5 (citing 19 U.S.C. § 1677(5)(E)(ii)). However, according to the DOC, loans from private and foreign banks in China are not comparable commercial

distortions in the Chinese loan market were twofold. First, the DOC argued that the Chinese loan market is distorted because of the “continued overwhelming dominance of state ownership in Chinese banks,”<sup>130</sup> supported by its assertion that the Chinese banking sector “remains almost entirely state-owned.”<sup>131</sup> Second, the DOC argued that the Chinese loan market is distorted because of “the [Chinese government’s] long history of using the banks to allocate resources in the economy in accordance with its policy objectives.”<sup>132</sup> As evidence of this policy-induced distortion, the DOC cited the simultaneous “deposit rate cap” and “lending rate floor” that China maintains in order to “guarantee the banks a considerable profit margin on each of their loans.”<sup>133</sup> Having rejected in-country loan benchmarks, the DOC turned to an out-of-country interest rate benchmark based on the interest rates of a group of thirty-three lower- to middle-income countries, because of the “broad inverse relationship between income and interest rates.”<sup>134</sup>

After *China CFS Paper*, the DOC adopted the same out-of-country benchmark for Chinese loans in four subsequent cases involving imports from China: *Circular Welded Carbon Quality Steel Pipe from China (China CWP)*,<sup>135</sup> *Light-Walled Rectangular Pipe and Tube from China (China LWP)*,<sup>136</sup>

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loans due to the significant distortions created by the Chinese government’s interventions in the banking sector. *Id.* at 5–6. The DOC then noted that if a firm does not have comparable commercial loans, its regulations allow it to use a “national interest rate for comparable commercial loans.” *Id.* at 6 (citing 19 C.F.R. § 351.505(a)(3)(ii)). But the DOC found that the Chinese national interest rates are not reliable benchmarks, because of the “pervasiveness of the [Chinese government]’s intervention in the banking sector.” *Id.* at 6.

130. *Id.* at 67–68.

131. *Id.* at 67.

132. *Id.* at 67–68.

133. *Id.* at 68.

134. *Id.* at 6. The DOC constructed the out-of-country loan benchmark by using a regression of inflation-adjusted interest rates of the comparison countries on a composite index of World Bank governance indicators that measure the quality of each country’s institutions across dimensions such as political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. *Id.*

135. See *Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China*, 73 Fed. Reg. 31966 (Dep’t of Commerce Jun. 5, 2008) (final affirmative determination); Issues and Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, for *Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China* (May 29, 2008) (final determination), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-12606-1.pdf> [hereinafter *China CWP I&D Memo*].

136. See *Light-Walled Rectangular Pipe and Tube From People’s Republic of China*, 73 Fed. Reg. 35642 (Dep’t of Commerce Jun. 24, 2008) (final affirmative determination); Issues and Decision Memorandum from Stephen J. Claeys, Deputy

*Laminated Woven Sacks from China (China Sacks)*,<sup>137</sup> and *New Pneumatic Off-the-Road Tires from China (China Tires)*.<sup>138</sup>

*Input Subsidies* — In three countervailing duty cases involving imports from China subsequent to *Lumber IV—China CWP*, *China LWP*, and *China Sacks*—the DOC used an out-of-country benchmark to measure the subsidies the Chinese government allegedly conferred on Chinese producers through the provision of input for less than adequate remuneration. Two of three cases (*China CWP* and *China LWP*) involved steel input, while the third (*China Sacks*) involved petrochemical input. In all three cases the DOC rejected the use of actual market prices within China for the input in question, as the subsidy benchmarks, on the grounds that China's state-owned-enterprises (SOEs) account for the overwhelming majority of the production and sale of the input in question.<sup>139</sup> Having rejected

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Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, for Light-Walled Rectangular Pipe and Tube from the People's Republic of China (June 13, 2008) (final determination), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-14250-1.pdf> [hereinafter *China LWP I&D Memo*].

137. See *Laminated Woven Sacks From the People's Republic of China*, 73 Fed. Reg. 35639 (Dep't of Commerce June 24, 2008) (final determination); Issues and Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, for *Laminated Woven Sacks from the People's Republic of China* (June 16, 2008) (final determination), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-14256-1.pdf> [hereinafter *China Sacks I&D Memo*].

138. See *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China*, 73 Fed. Reg. 40480 (Dep't of Commerce July 15, 2008) (final determination); Issues and Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, for *Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China* (July 7, 2008) (final determination), available at <http://ia.ita.doc.gov/frn/summary/PRC/E8-16154-1.pdf> [hereinafter *China Tires I&D Memo*].

139. In *China CWP*, the input in question is hot-rolled steel. The DOC found that 96.1% of hot-rolled steel production in China is from SOEs. *China CWP I&D Memo*, *supra* note 135, at 64. Citing to the preamble to its 1998 countervailing duty regulations, the DOC stated:

[W]here the Department finds that the government provides the majority, or a substantial portion of the market for a good or service, prices for such goods and services in the country will be considered significantly distorted and will not be an appropriate basis of comparison for determining whether there is a benefit.

*Id.* at 64 n.205 (citing Preamble to 1998 CVD Regulations at 65377). In *China LWP*, a case involving the same hot-rolled steel input as in *China CWP*, the DOC repeated the same finding of facts and reasoning as in *China CWP* in rejecting the use of Chinese hot-rolled steel prices as the subsidy benchmark. See *China LWP I&D Memo*, *supra* note 136, at 35–37. In *China Sacks*, the input in question is a petrochemical input called biaxial-oriented polypropylene (BOPP). The DOC found



Chinese prices as the subsidy benchmark, the DOC selected an out-of-country price as the benchmark for the input in question in all three cases.<sup>140</sup>

*Land Subsidies* — In *China Sacks*, the DOC applied its out-of-country benchmark analysis to yet another factor of production—land. The subsidy issue concerning land in that case was whether the Chinese government provided land-use rights to Chinese producers for less than adequate remuneration.<sup>141</sup> Noting that the Chinese government, either at the national or local level, is the ultimate owner of all land in China,<sup>142</sup> the DOC rejected in-country land prices as benchmarks because “Chinese land prices are distorted by the significant government role in the market.”<sup>143</sup> The DOC then went on to look for “comparable market-based prices for land purchases in a country at a comparable level of economic development that is reasonably proximate to, but outside of, China.”<sup>144</sup> The DOC finally settled on land values in Thailand as reported by an industry publication as the land benchmark.<sup>145</sup>

In the above “market distortion” cases, the resort to out-of-country benchmarks plays a very significant role in determining the outcome of each case. The following table lists the countervailing duty rates found by the DOC for some of the major foreign respondents in the market distortion cases. For each of the respondents, the first column of the table shows the overall countervailing duty rate, the second column shows the countervailing duty rate attributable to programs for which the DOC engaged in the market distortion analysis and selected out-of-country benchmarks, and the third column calculates the percentage of the overall countervailing duty rate attributable

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through adverse inference from the failure of the Chinese government to provide relevant information that the production and sale of BOPP in China is dominated by SOEs. See *China Sacks I&D Memo*, *supra* note 137, at 19. The DOC then rejected Chinese BOPP prices as the subsidy benchmark using the same reasoning as in *China CWP* and *China LWP*. See *id.*

140. In *China CWP*, the DOC used the world market export prices as reported in *SteelBenchmarker*, an international steel industry publication, as the subsidy benchmark. See *China CWP I&D Memo*, *supra* note 135, at 66; *China LWP I&D Memo*, *supra* note 136, at 37. In *China Sacks*, the DOC selected the world market prices for BOPP as reported by the London Metals Exchange as the subsidy benchmark. See *China Sacks I&D Memo*, *supra* note 137, at 19.

141. See *China Sacks I&D Memo*, *supra* note 137, at 14.

142. *Id.* at 15.

143. *Id.*

144. *Id.* at 17.

145. *Id.*

to programs for which out-of-country benchmarks were used. The types of the programs for which out-of-country benchmarks were used are indicated in parentheses following the countervailing duty rates reported in the second column. As is shown in the table, for every respondent the majority of the total countervailing duty margin imposed by the DOC resulted from government programs for which the DOC rejected in-country prices on market distortion grounds and selected out-of-country prices as benchmarks. In some cases, out-of-country benchmarks account for one hundred percent of the margins. Were it not for the use of out-of-country benchmarks, the countervailing duty margins in most of the cases would have been much lower, and may not have existed at all.

**Table 1. The Role of the Market Distortion Analysis in Certain Countervailing Duty Cases<sup>146</sup>**

	<b>Overall CVD Rate</b>	<b>CVD Rate Attributable to Programs for Which Out-of- Country Benchmarks Are Used</b>	<b>Percentage of the Overall CVD Rate Attributable to Programs for Which Out-of- Country Benchmarks Are Used</b>
<i>Lumber IV</i>			
Canada <sup>147</sup>	19.34%	19.25% (stumpage)	99.5%
<i>Indonesia CLPP</i>			
TK	40.55%	39.37% (stumpage)	97.1%
<i>Indonesia CFS Paper</i>			
TK/PT	22.48%	14.21%	63.2%

146. Data for this table is compiled from the DOC's Final Determinations and Issues & Decision memoranda issued in the cases identified in the table. See Lumber IV CVD I&D Memo, *supra* note 94; Indonesia CLPP I&D Memo, *supra* note 122; Indonesia CFS Paper I&D Memo, *supra* note 123; China CFS Paper I&D Memo, *supra* note 127; China CWP I&D Memo, *supra* note 135; China LWP I&D Memo, *supra* note 136; China Sacks I&D Memo, *supra* note 137; China Tires I&D Memo, *supra* note 138.

147. Due to the large number of lumber producers in Canada, the DOC decided to conduct an aggregate investigation in *Lumber IV*, resulting in a Canada-wide countervailing duty rate.

		(stumpage)	
<i>China CFS Paper</i>			
Gold East	7.40%	4.11% (loan)	55.5%
<i>China CWP</i>			
Kingland	44.86%	44.84% (input)	99.9%
Weifang East Pipe	29.57%	27.35% (input)	92.5%
<i>China LWP</i>			
ZZ Pipe	15.28%	15.28% (input, land)	100%
Kunshan Lets Win	2.7%	1.9% (input)	70.4%
<i>China Sacks</i>			
Zibo Aifudi	29.54%	29.54% (loan, input, land)	100%
<i>China Tires</i>			
Hebei Starbright	2.38%	2.37% (loan, input)	99.6%
Guizhou Tyre	3.13%	2.98% (loan, input, land)	95.2%
Tianjin United Tire	6.59%	6.22% (loan, input)	94.4%

#### IV. THE PITFALLS OF THE MARKET BENCHMARK ANALYSIS IN COUNTERVAILING DUTY LAW

As discussed above, the market benchmark analysis in the countervailing duty law has come a long way. In the early days the law lacked a definition of subsidy, much less an explanation of subsidy benchmarks. With the establishment of the WTO and the adoption of the SCM Agreement, a working definition of subsidy that embraced the market as the only benchmark for identifying and measuring subsidies was established. Furthermore, the Appellate Body of the WTO makes it clear that the SCM Agreement envisions a perfect market, or a market undistorted by government presence or intervention, in its market benchmark analysis. This undistorted-market approach requires that, when identifying and measuring subsidies conferred by a government action, the terms of the government action must be compared with the terms that would arise in an undistorted, perfect market. The economic logic of undistorted-market benchmarks is straightforward: an undistorted market allocates resources efficiently, and therefore

subsidies can be identified and measured through deviations from the most efficient resource allocation in an undistorted market.

The undistorted-market approach to the market benchmark analysis leaves countervailing duty law in constant search for the undistorted market, which exists only in the counterfactual world. Unfortunately, as is demonstrated below, the search for the undistorted market is fraught with pitfalls that seriously undermine the validity and suitability of the undistorted-market approach.

#### A. DETERMINING DISTORTION

The search for the undistorted market starts with the question of whether the private market in place in the country under investigation is distorted. If there is no distortion, the inquiry ends and the in-country private market prices will serve as the subsidy benchmark. Yet if there is an allegation that in-country private market prices are distorted by the very government action that is accused of conferring subsidies, investigating authorities must decide whether to reject the existing private market prices as distorted. But on what basis is a market determined to be distorted?

Since the SCM Agreement and the countervailing duty statute do not specify how market distortion should be determined, the DOC has exercised its regulatory discretion to come up with its own market distortion analysis. As in the market distortion cases summarized above, the primary factor the DOC looks for in its market distortion analysis is whether the government provides a majority, or a substantial portion, of the market in question.<sup>148</sup> If the government is the dominant player in the market, the DOC reasons, private market prices will be dependent upon the government price.<sup>149</sup> Therefore, if the government prices its products or services at below-market prices, the private market prices must attempt to match the government price, resulting in distortion of the private market price. Using private market prices as subsidy benchmarks under that circumstance, the DOC believes, would be like comparing the government price to itself.<sup>150</sup>

First, we should note a paradox inherent in the market benchmark analysis when the government is the predominant

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148. See *supra* notes 125, 131, 139, and 142 and accompanying text.

149. See *supra* note 97 and accompanying text.

150. See *supra* note 98 and accompanying text.

provider (or, in economic jargon, has market power).<sup>151</sup> Rudimentary economics tells us that resource allocation is efficient only in competitive markets.<sup>152</sup> In a market where one provider has market power, the market price will be higher, and the quantity of production lower, than the socially optimal level.<sup>153</sup> So when the government has market power, what is the market price with which the government price is supposed to be compared in the market benchmark analysis? Is it the market price that would prevail in a competitive market, i.e., a market where no one has market power? Or is it the market price that would prevail if the same entity that has market power were a private profit-maximizing entity? If it is the former, the comparison is apples-to-oranges. But if it is the latter, why should the price charged by a private firm that has market power serve as a proxy for economic efficiency when that price itself is an outcome of market imperfection and thus is *not* efficient? From the standpoint of economic efficiency, in a market characterized by market power, the government is justified to price a product that it provides *below* the price that would be charged by a private provider with the same degree of market power. Ironically, under the DOC's market benchmark analysis, it is precisely this efficiency-enhancing under-pricing that will be treated as a subsidy.

That issue aside, the DOC's market-distortion analysis is circular. As the Appellate Body pointed out, the fact that the government is the predominant player in the market in and of itself would not disqualify government prices as market benchmarks.<sup>154</sup> The government could provide the majority of the goods or services in a market and still provide the goods or services at the price that a profit-maximizing private provider would provide. Whether the government will indeed price its

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151. "Market power" is a measure of "the degree of control that a single firm or a small number of firms have over the price and production decisions in an industry." SAMUELSON & NORDHAUS, *supra* note 3, at 164. The courts have defined market power as "the ability of a single seller to raise price and restrict output." *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464 (1992) (citing *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) and *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). The existence of market power usually is inferred from the seller's possession of a predominant share of the market. *Eastman Kodak Co.*, 504 U.S. at 464 (citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 17 (1984); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611–13 (1953)).

152. See SAMUELSON & NORDHAUS, *supra* note 3, at 341–42.

153. See *id.* at 172.

154. See *supra* note 114 and accompanying text.

goods or services at below-market prices will depend on both the government's intention in providing the goods or services and the government's ability to gather and act on market information that would allow it to price its goods or services at market prices. The whole purpose of the market benchmark analysis is to distinguish instances in which the government makes financial contributions on market-determined terms from instances in which the government makes financial contributions on terms more favorable than market-determined ones. However, the DOC's market distortion analysis states that when the government dominates the market, private market prices will be distorted by the government price *if* the government price is not set at market rates. The word *if*—followed by no analysis of whether the government prices are indeed set at market rates—reveals the circular nature of the DOC's reasoning. The DOC essentially creates a presumption that the government will not price its goods or services at market rates. Under this presumption, the government will distort market prices when it has the ability to do so, i.e., when it is a dominant player in the market. In effect, this circular analysis treats the predominance of the government in the market as the only showing required for a finding of market distortion, a proposition that has been firmly rejected by the Appellate Body.<sup>155</sup> Indeed, in all of the market-distortion cases to date, the DOC determined that the market in question is distorted by demonstrating nothing more than the fact that the government is the dominant provider in the market.<sup>156</sup>

In one category of market distortion cases, i.e., those involving Chinese loan subsidies, the DOC has disqualified in-country private market prices as subsidy benchmarks by pointing to not only the dominant status of the government in the market but also broader regulatory restrictions imposed by the government on the market. Specifically, the DOC argued that lending rates in China are distorted by the government because, in addition to the dominance by the state-owned commercial banks in the loan market, the government “maintains both a deposit rate cap and a lending rate floor simultaneously.”<sup>157</sup> However, regulatory constraints on market

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155. See *supra* note 114 and accompanying text.

156. See Indonesia CLPP I&D Memo, *supra* note 18, at 5; Indonesia CFS Paper I&D Memo, *supra* note 19, at 19; China CFS Paper I&D Memo, *supra* note 127, at 67; China CWP I&D Memo, *supra* note 135, at 64; China LWP I&D Memo, *supra* note 136, at 35–37; China Sacks I&D Memo, *supra* note 137, at 15 & 19.

157. China CFS Paper I&D Memo, *supra* note 133, at 68.

prices do not necessarily have distorting effects. Regulatory constraints are “distorting” only when they are “binding,” i.e., when they would have altered private behaviors.<sup>158</sup> If the supply and demand of the market is such that the resulting market price would be the same with or without the regulatory constraints, the existence of those regulatory constraints would not have changed the behavior of the private market and therefore will not be distorting.<sup>159</sup> Determining whether a specific regulatory constraint has binding effects is a complicated exercise that requires economic modeling and examination of empirical data.<sup>160</sup> The DOC, however, has not acknowledged the necessity of undertaking this exercise.

Even if a regulatory constraint is shown to be binding on market prices, the more difficult question is to what extent it should disqualify market prices as subsidy benchmarks. Obviously, not all government intervention in the market should be considered market-distorting. But the question is where to draw the line? In the United States, for example, the Federal Reserve regulates the aggregate amount of money supply through several instruments, the most prominent of which is open market operations.<sup>161</sup> The aggregate amount of money supply, in turn, impacts interest rates in the market.<sup>162</sup> Given the prominent role of the Federal Reserve’s money supply policies in influencing interest rates, should those policies be considered market-distorting? How should we distinguish legitimate government intervention from government intervention that should be countervailed? Obviously, this line-drawing exercise does not lend itself to clear-cut answers and, if

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158. JOHN LEACH, *A COURSE IN PUBLIC ECONOMICS* 327 (2004) (“A constraint on an agent is non-binding if it requires him to do something that he would have done anyway.”).

159. For example, if the market equilibrium interest rate is 5%, and the government imposes a 6% cap on interest rate, the cap will not be binding and therefore will not be distorting.

160. For example, the United States maintained interest rate ceilings on deposits through what has come to be known as Regulation Q between 1933 and 1986. However, economists have demonstrated that between 1933 and 1966, the deposit rate ceilings imposed by Regulation Q were binding for only a few short intervals. See, e.g., R. Alton Gilbert, *Requiem for Regulation Q: What It Did and Why It Passed Away*, THE FED. RESERVE BANK OF ST. LOUIS REVIEW, Feb. 1986, at 22–37, available at [http://research.stlouisfed.org/publications/review/86/02/Requiem\\_Feb1986.pdf](http://research.stlouisfed.org/publications/review/86/02/Requiem_Feb1986.pdf).

161. See FREDERIC S. MISHKIN, *THE ECONOMICS OF MONEY, BANKING, AND FINANCIAL MARKETS* 458–71 (5th Ed. 1997)

162. Indeed, in open market operations, the Federal Reserve sets a target federal funds rate first and then decides how large a change in bank reserves is needed to obtain the desired level of the federal funds rate. *Id.* at 459.

allowed, will leave decisions about market distortion completely to agency discretion.

#### B. WHAT ALTERNATIVE BENCHMARKS WILL REPLICATE THE COUNTERFACTUAL UNDISTORTED MARKET?

We have explained that the first step in the undistorted-market benchmark analysis is to decide whether in-country private market prices are distorted. We have shown that the justifications offered for findings of market distortion by the DOC are undermined by its circular reasoning and inconsistency with basic economic principles. As discussed below, the problem stems from the wide latitude granted to the DOC to conduct an essentially free-wheeling market distortion analysis. This problem is further exacerbated by the same, if not wider, latitude granted to the DOC to choose alternative benchmarks. In all of the cases in which the DOC has found market distortion and therefore rejected in-country private market prices as subsidy benchmarks, the DOC has turned to an out-of-country benchmark—a benchmark taken from outside of the country under investigation.<sup>163</sup> However, as is discussed below, out-of-country benchmarks do not serve the purpose they are supposed to serve, i.e., replicating the price that would prevail in an undistorted market in the country under investigation.

Although the DOC has repeatedly opted for out-of-country benchmarks, it has not explained exactly why a price in one country could somehow be indicative of the correct price level in another country. However, upon closer analysis, the DOC's selection of out-of-country benchmarks seem to be based on two different economic concepts—the law of one price and the comparability of prices between countries sharing common characteristics.

In cases involving goods that are tradable across countries, such as logs,<sup>164</sup> steel inputs,<sup>165</sup> and petrochemical inputs,<sup>166</sup> the DOC's out-of-country benchmark analysis is implicitly

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163. See China CFS Paper I&D Memo, *supra* note 127, at 6; China CWP I&D Memo, *supra* note 135, at 66; China LWP I&D Memo, *supra* note 136, at 37; China Sacks I&D Memo, *supra* note 137, at 17, 19; Indonesia CFS Paper I&D Memo, *supra* note 123, at 20; Indonesia CLPP I&D Memo, *supra* note 122, at 5.

164. See Indonesia CFS Paper, *supra* note 123; Indonesia CLPP, *supra* note 122; *Lumber IV*, *supra* note 94.

165. See China CWP I&D Memo, *supra* note 135; China LWP I&D Memo, *supra* note 136.

166. See China Sacks I&D Memo, *supra* note 137.



predicated on what economists call the law of one price. The law of one price is an economic hypothesis stating that in an efficient market, identical goods must have identical prices.<sup>167</sup> When it comes to international trade, the law of one price predicts “if there were no obstacles to trade and no costs of transporting goods, the price of a given good would be the same all over the world.”<sup>168</sup> The driving force behind the law of one price is market arbitrage.<sup>169</sup> In a market with negligible transportation costs, perfect information, and no barriers to trade, buyers will buy goods from a place where the price is lower and sell them to a place where the price is higher, which causes prices in different places to converge. The logic behind the DOC’s out-of-country benchmark analysis is as follows: since prices across national borders are supposed to be the same if there is a difference between the price in the country under investigation and the price in the benchmark country, then the difference must be because of market distortion caused by government subsidies in the country under investigation.

The problem with this reasoning is that the law of one price requires very strict preconditions for it to hold. Economists have demonstrated that the preconditions for the law of one price are so onerous that the law of one price is more of a theoretical construct than a depiction of reality. Empirical economic studies support the conclusion that the law of one price fails in virtually every market.<sup>170</sup> One of the major obstacles to the law of one price holding in reality is the transportation cost that must be incurred in order to arbitrage goods. Therefore, prices from different locations will differ at least by costs of transportation between the locations.<sup>171</sup> But in

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167. See Owen A. Lamont & Richard H. Thaler, *Anomalies: The Law of One Price in Financial Markets*, 17 J. ECON. PERSP. 191, 191 (2003).

168. STANLEY FISCHER & RUDIGER DORNBUSCH, *ECONOMICS* 203 (1983).

169. See, e.g., Paul G.J. O’Connell & Shang-Jin Wei, “*The Bigger They Are, the Harder They Fall*”: *How Price Differences Across U.S. Cities Are Arbitrated*, 56 J. INT’L ECON. 21 (2002).

170. A leading international economics textbook summarizes the empirical evidence for the law of one price as the following:

A large body of empirical evidence shows, however, that the law of one price fails dramatically in practice, even for products that commonly enter international trade. The reasons include transport costs, official trade barriers, and noncompetitive market structures. Transport costs are so high for some commodities that they become nontraded goods.

MAURICE OBSTFELD & KENNETH ROGOFF, *FOUNDATIONS OF INTERNATIONAL MACROECONOMICS* 202 (1996).

171. For a technical analysis of how the cost of trading goods leads to deviation from the law of one price, see Panos Michael, A. Robert Nobay & David A. Peel,

its out-of-country benchmark analysis, the DOC never adjusts its out-of-country benchmarks to reflect the costs of transporting the goods in question between the country under investigation and the benchmark country.<sup>172</sup>

Furthermore, even if the DOC has adjusted its out-of-country benchmarks for transportation costs, prices across national borders could still differ for other reasons. Empirical evidence shows that the law of one price fails to a greater extent across national borders than can be explained by distance. This is the so-called “thick border effect,” meaning prices across national borders differ more than prices within a country.<sup>173</sup> The thick border effect is typically explained by a variety of factors, including currency differences, measurement conventions, nominal price stickiness, regulatory and tax laws, tariffs, and quotas.<sup>174</sup> Government presence and intervention in the market may cause prices to differ across national borders, but it is only one of the many factors that could do so. Therefore, the difference between the price in the country under investigation and the price in the benchmark country cannot be attributed solely to market distortion in the country under investigation.

Another economic concept relied on by the DOC in justifying out-of-country benchmarks is the concept that prices are comparable among countries sharing certain common characteristics, such as developmental stage or income level. The DOC has implicitly embraced this justification in cases involving non-tradable assets, such as lands and loans. In *China Sacks*, the DOC justifies its selection of land prices from Thailand as the benchmark for Chinese land prices by arguing

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*Transactions Costs and Nonlinear Adjustment in Real Exchange Rates: An Empirical Investigation*, 105 J. POL. ECON. 862 (1997).

172. Indeed, even if the DOC were willing to do the transportation cost adjustment, it would not be able to do so because data on the cost of transportation between the country under investigation and the benchmark country do not exist.

173. For example, one study finds that the U.S.-Canada border reduces trade flows by more than a factor of 20 compared to trade of equal distances among provinces. See John McCallum, *National Borders Matter: Canada-U.S. Regional Trade Patterns*, 85 AM. ECON. REV. 615–23 (1995). Another study finds that price volatility across the U.S.-Canada border is much larger, corrected for distance, than among either U.S. cities or Canadian cities. See Charles Engel & John H. Rogers, *How Wide is the Border?*, 86 AM. ECON. REV. 1112–25 (1996).

174. See Engel & Rogers, *supra* note 173; Charles Engel & John H. Rogers, *Deviations from Purchasing Power Parity: Causes and Welfare Costs*, 55 J. INT'L ECON. 29–58 (1999); Carolyn L. Evans, *The Economic Significance of National Border Effects*, 93 AM. ECON. REV. 1291–312 (2003); David C. Parsley & Shang-Jin Wei, *Limiting Currency Volatility to Stimulate Good Market Integration: A Price Based Approach* (NBER Working Paper No. 8468, 2001).

that “China and Thailand have similar levels of per capita [gross national income], and that producers consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China.”<sup>175</sup> The essence of this argument is that countries with the same per capita gross national income will have the same land price.

In the market distortion cases involving loans, the DOC adopts a similar approach. For example, recall that in *China CFS Paper*, the DOC constructed an out-of-country benchmark for Chinese loans based on a regression analysis of inflation-adjusted interest rates of a group of thirty-three countries with similar national income levels.<sup>176</sup> The DOC justifies this benchmark by arguing that there is a “broad inverse relationship between income and interest rates.”<sup>177</sup> Implicit in this argument is the proposition that countries with similar income levels will see similar interest rates. Unlike in *China Sacks*, where the DOC chooses only one data point (i.e., Thailand) for comparison, the DOC in the loan benchmark cases chooses multiple data points and uses as control variables other factors that it thinks may affect interest rates.<sup>178</sup> But the similarity between the land benchmark analysis and the loan benchmark analysis is clear: both operate on the premise that the price in one country or a group of countries could predict the price in another country if the countries share certain characteristics that have been shown to correlate with price levels.

However, the central defect in the DOC’s land and loan benchmark analysis is that it confuses the statistical concept of correlation with the mathematical concept of equality. Statistical correlation between two variables, say, variable *a* and variable *b*, only means that variable *a* moves in tandem with variable *b*.<sup>179</sup> It does not mean that for any given value of variable *a*, variable *b* will always have the same value.<sup>180</sup> Indeed, for a given value of variable *a*, the value of variable *b* could be all over the place, despite the overall correlation between variable *a* and variable *b* across different data

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175. See *China Sacks I&D Memo*, *supra* note 137, at 17.

176. See *supra* note 134 and accompanying text.

177. See *China CFS Paper I&D Memo*, *supra* note 127, at 6.

178. See *supra* note 134 and accompanying text.

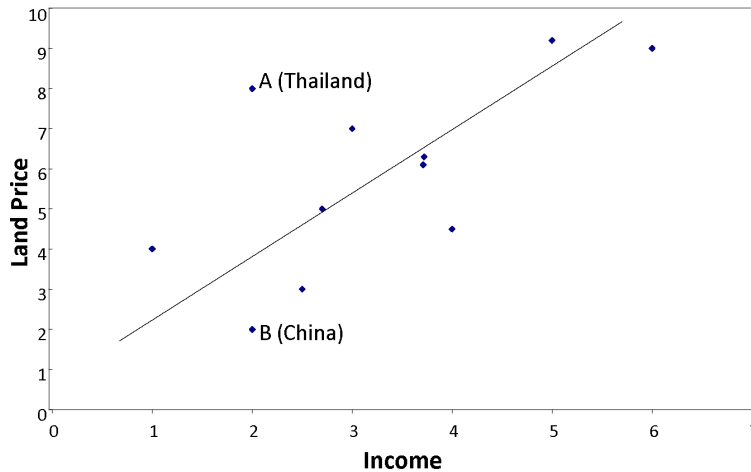
179. See TIMOTHY C. URDAN, *STATISTICS IN PLAIN ENGLISH 75* (2001) (“A positive correlation indicates that the values on the two variables being analyzed move in the same direction. . . . A negative correlation indicates that the values on the two variables being analyzed move in opposite directions.”).

180. *Id.*

points.<sup>181</sup> This concept can be demonstrated in Figure 1 below, which shows a hypothetical relationship between land price and income.

In Figure 1, there exists a positive correlation between land price and income, as can be seen from the positively sloped regression line. Suppose data point A represents Thailand and data point B represents China. The choice of data points A and B is such that they have the same value for income, but the land price values for the two data points could not be further apart among all of the data points. Thus, the land price value of data point A cannot predict the land price value of data point B, despite the overall positive correlation between land price and income.

**Figure 1. Land Price versus Income (Hypothetical)**



Using multiple data points, rather than one data point, in the out-of-country benchmark analysis does not solve the problem. In the loan benchmark cases, the DOC's implicit assumption is that because of the inverse relationship between national income and interest rate, the interest rate of China must be the same as the fitted interest rate of a group of thirty-three countries with similar income levels—had it not been for government distortion of China's financial market. But the DOC's reasoning on this point fails. The fitted values of the dependent variable in a regression lie on the regression line,

181. *Id.*

which, as shown in Figure 1 above, is not expected to intersect with any data points utilized in the regression except by pure coincidence. Therefore, there is no basis to expect that the interest rate of one country (China) will be equal to the fitted value of the interest rate of a group of countries with similar income levels, even though there is an inverse relationship between interest rate and national income.

In sum, regardless of how the DOC may have implicitly justified its out-of-country benchmarks, its justifications are supported neither by economic theories nor by empirical evidence. Under the undistorted-market approach, not only is the DOC given a free pass to reject in-country private market prices as distorted and unfit to serve as subsidy benchmarks, it is given a free pass to resort to out-of-country benchmarks that are unreliable proxies of the prices that would exist in an undistorted market. The difference between the out-of-country benchmark and the government price will in turn be used by the DOC as evidence that the domestic market of the country under investigation is distorted. In this sense, the DOC's market distortion and out-of-country benchmark analyses are fed into a negative feedback loop and reinforce each other's flaws.

### C. IS THE SEARCH FOR THE UNDISTORTED MARKET NECESSARY?

As discussed above, the DOC's rejection of in-country markets as distorted and its resort to out-of-country benchmarks as alternatives rest on untenable grounds. These pitfalls of the market benchmark analysis can be characterized as technical. The next pitfall is more fundamental and proves fatal for the undistorted- or perfect-market approach to the market benchmark analysis in countervailing duty law.

The fatal pitfall of the market benchmark analysis in countervailing duty law lies in the fundamental disconnect between the undistorted market benchmark and the purpose it supposedly serves. The undistorted-market approach to the market benchmark analysis looks to the market undistorted by government presence or intervention as the benchmark for subsidies. Ostensibly, the rationale for that approach is that an undistorted market allocates resources efficiently, and subsidies can thus be identified and measured by deviations from efficient resource allocation in an undistorted market. But a market in which there is no government presence or intervention may still not be perfect from the standpoint of economic efficiency. There are many instances where a market free of government presence or intervention fails to achieve efficient resource allocation

because of so-called “market failures.”<sup>182</sup> As has been widely documented elsewhere, market failures arise due to a variety of reasons, chief among which are imperfect competition, externality, asymmetric information, and increasing returns to scale.<sup>183</sup> When a market fails, the prices prevailing in the market are no longer socially optimal.<sup>184</sup> Under such circumstances, government subsidies aimed at addressing market failures may actually enhance market efficiency rather than reduce it.<sup>185</sup> An undistorted market, even if it somehow could be replicated, is no guarantee of economic efficiency.

To make matters worse, the ostensible goal of the market benchmark in countervailing duty law—economic efficiency—is not even the goal of the countervailing duty law itself. The efficiency justification for countervailing duty law has been ventured, and rejected, by many economists and legal scholars.<sup>186</sup> There are two chief reasons for rejecting the

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182. Market failure is defined in economics as failure of market to achieve allocative efficiency. Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351, 351 (1958) (“[Market failure] . . . at least in allocation theory, mean[s] the failure of a more or less idealized system of price-market institutions to sustain ‘desirable’ activities or to estop ‘undesirable’ activities.”).

183. See, e.g., STIGLITZ & WALSH, *supra* note 3, at 239–56; World Trade Organization, WORLD TRADE REPORT 2006: EXPLORING THE LINKS BETWEEN SUBSIDIES, TRADE, AND THE WTO 58–62 (2006).

184. See ROY RUFFIN & PAUL R. GREGORY, PRINCIPLES OF MICROECONOMICS 398 (1983).

185. For example, economists have argued that the positive externalities of research and development (R&D) make a certain amount of R&D subsidies welfare enhancing. See Gene M. Grossman & Elhanan Helpman, *Growth and Welfare in a Small Open Economy*, in INTERNATIONAL TRADE AND TRADE POLICY 141, 142 (Elhanan Helpman & Assaf Razin eds. 1991) (“There always exists an optimal subsidy to R&D that speeds growth relative to the market-determined rate. Increasing the rate of subsidization beyond this optimum causes the growth rate to increase still further but does so at the expense of welfare.”).

186. See John J. Barcelo III, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POLY INT'L BUS. 779 (1977); Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767 (1988) [hereinafter Diamond, *Foundations*]; Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POLY INT'L BUS. 507 (1989) [hereinafter Diamond, *Economic and Financial Principles*]; Warren F. Schwartz & Eugene W. Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972); Charles Goetz, Lloyd Granet & Warren Schwartz, *The Meaning of “Subsidy” and “Injury” in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17 (1986); Warren F. Schwartz, *Zenith Radio Corp. v. United States: Countervailing Duties and the Regulation of International Trade*, 1978 SUP. CT. REV. 297 (1978); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989) [hereinafter Sykes, *An Economic Perspective*]; Alan O. Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 LAW & POLY INT'L BUS. 699 (1989) [hereinafter Sykes, *A Critique of the Entitlement Approach*].

efficiency justification for countervailing duty law. First, as said above, countervailing duty law makes no distinction between efficient subsidies and inefficient subsidies.<sup>187</sup> Second, the lack of coordination among trading partners in the imposition of countervailing duties makes countervailing duty law unlikely to have systematic deterrent effects.<sup>188</sup>

Nor could countervailing duty law be reformulated to serve the purpose of advancing economic efficiency. Such reformulation faces two obstacles. First, conceptually, there is no consensus on what subsidies are efficiency-enhancing and what subsidies are efficiency-reducing.<sup>189</sup> Without such consensus, it is impossible to set out what exactly the market benchmark analysis should deter. Second, even assuming a subsidy is efficiency-enhancing, it is impossible for investigating authorities to gather all the information necessary for concluding whether the government is subsidizing by the correct amount from the efficiency standpoint. That a government subsidy remedies market failures conceptually does not preclude the possibility that the government may over-subsidize in practice. For example, if there are reasons to believe that a private firm investing in a new technology will not reap all the benefits of the technology to the greater society because, for example, the social benefit of the technology is greater than its private benefit, the government will be justified in subsidizing the firm investing in the technology, through either grants or loans with interest rates lower than prevailing market rates. But the government subsidy is efficiency-enhancing only if it helps make up for the gap between private benefit and social benefit, not a bit more. If it results in private benefit being greater than social benefit, it will create efficiency losses of its own. To know whether the government subsidy falls within the efficiency-enhancing range, investigating authorities need to find ways to quantify the technology's social and private benefit. Unfortunately, that is something that investigating authorities—or anyone else, for that matter—are unable to do without gathering an enormous amount of information. Therefore, despite being a neat theoretical proposition, a countervailing duty law that measures government subsidies

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187. See Sykes, *A Critique of the Entitlement Approach*, *supra* note 186, at 699.

188. If the threat of countervailing duties could deter the conferment of inefficient subsidies, the countervailing duty law would be in the mutual interest of all nations, thereby promoting global economic efficiency. See *id.*; see also Sykes, *An Economic Perspective*, *supra* note 186, at 200–01.

189. See Sykes, *An Economic Perspective*, *supra* note 186, at 200–01.

against the efficiency standard cannot be realistically implemented in practice.

It is also doubtful that countervailing duty law will result in greater economic welfare for the country applying it. When an exporting country confers a subsidy on the production of a good, a portion of the subsidy will be passed on to the consumers of the country to which the good is exported in the form of lower price. Although the producers of the same good in the importing country will suffer from the subsidy, the importing country as a whole will benefit from the subsidy because the resources that have been used to manufacture the good in the importing country will be shifted to uses of higher value. The consumers in the importing country will benefit more than producers in the importing country who will suffer from the subsidy.<sup>190</sup> If the importing country imposes countervailing duties to raise the price of the imported good, under most circumstances the lost welfare to its consumers will outweigh the benefits to its producers plus the additional government revenue collected from the countervailing duties.<sup>191</sup>

If economic efficiency is not the purpose of the countervailing duty law, then what is? And why does the countervailing duty law exist in the first place? Responding to these questions, some scholars go as far as suggesting that countervailing duty law serves no useful purpose and the first best policy would be to abolish countervailing duty law altogether.<sup>192</sup>

However, economic efficiency is not the only possible rationale for international trade policy. A country may want to base its international trade policy on goals not related to economic efficiency, such as protection of domestic employment,

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190. See Schwartz, *supra* note 186, at 305–06.

191. For a technical evaluation of the welfare consequences of countervailing duties for the importing country, see Sykes, *An Economic Perspective*, *supra* note 186, at 213–29. To summarize, when the import supply is perfectly elastic, the loss in consumer surplus caused by countervailing duties outweighs the gains in producer surplus and government revenue derived from countervailing duties. When the import supply is imperfectly elastic, the welfare analysis of the countervailing duty law is more complicated, but still it will be a mere coincidence that the imposition of countervailing duties will lead to net welfare gains. Furthermore, although the economic literature on strategic trade policy suggests that countervailing duties, like other tariff measures, may extract economic rents from foreign producers, the utility of countervailing duties—or any duties, for that purpose—is an outcome of the monopsony power of large importing countries. Subsidization abroad only is a self-regarding pretense for the exercise of monopsony power to impose the optimal tariff. See *id.* at 250–56.

192. See *id.* at 263.



protection of the environment, and national security.<sup>193</sup> Moreover, international trade policy is not an outcome of a rational policy-making process conducted by a political body whose sole concern is the welfare—economic or otherwise—of the country as a whole. Rather, it is more of an outcome of a policy-making process in which various political factions looking out for their own interests compete against one another. In this world, best described by public-choice theories,<sup>194</sup> countervailing duty law as it exists may only reflect the interests of the group that dominates the legislative process, not net national interests.

Whether or not countervailing duty law is an intended outcome of the political process, it could be described as a law protecting the interests, or entitlement, of domestic producers. Under this so-called entitlement theory or entitlement model of countervailing duty law, the goal of countervailing duty law is to shield domestic producers from the adverse effects of foreign subsidization.<sup>195</sup> The entitlement theory focuses on trade effects, instead of efficiency effects, of foreign subsidies. A foreign subsidy will be countervailed as long as it adversely affects domestic producers, even if it leads to enhanced efficiency in the world market and the imposition of countervailing duties hurts the importing country as a whole. Under the entitlement theory, not all foreign subsidies will be countervailed. A foreign subsidy will be countervailed only if it lowers foreign producers' marginal costs of production and thus increases their exports at the expense of domestic producers.<sup>196</sup>

If entitlement protection is the true purpose of countervailing duty law, it is certainly odd for the centerpiece of countervailing duty law—the subsidy benchmarks—to be

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193. Article XX of the GATT allows certain restrictions on international trade based on non-efficiency concerns, such as protection of public morals and protection of human, animal or plant life and health. GATT, *supra* note 31, at 262. Article XXI of the GATT allows international trade restrictions related to national security. *Id.* at 266.

194. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

195. See Diamond, *Economic and Financial Principles*, *supra* note 186; Diamond, *Foundations*, *supra* note 186; Goetz, Granet & Schwartz, *supra* note 186; Gene M. Grossman & Petros C. Mavroidis, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom: Here Today, Gone Tomorrow? Privatization and the Injury Caused by Non-Recurring Subsidies*, in *THE WTO CASE LAW OF 2001: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES* 170 (Henrik Horn & Petros C. Mavroidis eds. 2001).

196. See, e.g., Diamond, *Foundations*, *supra* note 186, at 778–811.

ostensibly tied to efficiency, something that in many cases is contrary to the goal of entitlement protection. As discussed above, the entitlement model calls for the protection of domestic producers even if the subsidies from which domestic producers are protected are indeed efficiency-enhancing. Furthermore, protecting domestic producers in the form of countervailing duties introduces economic distortions of its own.

In sum, the search for the undistorted market, which has been a central issue in so many high-profile countervailing duty cases, does not necessarily fit the purpose of countervailing duty law in the first instance. For countervailing duty law, the fact that the search for the undistorted market cannot replicate the true undistorted market is certainly damaging, but the fact that the search for the undistorted market is not needed at all is fatal.

#### D. SUGGESTIONS FOR AVOIDING PITFALLS

As discussed above, the market benchmark analysis as currently formulated under countervailing duty law is replete with pitfalls. But there are some ways of avoiding them.

First, countervailing duty law should make it more difficult for investigating authorities to reject in-country markets as distorted. Rather than allowing investigating authorities to engage in circular reasoning in their market distortion analysis,<sup>197</sup> countervailing duty law should require investigating authorities to demonstrate more than the fact that the government is the dominant player in the market in question. Independent evidence should be required to demonstrate that the prevailing market prices in the country under investigation would be different absent the government action in question.<sup>198</sup> Essentially, this calls for abandoning the assumption that governments set out to price differently than markets whenever they participate or intervene in markets.

Second, if independent evidence does indicate that the market in the country under investigation is distorted, or the

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197. *See supra* Part IV.A.

198. One strong, albeit non-conclusive, piece of evidence of government distortion of market prices would be internal government documents, which indicate that the goal of the government program in question is to change prevailing market price. Another possible piece of evidence of government distortion is data showing changes in the market price after the government's entry into the market. Admittedly, independent evidence of government distortion of market may not exist in certain scenarios. If that is the case, the presumption should be no finding of market distortion, rather than the other way around.

government is the sole provider of a good or service in a market, countervailing duty law should limit the alternative benchmarks to which investigating authorities will be allowed to resort. Specifically, countervailing duty law should outlaw the use of out-of-country benchmarks, which, as shown in this Article, are incapable of achieving what they are set out to achieve, i.e., replication of market prices that would prevail but for government subsidies.

One possible alternative benchmark that could be adopted by investigating authorities is the costs to the government (or, in the case of private entities being entrusted or directed by the government to provide subsidies, the costs to the private providers) of providing the subsidies in question. In the preamble to the 1998 countervailing duty regulations, the DOC already lists costs as one of the factors that it will consider in assessing subsidies when the government is the sole provider of a good or service.<sup>199</sup> The main advantage of using costs as the subsidy benchmark is that they are objective—unlike hypothetical prices constructed by out-of-country benchmarks, costs are gleaned from real-world data and can be reasonably ascertained by producers assessing their potential countervailing duty liabilities.<sup>200</sup> By requiring either the use of in-country prices or in-country costs as subsidy benchmarks, this reform essentially calls for the abandonment of the undistorted market approach.

If implemented properly, these two reform measures will enable countervailing duty law to navigate around the pitfalls associated with the undistorted market benchmark. Given that the undistorted market benchmark is not necessary for countervailing duty law, or in some cases even runs counter to it, its abandonment certainly does not contradict that law's purposes.

In addition, the abandonment of the undistorted market benchmark has important collateral benefits in terms of economic efficiency. As analyzed above, the undistorted-market

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199. Preamble to 1998 Countervailing Duty Regulations, *supra* note 80, at 65,378 (“Where the government is the sole provider of a good or service . . . we will assess whether the government price was set in accordance with market principles through an analysis of such factors as . . . costs (including rates of return sufficient to ensure future operations) . . .”).

200. One potential drawback of using costs as the subsidy benchmark, however, is that costs may suffer from the same valuation concern that plagues the subsidy inquiry in the first place, if the government is a dominant player in the input markets for the constituting elements of costs. In-depth analysis of this issue is not within the scope of this Article and is better dealt with by future research.

approach currently espoused by the market benchmark analysis in countervailing duty law allows investigating authorities to reject in-country market benchmarks and resort to out-of-country benchmarks if they simply assert that the in-country market is distorted. Equipped with this almost unbridled discretion, investigating authorities operating under the pressure of domestic interests will be tempted to resort to economically unsound methodologies resulting in larger countervailing duty margins. Elimination of such discretion is expected to result in smaller countervailing duty margins, which will in turn result in less economic distortion.

Finally, the abandonment of the undistorted market benchmark will remove one of the greatest uncertainties in the application of countervailing duty law. One of the major goals of international trade organizations, including the WTO, is to create a transparent and predictable trade environment so that firms can plan their production and sales activities with a relatively high degree of certainty. In countervailing duty law, however, many uncertainties have been created by the undistorted-market approach to the market benchmark analysis. Although the WTO rules lay out a definition of subsidy, it is far from clear that firms and governments are able to predict whether their actions will or will not be treated as subsidies. They are not able to look to the prices prevailing in the private market in their own country as definitive guidance because the in-country private market may be considered distorted and thus its prices unsuitable as subsidy benchmarks. They are not able to look to prices prevailing in other countries as definitive guidance either because it is impossible to predict which country's prices will be selected as subsidy benchmarks. By forcing investigating authorities to accept either in-country prices or in-country costs as the subsidy benchmark, the reform measures will go a long way toward promoting certainty.

## V. CONCLUSION

This Article demonstrates that in countervailing duty law, the market benchmark has won out against the preferentiality benchmark to become the favored benchmark for identifying and measuring subsidies. Efficiency is the offered justification for a market benchmark analysis. Markets, it is said, provide a measure of maximum economic efficiency. Therefore, countervailing subsidies identified and measured through comparison to the market benchmark enhance economic

efficiency.

This Article further demonstrates that the market benchmark analysis as currently formulated in countervailing duty law envisions an undistorted, perfect market and grants wide discretion to the DOC in its search for this perfect market. Exercising this discretion, the DOC has liberally rejected in-country prices on grounds of market distortion and has consistently resorted to out-of-country prices as alternative subsidy benchmarks. Both practices, however, lack support in economic theories and empirical evidence. As a result, the alternative benchmarks selected by the DOC cannot be a reliable proxy for the prices that would arise in an undistorted market absent government subsidies. Even if this undistorted market could somehow be replicated, there is no guarantee that it will represent maximum economic efficiency, due to the possibility of market failures. Finally, this Article demonstrates that the fatal pitfall of the market benchmark analysis in countervailing duty law is that the ostensible purpose of the undistorted market benchmark—economic efficiency—is not the purpose of countervailing duty law itself.

It is important to bear in mind that countervailing duty law is only one of the many areas of law that use markets as a benchmark for economic value. The answer given by countervailing duty law to the question of what type of market should be used in the market benchmark may not be representative of the answers given by other areas of law. At least one other area of law has given an opposite answer to this question, albeit in a different setting.<sup>201</sup> Still, the lessons learned from the countervailing duty law may offer valuable insights for other areas of law, especially when there is a temptation to opt for a perfect yet hypothetical market over an imperfect yet real market as the benchmark for economic value. Countervailing duty law teaches us that when faced with such a choice, it is crucial to evaluate the purpose of the law in

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201. Under the federal bankruptcy code, a bankruptcy trustee can avoid certain pre-petition transfers of the debtor's property as fraudulent if the debtor received "less than a reasonably equivalent value in exchange." 11 U.S.C. § 548(a)(1)(B) (2000). A question arises as to whether the price a transferee paid at a non-collusive, regularly scheduled judicial foreclosure sale is the "reasonably equivalent value" of the property. The foreclosure market, by its very nature, is a market under distress and is not perfect in that sense. In *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), the United States Supreme Court holds that the foreclosure price, although lower than in a normal market, constitutes a reasonably equivalent value of the property. This essentially calls for the use of a market-as-is benchmark over a perfect-market benchmark for the purpose of 11 U.S.C. § 548(a)(1)(B).

question before deciding which type of market best suits that purpose. It is also important to bear in mind that even if a perfect market happens to be the most suitable benchmark in light of the purpose of the law, the search for that perfect market may not yield any valid results, as in the case of countervailing duty law.