

SUBSIDY EXTINCTION AND THE DISTINCTION BETWEEN COMPANY AND SHAREHOLDERS UNDER THE SCM AGREEMENT: PROPOSING A CONTROL-CENTERED APPROACH

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ABSTRACT

The Agreement on Subsidies and Countervailing Measures allows Members to impose countervailing duties on subsidized imports that are causing harm to the relevant domestic industry. To impose Countervailing Duties (hereinafter “CVDs”), Members must establish, among other things, that the producer in question enjoyed a subsidy “benefit” during the time of export. In two privatization cases, US — Lead and Bismuth II and US — Countervailing Measures on Certain EC Products, the Panels and Appellate Body (hereinafter “AB”) established a principle that could significantly affect a Member’s right to impose CVDs. The principle states that the sale of shares in a company at arm’s length and for fair market value presumably extinguishes any subsidy “benefit” previously enjoyed by that company. It follows that the company is no longer deemed to enjoy any subsidy “benefit”, therefore, the importing Member will not be able to countervail the company’s products. One particularly questionable aspect of the principle’s rationale is the complete lack of a distinction between the company and its shareholders. The lack of distinction allowed for the notion that a purchase of shares made by the shareholders could extinguish a subsidy received by the company even though there was no money being taken out of the company. The Panels (and the AB to some

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extent) in the two privatization cases considered that whether the money taken out of the company is irrelevant, as the company and its shareholders are together a single subsidy “recipient” to be assessed. This paper argues that the Panel and AB’s reasoning and assessment of the shareholder-company relationship are flawed and introduces a control-centered approach as a potential alternative.

KEYWORDS: *SCM Agreement, privatization, subsidy benefit, pass-through, subsidy extinction, subsidy recipient*