

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

DISPUTE SETTLEMENT

WORLD TRADE ORGANIZATION

3.7 Subsidies and Countervailing Measures



UNITED NATIONS
New York and Geneva, 2003

NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of forty modules.

This Module has been prepared by Mr. E. Vermulst at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

The designations employed and the presentation of the material do not imply an expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city or areas or of its authorities, or concerning the delimitations of its frontiers or boundaries. In quotations from the official documents and the jurisprudence of international organizations and tribunals countries are designated as reported.

The United Nations holds copyright to this document. The course is also available in electronic format on the UNCTAD website (www.unctad.org). Copies may be downloaded free of charge on the understanding that they will be used for teaching or study and not for a commercial purpose. Appropriate acknowledgement of the source is requested.

UNCTAD/EDM/Misc.232/Add.15

Copyright © United Nations, 2003
All rights reserved

TABLE OF CONTENTS

Notes	ii
What You Will Learn	1
1. The Agreement on Subsidies and Countervailing Measures	3
1.1 History	3
1.2 Structure of ASCM	3
1.3 Interested Parties	5
1.4 Users of CVD Action	5
1.5 WTO Disputes	5
1.5.1 Multilateral Track	7
1.5.2 Challenging Legislation	7
1.5.3 Specificity of Claims in Request for Establishment	8
1.5.4 'New' Claims	8
1.5.5 Special Standard of Review	8
1.6 Test Your Understanding	8
2. The Determination of Subsidization	11
2.1 Definition of Subsidy	11
2.1.1 Conferred Benefit	11
2.1.2 Specificity	13
2.1.3 De Jure Specificity	13
2.1.4 De Facto Specificity	14
2.2 Prohibited Subsidies	14
2.2.1 Export Subsidies	14
2.2.2 Import Substitution Subsidies	16
2.3 Non-Actionable Subsidies	17
2.4 Calculation of Benefit to Recipient for CVD Purposes	17
2.5 Calculation of Benefit to Recipient for Serious Prejudice Purposes	17
2.6 Test Your Understanding	17
3. The Determination of Material Injury/Adverse Effects/Serious Prejudice	19
3.1 Adverse Effects	19
3.2 Serious Prejudice	19
3.3 Material Injury, the Key Elements	20
3.3.1 The Like Product	21
3.3.2 The Domestic Industry	21
3.3.3 Material Injury Assessment	22
3.3.4 Subsidized Imports	22
3.4 The Injury Factors	22
3.5 Causation/Other Known Factors	23
3.6 Threat of Injury	23
3.7 Injury Margins	24
3.8 Test Your Understanding	25

4. Procedural Rules/Remedies	27
4.1 CVD Track	27
4.1.1 <i>Initiation Procedures</i>	27
4.1.2 <i>Due Process Rights</i>	28
4.1.3 <i>Provisional Measures</i>	29
4.1.4 <i>Countervailing Duties</i>	30
4.1.5 <i>Retroactivity</i>	30
4.1.6 <i>Reviews</i>	30
4.2 Multilateral Track	31
4.2.1 <i>Failure to Cooperate</i>	32
4.2.2 <i>Retroactivity</i>	33
4.3 Test Your Understanding	34
5. Developing Country Members/Economies in Transition	35
5.1 <i>Export Subsidies' Prohibition</i>	35
5.2 <i>Import Substitution Subsidies</i>	36
5.2 <i>5.3 No Presumption of Serious Prejudice</i>	36
5.4 <i>Part III Actionable Subsidies</i>	36
5.5 <i>De minimis/Negligibility</i>	36
5.6 <i>Transition Economies</i>	37
5.7 <i>Test Your Understanding</i>	37
6. Case Study	39
7 Further Readings	41
7.1 List of Relevant Appellate and Panel Report	41
7.1.1 <i>Appellate Body Reports</i>	41
7.1.2 <i>Panel Reports</i>	42

WHAT YOU WILL LEARN

The WTO Agreement on Subsidies and Countervailing Measures [hereinafter: ASCM] sets out the remedies, which WTO Members have against injurious subsidization and the procedures, which they must follow. It provides detailed rules on the concepts of *subsidization*, *actionable subsidies* and *material injury/serious prejudice*. It contains many procedural provisions that WTO Members, wishing to take countervailing duty action (the *unilateral track*), must comply with. It also provides provisions for attacking certain subsidies in the WTO (the *multilateral track*).

This Module volume gives an overview of the ASCM, as Panels and the Appellate Body have interpreted it over the last six years. It will review both substantive and procedural rules. Since the entry into force of the ASCM in 1995, 13 WTO Panel reports have been issued interpreting ASCM provisions, eight of which were appealed. These Panel and Appellate Body reports offer crucial interpretations of key provisions of the Agreement. Panel and Appellate Body findings form an important element of this volume and will be discussed in tandem with the relevant provisions.

The first Section gives a general overview of the ASCM, including selected systemic issues.

The second, entitled “the Determination of Subsidization”, explains important subsidy concepts, such as the definition and quantification of subsidies, the cost-to-the-government vs. benefit-to-the-recipient approach, actionable subsidies, specificity, and green, orange and red subsidies.

The third Section on the “Determination of Injury/serious prejudice” explains unilateral track requirements such as the material injury requirement, as well as related concepts such as the definitions of the like product and the domestic industry and the causal link between the subsidized imports and the injury suffered by the domestic industry. It also covers the multilateral track requirement of serious prejudice.

The Section entitled “Procedural Rules” highlights the various stages and procedures of the unilateral and multilateral tracks, and the final section analyses the position of developing countries.

After having studied this volume the reader will be able to distinguish between prohibited and admissible subsidies and learn how to assess the possibilities of taking action against a prohibited subsidy. Ultimately the reader will be capable of enumerating the procedural rules, which investigating authorities must comply with to avoid violating the rules established in the ASCM.

1. THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

1.1 History

Notably because of policy differences between the United States and the EC, the GATT treatment of subsidies (Articles VI and XVI) has historically been controversial and the disciplines weak. A Subsidies Code was agreed upon in the Tokyo Round, but it skirted around important issues. The Uruguay Round Agreement on Subsidies and Countervailing Measures [ASCM] has generally been hailed as a major improvement over previous regimes, because it provides for the first time a definition of ‘subsidy’, lays down detailed standards for the conduct of countervailing duty investigations and provides a workable multilateral discipline over subsidies.¹

Panel Report, US-FSC

...nowhere in Article XVI of GATT 1947 is there any definition whatsoever of the term “subsidy”. Rather, that term is first defined in the GATT/WTO context only in Article 1 of the SCM Agreement, and the inclusion of this detailed and comprehensive definition of the term “subsidy” is generally considered to represent one of the most important achievements of the Uruguay Round in the area of subsidy disciplines. Under these circumstances, it would in our view be inappropriate to place any weight in interpreting the definition of subsidy found in Article 1 of the SCM Agreement on an understanding regarding Article XVI:4 of GATT 1947 which was adopted more than a decade before that definition was formulated.²

It should be noted that the Agriculture Agreement contains its own disciplines with respect to subsidization of agricultural products, covered by that Agreement. However, Article 13 provides that, under certain circumstances, and provided that ‘due restraint’ is shown before initiation, agricultural subsidies may be countervailed under the ASCM. This Module will not cover cases brought under the Agriculture Agreement.

1.2 Structure of ASCM

The ASCM is divided into 11 parts as follows:

Part I *General*

This part includes the definition of subsidies in Article 1 as well as the concept of specificity in Article 2.

¹ Horlick, Clarke, *The 1994 Subsidies Agreement, World Competition, 1994*, at 41.

² Panel Report, United States – Tax Treatment for “Foreign Sales Corporations” (US- FSC), *WT/DS/108/R*, para. 7.80, footnote omitted.

- Part II** ***Prohibited subsidies***
Article 3 provides that export subsidies and import substitution subsidies are prohibited. Article 4 provides the multilateral remedies against such prohibited subsidies.
- Part III** ***Actionable subsidies***
Article 5 covers the concept of adverse effects while Article 6 discusses serious prejudice. Article 7 is the mirror provision of Article 4 in discussing the multilateral remedies against actionable subsidies.
- Part IV** ***Non-actionable subsidies***
Article 8 provides that subsidies, which are not specific, are non-actionable. It furthermore exempts certain environmental, R&D and regional subsidies, even though they are specific; however, multilateral remedies remain open.
- Part V** ***Countervailing Duties***
Articles 10-23 largely mirror procedural and material injury provisions of the Anti-Dumping Agreement. Article 14, however, contains important rules on the calculation of the amount of certain subsidy.
- Part VI** ***Institutions***
Establishes the Committee on Subsidies and Countervailing Measures and authorizes the establishment of a Permanent Group of experts.
- Part VII** ***Notification and surveillance***
Contains important notification and surveillance procedures
- Part VIII** ***Developing countries***
Grants significant special and differential treatment to developing country Members
- Part IX** ***Transitional arrangements***
Deals with accessions and transition economies.
- Part X** ***Dispute settlement***
Article 30 provides that the DSU provisions apply, except as otherwise specified in the ASCM.
- Part XI** ***Final provisions***
Includes the provision that Article 6.1 (serious prejudice definition) and Articles 8 and 9 (non-actionable subsidies) applied for five years only. Because of the failure of the Seattle Ministerial Meeting to renew them these provisions expired on 31 December 1999.

Furthermore, the ASCM contains important annexes covering:

- the illustrative list of export subsidies (Annex I),
- guidelines on consumption of inputs in the production process (Annex II),

- guidelines in the determination of substitution drawback systems as export subsidies (Annex III),
- calculation of the total ad valorem subsidization for purposes of Article 6.1(a) (Annex IV),
- procedures for developing information concerning serious prejudice (Annex V),
- procedures for on-the-spot investigations ex Article 12.6 (Annex VI),and
- coverage of developing and least developed country Members (Annex VII).

1.3 Interested Parties

The parties most directly affected by an anti-subsidy proceeding are the domestic producers, foreign producers and exporters and their importers as well as representative trade associations. Furthermore, the government of the exporting country will be the ‘interested Member’. Indeed, contrary to an anti-dumping proceeding, the exporting country government also will have to complete a questionnaire response, which will subsequently be verified by the importing country Member.

1.4 Users of CVD Action

Until the 1990s, the United States, followed, to a lesser extent, by Australia and Canada, were the main users of countervailing duty actions. However, since that time, the EC and some developing countries have also started to apply countervailing measures. According to WTO statistics, the current main users include the EC and Brazil in addition to the three traditional users.

1.5 WTO Disputes

The table below provides details with respect to the ASCM cases which led to Panel/AB reports from 1995 to 2001.

Panel Report	AB Report	Date of Adoption	Applicant	Respondents	Third Parties
<i>US-Offset Act of 2000 (circulated 16/09/2002)</i>		WT/DS217/R WT/DS234/R	Australia Brazil Chile EC India Indonesia Japan Republic of Korea Thailand	United States USA	Argentina Canada Costa Rica Hong Kong China Israel Mexico Norway
<i>US-Countervailing Measures from EC (appealed)</i>		WT/DS212/R	EC	United States	Brazil India Mexico
<i>US-Section 129 Act</i>		30/08/2002 WT/DS221/R	Canada	United States	Chile EC India Japan
<i>US-Carbon Steel (appealed)</i>		WT/DS213/R	EC	United States	Japan Norway
<i>US-Steel Plate from India</i>		29/07/2002 WT/DS206/R	India	United States	Chile EC Japan
	<i>US-FSC (Article 21.5-EC)</i>	29/01/2002 WT/DS108/AB/RW	EC, United States USA EC	EC, United States	Australia Canada India Japan
<i>Canada – Regional Aircraft</i>		19/02/2002 WT/DS222/R/Corr. 1	Brazil	Canada	Australia EC India United States
<i>US-Export Restraints</i>		23/08/2001 WT/DS194/R	Canada	United States	Australia EC India
	<i>Brazil-Aircraft (Article 21.5-Canada)</i>	04/08/2000 WT/DS46/AB/RW	Canada	Brazil	EC United States
	<i>Canada-Aircraft (Article 21.5-Brazil)</i>	04/08/2000 WT/DS70/AB/RW	Brazil	Canada	EC United States
	<i>Canada-Autos</i>	19/06/2000 WT/DS139/AB/R WT/DS142/AB/R	Canada EC Japan	Canada EC Japan	Republic of Korea USA United States
	<i>US-Lead and Bismuth II</i>	07/06/2000 WT/DS138/AB/R	United States	EC	Brazil Mexico
<i>Canada-Aircraft (Article 21.5-Canada) (appealed)</i>		WT/DS70/RW	Brazil	Canada	EC United States
<i>Brazil-Aircraft (Article 21.5-Canada) (appealed)</i>		WT/DS46/RW	Canada	Brazil	EC United States
	<i>US-FSC</i>	20/03/2000 WT/DS108/AB/R	United States	EC	Canada Japan
<i>Canada-Autos (appealed)</i>		WT/DS139/R WT/DS142/R	United States	Australia	EC Mexico
<i>Australia-Automotive Leather II (Article 21.5-US)</i>		11/02/2000 WT/DS126/RW	United States	Australia	EC Mexico
<i>US-Lead and Bismuth II (appealed)</i>		WT/DS138/R	EC	United States	Brazil Mexico
<i>US-FSC (appealed)</i>		WT/DS108/R	EC	United States	Barbados Canada Mexico
	<i>Brazil-Aircraft</i>	20/08/1999 WT/DS46/AB/R	Brazil Canada	Brazil Canada	EC United States
	<i>Canada-Aircraft</i>	20/08/1999 WT/DS70/AB/R	Brazil Canada	Brazil Canada	EC United States
<i>Australia Automotive Leather II</i>		16/06/1999 WT/DS126/R	United States	Australia	
<i>Brazil Aircraft (appealed)</i>		WT/DS46/R	Canada	Brazil	EC United States
<i>Canada Aircraft (appealed)</i>		WT/DS70/R	Brazil	Canada	EC United States

<i>Indonesia-Autos</i>		23/07/1998 WT/DS54/55/59/64/R	EC Japan United States	Indonesia	India Republic of Korea
	<i>Brazil- Desiccated Coconut</i>	20/03/1997 WT/DS22/AB/R	Brazil Philippines	Brazil Philippines	EC United States
<i>Brazil-Desiccated Coconut</i>		WT/DS22/R	Philippines	Brazil	Canada EC Indonesia Sri Lanka United StatesA

The EC was a complainant in four cases, Canada in three cases, and Japan, the United States and Brazil each in two cases. The Philippines were complainants in one case. The United States was a defendant in eight cases, Canada in three cases, and Australia and Indonesia each in one case. It is noteworthy that developing countries³ were involved as principal parties in five cases and as third parties in eight cases.

Third party representations were made mostly by the EC (seven times), the United States (five times), India (four times) and Canada (three times).

1.5.1 Multilateral Track

In terms of substance, two cases (*Brazil-Desiccated Coconut*⁴; *US-Lead and Bismuth II*⁵) involved the imposition of a countervailing duty, while *US-Export Restraints*⁶ involved potential countervailability of export restraints under United States law. All other cases were multilateral track cases.

1.5.2 Challenging Legislation

Panel Report, US-Export Restraints

In *US-Export Restraints*, Canada challenged a United States statute on the ground that it mandated treatment of export restraints as financial contributions within the meaning of Article 1 ASCM. The United States argued as, a matter of procedure, that the law was discretionary and that this should be examined first as a threshold question. The Panel rejected this argument, found against the United States on the substance, but then agreed with the United States that the law was not mandatory.

In sum, therefore, we find that the statute – including as read in light of the SAA and the Preamble – does not mandate the treatment of export restraints as financial contributions (which treatment we have found, however, would violate the SCM Agreement). Accordingly, we find that Section 771(5)(B)(iii) of the Tariff Act as such does not violate the SCM Agreement, and we reject the claims of Canada under SCM Article 1.⁷

³ For this purpose Barbados, Brazil, India, Indonesia, the Republic of Korea (self-declared), Sri Lanka and the Philippines are included. Mexico is not included.

⁴ Appellate Body Report, Brazil – Measures Affecting Desiccated Coconut (Brazil-Desiccated Coconut) WT/DS22/AB/R

⁵ Appellate Body Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US- Bismuth II) WT/DS138/AB/R

⁶ Panel Report, United States – Measures Treating Export Restraints as Subsidies (US-Export Restraints), WT/DS194/R

⁷ US – Export Restraints, para. 8. 131.

1.5.3 Specificity of Claims in Request for Establishment

The Appellate Body has held that claims must be sufficiently precisely specified in the request for establishment of a Panel. While in some instances it may be sufficient to mention the articles of the Agreements alleged to have been violated (*EC-Bananas*⁸), in cases where articles contain multiple obligations, more detail will generally be necessary (*Korea-Dairy*⁹). This ruling is very important for the ASCM because many ASCM articles, including key articles such as Articles 1, 3, 5, 6, 12, 15 and 22, contain multiple obligations and may form the basis for numerous claims. It is therefore recommendable that an applicant not only refers to articles and paragraphs in an ASCM dispute, but also summarizes its claims in descriptive form.

1.5.4 'New' Claims

The Appellate Body has confirmed in a dumping case, *Thailand-H-Beams*¹⁰, that a government bringing a dispute settlement case is not necessarily confined to the claims made by its producers in the course of administrative proceeding.

1.5.5 Special Standard of Review

Article 17.6 of the ADA provides a special standard of review for Panels examining anti-dumping disputes, designed to grant importing country Members that have imposed anti-dumping measures a certain leeway. Efforts by the United States to expand this standard to CVD disputes were rejected by the Appellate Body in *US-Lead and Bismuth II*. The AB ruled that the general Article 11 DSU standard applies.¹¹

1.6 Test Your Understanding

1. **The ASCM defines subsidies and sets up a criterion of specificity. Are subsidies, which fall under this definition, considered 'prohibited'?**
2. **In comparison with the other WTO trade defence agreements, what role does the exporting country's government play in the importing country investigation procedures?**
3. **A WTO Member claims in its request for establishment of a Panel that another Member has violated Article 1 ASCM. Is this claim sufficiently precise? What if it claims a violation of Article 1.1?**

⁸ Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), *WT/DS27/AB/R*

⁹ Appellate Body Report, Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea-Dairy), *WT/DS98/AB/R*

¹⁰ Appellate Body Report, Thailand-Anti-Dumping Duties on Angels, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand –H-Beams), *WT/DS122/AB/R*

¹¹ Appellate Body Report, United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US- Lead and Bismuth II), *WT/DS138/AB/R*, AB, para. 50.

4. **A WTO Member starts a dispute settlement proceeding against a final countervailing duty imposed by another Member and raises an issue that was not raised by its exporters in the course of the administrative proceeding. Does the Panel have competence to entertain this claim?**

2. THE DETERMINATION OF SUBSIDIZATION

This Section examines the term definition of a subsidy within the context of the ASCM.. The ASCM prohibits certain subsidies against which counteraction can be taken. Further, the ASCM provides that certain subsidies are to be regarded as legitimate depending on their purpose.

2.1 Definition of Subsidy

Article 1 ASCM

Article 1 of the ASCM defines the term ‘subsidy’ very broadly.

Article 1 ASCM

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a) (1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ‘government’), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);¹²

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a) (2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

Thus, in order for a subsidy to exist, there must be a *financial contribution* by a government and a *benefit conferred* thereby.

2.1.1 Conferred Benefit

Panel Report, US – Export Restraints

In short, the negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of “financial contribution” and “benefit”, was intended specifically to prevent the countervailing of benefits from any →

¹² *In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.*

sort of (formal, enforceable) government measures, by restricting to a finite list the kinds of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)-(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under subparagraphs (i)-(iii), the government acting on its own behalf is effecting that transfer by directly providing something of value – either money, goods, or services – to a private entity. Subparagraph (iv) ensures that the same kinds of government transfers of economic resources, when undertaken through explicit delegation of those functions to a private entity, do not thereby escape disciplines.¹³

The Appellate Body has unambiguously stated that the term ‘benefit’ means *benefit to the recipient*, as opposed to the *cost to the government*, thereby definitively putting to rest the old conflict between the United States and the EC.

**Appellate Body
Report, Canada-
Aircraft**

*A “benefit” does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a “benefit” can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term “benefit”, therefore, implies that there must be a recipient... Accordingly, we believe that Canada’s argument that “cost to government” is one way of conceiving of “benefit” is at odds with the ordinary meaning of Article 1.1(b), which focuses on the recipient and not on the government providing the “financial contribution”.*¹⁴

The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the “benefit” to the recipient, and not with the “cost to government”. The definition of “subsidy” in Article 1.1 has two discrete elements: “a financial contribution by a government or any public body” and “a benefit is thereby conferred”. The first element of this definition is concerned with whether the government made a “financial contribution”, as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the “financial contribution”. That being so, it seems to us logical that the second element in Article 1.1 is concerned with the “benefit ...conferred” on the recipient by that governmental action...¹⁵ 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.¹⁶

¹³ Panel Report, US – Export Restraints para. 8.73.

¹⁴ Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft), WT/DS70/AB/R, para. 154.

¹⁵ Appellate Body Report, Canada – Aircraft para. 156.

¹⁶ Appellate Body Report, Canada – Aircraft para. 157.

While the term subsidy is broadly defined, covering a wide scale of governmental support, not all subsidies are countervailable. Rather, a subsidy must be *specific* in order to be countervailable.

2.1.2 Specificity

There are four types of “specificity” within the meaning of the ASCM:

Enterprise-specificity. A government targets a particular company or companies for subsidization;

Industry-specificity. A government targets a particular sector or sectors for subsidization.

Regional specificity. A government targets producers in specified parts of its territory for subsidization.

Prohibited subsidies. A government targets export goods or goods using domestic inputs for subsidization.¹⁷

2.1.3 De Jure Specificity

Where a subsidy is explicitly limited sectorally or regionally, either by the granting authority, or by legislation, it is *de jure* specific. On the other hand, where the authority, or legislation, establish objective criteria or conditions governing the eligibility for, and amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and the criteria and conditions are strictly adhered to.¹⁸ Footnote 2 of the ASCM clarifies that objective criteria or conditions are criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application. It is relatively easy to establish such de jure specificity or non-specificity.

Panel Report Canada-Aircraft

...in our opinion, export credits granted “for the purpose of supporting and developing, directly or indirectly, Canada’s export trade” are expressly contingent in law on export performance. We therefore find that the Canada Account debt financing in issue is “contingent in law...upon export performance” within the meaning of Article 3.1(a) of the SCM Agreement.¹⁹

Appellate Body Report, Canada-Autos

In our view, a subsidy is contingent “in law” upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be de jure export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be de jure export contingent, the underlying legal instrument does not always have to provide

¹⁷ WTO: ASCM Overview, http://www.wto.org/english/tratop_e/scm_e/subs_e.htm

¹⁸ ASCM, Art. 2.1 (b)

¹⁹ Panel Report, Canada – Aircraft, WT/DS70/R, para. 9.230.

expressis verbis that the subsidy is available only upon fulfilment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.²⁰

2.1.4 De Facto Specificity

It is quite possible that a subsidy at face value is non-specific, but in fact is operated in a specific manner. If there are reasons to believe that this is the case, other factors may be considered, including the use of a subsidy programme by a limited number of certain enterprises, predominant use of certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy (notably information on the frequency with which applications for a subsidy are refused or approved and the reasons therefore). In the analysis, account must be taken of the extent of diversification of economic activities within the jurisdiction as well as of the length of time during which the subsidy programme has been in operation. The analysis may lead to a finding of *de facto* specificity.

2.2 Prohibited Subsidies

Article 3 ASCM

Prohibited - red light – subsidies, as defined in Article 3, are by definition specific and therefore countervailable. Article 3 singles out two types of subsidies: export subsidies and import substitution subsidies.

2.2.1 Export Subsidies

Export subsidies are subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including the programmes enumerated in the Illustrative List of export subsidies in Annex I. The *Canada-Autos* Panel has held that, while all practices identified in the Illustrative List are subsidies contingent upon export performance, there may be other practices not identified in the Illustrative List that are also subsidies contingent upon export performance.²¹ The concept of *de jure* export subsidies is relatively straightforward.

Footnote 4 provides that *de facto* export subsidies exist when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings; on the other hand, the fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy.

²⁰ Appellate Body Report, Canada – Certain Measures Affecting the Automotive Industry (Canada-Autos), *WT/DS139/AB/R, WT/DS142/AB/R, para. 100.*

²¹ Panel Report, Canada – Certain Measures Affecting the Automotive Industry (Canada – Autos), *WT/DS139/R, WT/DS142/R, para. 10.196.*

**Appellate Body
Report, Canada-
Aircraft**

Article 3.1(a) prohibits any subsidy that is contingent upon export performance, whether that subsidy is contingent “in law or in fact”. The Uruguay Round negotiators have, through the prohibition against export subsidies that are contingent in fact upon export performance, sought to prevent circumvention of the prohibition against subsidies contingent in law upon export performance. In our view, the legal standard expressed by the word “contingent” is the same for both de jure and de facto contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. De jure export contingency is demonstrated on the basis of the words of the relevant legislation, regulation or other legal instrument. Proving de facto export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is “contingent...in fact...upon export performance”. Instead, the existence of this relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.²²

The Illustrative List in Annex I lists 11 types of export subsidies ranging from direct export subsidies to currency retention schemes, exemptions, remissions or deferrals of direct taxes on exports (*US-FSC*²³), excessive duty drawback, and provision of export credit guarantee or insurance programmes at premium rates or export credits below commercial rates (*Brazil-Aircraft*²⁴; *Canada-Aircraft*). Some developing countries have argued that to the extent that export subsidies are provided by them only to offset certain disadvantages that developing country exporters face, ought not to be countervailable. However, Panels have rejected this line of reasoning.

**Panel Report, Brazil-
Aircraft**

...In items (e), (f), (g), (h) and (i) of the Illustrative List, all of which relate to exemptions, remissions or deferrals of taxes or import charges, there is no hint that a tax advantage would not constitute an export subsidy simply because it reduced the exporter’s tax burden to a level comparable to that of foreign competitors.²⁵

“duty drawback”

Virtually every country in the world has a duty drawback or exemption scheme. The basic concept underlying such schemes is that import duties on imports of raw materials are either not payable or refundable on the condition that such raw materials are used in the manufacture of products, which are consequently exported. Duty drawback schemes assume special importance in cases where import duties are still high, as is often the case for developing countries. In the ASCM, footnote 1 and Annexes I-III are all relevant to determining the legality of duty drawback schemes. Duty drawback systems, particularly those

²² *Appellate Body Report, Canada – Aircraft, para. 167.*

²³ *Appellate Body Report, United States-Tax Treatment for “Foreign Sales Corporations” (US- FSC), WT/DS108/AB/R*

²⁴ *Appellate Body Report, Brazil – Export Financing Programme for Aircraft (Brazil - Aircraft) WT/DS46/AB/R*

²⁵ *Panel Report, Brazil – Export Financing Programme for Aircraft (Brazil – Aircraft), WT/DS46/R, para. 7.25.*

used by developing countries, have proven very problematic in the context of countervailing duty proceedings. First, many developing countries have simplified systems in use for small and medium-size enterprises to facilitate their paperwork. Typically, such systems work with standard input-output ratios to quantify the amount of drawback. However, importing country Members may determine that such systems are not sufficiently precise and violate Annex II. Second, the ASCM requires that imported raw materials be used in the exported finished product. However, in the production of bulk items, in cases where both domestically purchased and imported raw materials are used, producers may not always be able to prove conclusively that particular export shipments incorporated exclusively imported raw materials; again, this may be ground to consider the duty drawback scheme countervailable. Last, duty drawback schemes have been considered illegitimate on the ground that developing country Members did not have in place adequate verification procedures.

2.2.2 Import Substitution Subsidies

This second category of prohibited subsidies is defined as subsidies contingent whether solely or as one of several other conditions, upon the use of domestic over imported goods. Often, these take the form of local content requirements. However, Article 3.1(b) talks about ‘goods’ and as local content requirements often comprise not only goods, but also other costs items; the requirements themselves will need to be scrutinized in detail.

Appellate Body
Report, Canada-Autos

In our view, the Panel’s examination of the CVA requirements for specific manufacturers was insufficient for a reasoned determination of whether contingency “in law” on the use of domestic over imported goods exists. For the MVTO 1998 manufacturers and most SRO manufacturers, the Panel did not make findings as to what the actual CVA requirements are and how they operate for individual manufacturers. Without this vital information, we do not believe the Panel knew enough about the measure to determine whether the CVA requirements were contingent “in law” upon the use of domestic over imported goods. We recall that the Panel did make a finding as to the level of the CVA requirements for one company, CAMI. The Panel stated that the CVA requirements for CAMI are 60 per cent of the cost of sales of vehicles sold in Canada. At this level, it may well be that the CVA requirements operate as a condition for using domestic over imported goods. However, the Panel did not examine how the CVA requirements would actually operate at a level of 60 per cent.²⁶

The Appellate Body, overruling the Panel, has held that this provision also covers both *de jure* and *de facto* variants.

Appellate Body
Report, Canada-Autos

...we believe that a finding that Article 3.1(b) extends only to contingency “in law” upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy.²⁷

2.3 Non-Actionable Subsidies

First, non-specific subsidies are not actionable. Second, certain narrowly defined R&D, environmental and regional subsidies are non-actionable (these expired on 31 December 1999), on the condition that they are notified in advance to the Subsidies Committee. Non-actionable subsidies are often referred to as green light subsidies.

2.4 Calculation of Benefit to Recipient for CVD Purposes

Article 14 ASCM

Article 14 of ASCM provides guidelines for calculating the benefit to the recipient of four types of subsidies:

- specific government provision of equity on terms inconsistent with the usual investment practices of private investors in the country;
- specific government loans for less than the beneficiary would pay on a comparable commercial loan which the firm could actually obtain on the market;
- specific government loan guarantees for less than the firm would pay on a comparable commercial loan absent the government guarantee;
- specific government provision of goods or services for less than adequate remuneration, or specific government purchase of goods for more than adequate remuneration. The adequacy of remuneration must be determined in relation to prevailing market conditions for the good or service in the country concerned, including price, quality, availability, marketability, transportation and other conditions of purchase or sale.

In all four cases the benchmark is the price in the market. Article 14 further provides that law or regulation must provide national calculation methods.

2.5 Calculation of Benefit to Recipient for Serious Prejudice Purposes

In contrast, Annex IV to the ASCM provides that, any calculation of the amount of subsidy for the purpose of paragraph 1(a) of Article 6 (ad valorem subsidization exceeding five per cent) shall be done in terms of cost to granting governments.

2.6 Test Your Understanding

1. **In determining if a benefit has been conferred, what is the most significant factor that the recipient is ‘better off’ or that the government has born a cost?**

²⁶ *Appellate Body Report, Canada- Autos, para. 131.*

²⁷ *Appellate Body Report, Canada- Autos, para. 142.*

2. Describe the difference between *de jure* and *de facto* specificity in the determination of a subsidy.
3. The cost of borrowing for the Government in a WTO Member is 6 per cent . The comparable commercial interest rate is 7.5 per cent The Government provides an interest – free loan to a company. What is the subsidy under the cost-to-the-government approach? What is the subsidy under the benefit-to-the recipient approach?
4. The law of a WTO Member provides for an exemption of import duties on imported machinery. Is this a subsidy? Is it countervailable? What if there a requirement that the company must be located in an export-processing zone? What if there is a requirement that the company must use at least 45 per cent local content? Suppose that the normal import duty is 20 per cent and the CIF value of the machinery imported in 1995 was US\$10,000,000. A countervailing duty investigation is initiated in 2002 with 2001 as the investigation period. Is there still a countervailable subsidy and, if so, how much?
5. As part of its duty drawback legislation, a WTO Member has a procedure under which companies with an annual turnover of less than US\$5,000,000 can claim duty drawback on the basis of standard input/output percentages, established by the Government on the basis of historical experience. Is this a countervailable subsidy?

3. THE DETERMINATION OF MATERIAL INJURY/ ADVERSE EFFECTS/SERIOUS PREJUDICE

The ASCM uses the three terms ‘adverse effects’, ‘serious prejudice’ and ‘material injury’ to indicate certain conditions that must be met for remedies to be applied. The first two terms relate to the multilateral track where actionable subsidies are concerned, while the last term relates to the unilateral – countervailing duty – track.

3.1 Adverse Effects

Article 5 ASCM

Article 5 provides that no Member should cause, through the use of actionable subsidies, adverse effects to the interests of other Members, *i.e.*

- (a) material injury in the sense of the CVD track;
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994;
- (c) serious prejudice, including threat thereof, to the interests of another Member.

3.2 Serious Prejudice

Article 6 ASCM

According to Article 6, serious prejudice *shall be deemed to exist* in the case of:

- (a) the total ad valorem subsidization of a product exceeding five per cent;
- (b) subsidies to cover operating losses sustained by an industry;
- (c) subsidies to cover operating losses sustained by enterprise, other than one-time measures which are non-recurrent and cannot be repeated for that enterprise and which are given merely to provide time for the development of long-term solutions and to avoid acute social problems;
- (d) direct forgiveness of debt, *i.e.* forgiveness of government-held debt, and grants to cover debt repayment.

However, where the subsidizing Member can demonstrate that the subsidy did not have any of the *effects* below, serious prejudice shall not be found.

Serious prejudice *may arise* where an actionable subsidy has one or more of the following *effects*:

- (a) it displaces or impedes imports of a like product of another Member into the market of the subsidizing Member;
- (b) it displaces or impedes the exports of a like product of another Member from a third country market;

- (c) it results in a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
- (d) it leads to an increase in the world market share of the subsidizing Member in a particular primary product or commodity as compared to the average share it had during the previous period of three years, and this increase follows a consistent trend over a period when subsidies have been granted.

In *Indonesia-Autos*²⁸, the EC and the United States had argued that as result of Indonesian subsidies to the Timor, their exports to Indonesia had been displaced or impeded. However, the Panel determined that these assertions were not supported by sufficient evidence.

**Panel Report,
Indonesia-Autos**

We do not mean to suggest that in WTO dispute settlement there are any rigid evidentiary rules regarding the admissibility of newspaper reports or the need to demonstrate factual assertions through contemporaneous source information. However, we are concerned that the complainants are asking us to resolve core issues relating to adverse trade effects on the basis of little more than general assertions. This situation is particularly disturbing, given that the affected companies certainly had at their disposal copious evidence in support of the claims of the complainants, such as the actual business plans relating to the new models, government documentation indicating approval for such plans... and corporate minutes or internal decision memoranda relating both to the initial approval, and the subsequent abandonment, of the plans in question. We note the United States' stated concern for the confidentiality of company business plans. However, an invitation by the Panel for proposals to ensure adequate protection of such information was not taken up. While complainants cannot be required to submit confidential business information to WTO dispute settlement panels, neither may they invoke confidentiality as a basis for their failure to submit the positive evidence required, in the present case, to demonstrate serious prejudice under the SCM Agreement.²⁹

3.3 Material Injury, the Key Elements

The determination of material injury consists of a determination that the subsidized imports have caused material injury to the domestic industry producing the like product. These four elements and the possible calculation of injury margins for WTO Members applying the lesser duty rule are explained below.

²⁸ Panel Report, *Indonesia-Certain Measures Affecting the Automobile Industry (Indonesia-Autos)*, WT/DS54/R and Corr. 1,2,3,4, WT/DS55/R and Corr. 1,2,3,4, WT/DS59/R and Corr. 1,2,3,4, WT/DS64/R and Corr. 1,2,3,4

²⁹ Panel Report *Indonesia – Autos*, paras 14.234-14.235.

3.3.1 *The Like Product*

Footnote 46 ASCM

The term like product ('produit similaire') is defined in footnote 46 ASCM as a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product that, although not alike in all respects, has characteristics closely resembling those of the product under consideration. This definition is strict and may be contrasted, for example, with the broader term 'like or directly competitive' in the Safeguards Agreement. As the definition applies throughout the ASCM, it is also relevant, for example, for the serious prejudice analysis of Article 6. In *Indonesia-Autos*, the Panel had to determine which European and American cars were like the Indonesian-produced Timor. The Panel rejected the EC argument that all passenger cars were like products and rather took a more nuanced view, based on data from the automotive industry itself.

Panel Report, Indonesia-Autos

One reasonable way for this panel to approach the "like product" issue is to look at the manner in which the automotive industry itself has analysed market segmentation. The United States and the European Communities have submitted information regarding the market segmentation approach taken by DRI's Global Automotive Group, a company whose clients include all major auto manufacturers, including KIA, PT TPN's national car partner..... DRI has in its analysis considered the physical characteristics of the cars in question when designing its segmentation. It has used as an initial filter the size of the vehicle, but it has then divided cars of a given size into upper and lower end categories, and has moved luxury cars, regardless of size, from lower segments to the E segment. We consider such an approach, which segments the market based on a combination of size and price/market position, to be a sensible one which is consistent with the criteria relevant to "like product" analysis under the SCM Agreement.³⁰

The Panel also concluded that finished Timors and comparable CKD car imports were alike in the circumstances of the case.

3.3.2 *The Domestic Industry*

Article 16.1 ASCM

Article 16.1 ASCM defines the domestic industry as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. There are two exceptions to this principle. First, and most importantly, where domestic producers are related to exporters or importers or themselves import the dumped products, they may be excluded from the definition of the domestic industry. Second, under restrictive circumstances, a regional industry comprising only producers in a certain area of a Member's territory may be found to exist. Last, it is noted that the definition of the domestic industry is closely linked to the standing determination that importing country authorities must make prior to initiation. This procedural issue is examined in the next section.

³⁰ *Panel Report, Indonesia – Autos*, paras. 14.177-14.178, footnotes omitted.

3.3.3 Material Injury Assessment

Article 15 ASCM

According to introductory Article 15.1 ASCM, the determination of material injury must be based on positive evidence and involve an objective examination of the volume of the dumped imports, their effect on the domestic prices in the importing country market and their consequent impact on the domestic industry.

However, the Appellate Body went on to emphasize due process rights of interested parties, emanating from Articles 6 and 12 ADA, against which the determination will be scrutinized.

Article 15.2 provides more details on the volume and price analysis, emphasizing the relevance of a significant increase in subsidized imports (either absolute or relative to production or consumption in the importing country Member) and price undercutting, depressing or suppressing³¹ effects of the dumped imports.

3.3.4 Subsidized Imports

All through Article 15, the notion of ‘subsidized imports’ is used. However, it happens often in CVD cases that some producers are found to have been subsidized while others did not benefit from subsidies. A conceptual issue then is whether such non-subsidized imports may be treated as subsidized in the injury analysis. By analogy to the *EC-Bed Linen*³² case, an anti-dumping case, this would appear not to be the case. In an important *obiter dictum* in that case, the Panel opined that imports from producers found not to have dumped, should not be included in the injury analysis.³³

“cumulation”

Article 15.3 legalizes the concept of cumulation. This principle means that where imports from several countries are simultaneously subject to anti-subsidy investigations, their effects may be assessed cumulatively for injury purposes as long as they do not qualify for the *de minimis* or *negligibility* thresholds and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic product. Many WTO Members apply cumulation almost as a matter of course as long as the thresholds are not met.

3.4 The Injury Factors

Article 15.4 requires that the examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry and then mentions 15 specific factors. Article 15.4 concludes that this list is not

³¹ Prevention of price increases that would have otherwise occurred.

³² Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (EC - Bed Linen), *WT/DS141/R*

³³ (EC - Bed Linen), *para. 6.138*.

exhaustive and that no single or several of these factors can necessarily give decisive guidance.

The 15 injury Factors, Article 15.4, ASCM

...actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes

By analogy to Panel and Appellate Body reports interpreting similar provisions in the ADA and the Safeguards Agreement, it seems beyond doubt that the evaluation of the 15 factors is mandatory in each case and must be clear from the published documents.

3.5 Causation/Other Known Factors

Footnote 47 ASCM

The evaluation of import volumes and prices and their impact on the domestic industry is relevant not only for the determination whether the domestic industry has in fact suffered material injury, but often will also be indicative of whether the injury has been caused by the dumped imports or by other factors. Footnote 47 ASCM refers back to Articles 15.2 and 15.4 ASCM that the demonstration of the causal link must be based on an examination of all relevant evidence before the authorities. The authorities must also examine any known factors other than the subsidized imports which are injuring the domestic industry at the same time and the injury caused by these other factors must not be attributed to the dumped imports. Article 3.5 then provides a non-exhaustive list of other factors which may be relevant depending on the facts of the case.

Other Factors, Article 3.5 ASCM

The volumes and prices of non-subsidized imports of the like product, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry

A WTO ADA Panel has held that, contrary to the Article 3.4 factors, the Article 3.5 factors need not be examined as a matter of course in each administrative determination. Rather, such examination will depend on the arguments made by interested parties in the course of the administrative investigation.³⁴

3.6 Threat of Injury

It may occur that a domestic industry alleges that it is not yet suffering material

³⁴ Panel Report, Thailand - Anti-Dumping Duties on Angels Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand -H-Beams), WT/DS122/R, para. 7.273.

injury, but is threatened with material injury, which will develop into material injury unless anti-subsidy measures are taken. However, Article 15.7 offers special provisions for a threat case, because such statements are easy to make and any investigation based on threat of material injury will necessarily be speculative because it involves analysis of events that have not yet happened. Thus, a determination of threat must be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances that would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a threat determination, the importing country authorities *should* consider, *inter alia*,

- nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;
- a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation;
- sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- inventories of the product being investigated.

No single factor will necessarily be decisive, but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent and that, unless protective action is taken, material injury would occur. The identical sentence in the ADA was an important reason for the *Mexico-Corn Syrup*³⁵ Panel to conclude that a threat analysis must also include evaluation of the injury factors.

3.7 Injury Margins

The determination whether dumping has caused material injury to the domestic industry producing the like product is generally made with respect to the country or countries under investigation. By nature, this is either an affirmative or a negative determination. If the determination is affirmative, WTO Members, which apply a lesser duty rule in accordance with Articles 8.1 and 9.1, will then calculate injury margins. The ADA does not give any guidance on such calculation and arguably leaves its Members substantial discretion. Suffice to say that injury margins are normally producer-specific and that they will compare the prices of imported and domestically-produced like products, focusing on whether the former are undercutting or underselling the latter.

³⁵ *Panel Report*, Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico – Corn Syrup), *WT/DS132/R and Corr.1*

3.8 Test Your Understanding

- 1. What can the allegedly subsidizing Member State do when accused of causing serious prejudice to the interest of another Member State under the multilateral track?**
- 2. List the key elements, which have to be assessed in the determination of “material injury”, under the CVD unilateral track.**
- 3. In the assessment of injury, which factors are the authorities obliged to examine? In regards to the assessment of a causal link, are there more factors?**
- 4. When determining a “threat” of injury, how shall the possibility of injury be characterized for the “threat” to justify countervailing measures?**

4. PROCEDURAL RULES/REMEDIES

The ASCM establishes two tracks to deal with subsidies: the unilateral CVD track and the multilateral remedy track. The purpose of the CVD track is to re-establish the level playing field for domestic producers, which face competition from subsidized imports. Thus, the imposition of a countervailing duty supposedly will offset the unfair advantage that the foreign exporters gained as a result of the subsidization. As the relevant procedure is a domestic one, the ASCM contains various procedural obligations that authorities wishing to investigate injurious subsidization must comply with.

However, a Member injured by another Member's subsidization may prefer the abolition of the subsidy programme itself. It is also possible that the Member in a third market feels the effects of the subsidy. In such cases, the ASCM provides for multilateral, accelerated track, dispute settlement procedures.

4.1 CVD Track

The following Articles of the ASCM contain important procedural provisions as far as CVD action is concerned:

- Article 11* Initiation and subsequent investigation, including the standing determination
- Article 12* Evidence, including due process rights of interested parties
- Article 13* Pre-initiation consultations
- Article 17* Provisional measures
- Article 18* Undertakings
- Article 19* Imposition and collection of countervailing duties
- Article 20* Retroactivity
- Article 21* Duration and review of countervailing duties and undertakings
- Article 22* Public notice and explanation of determinations, pertaining to initiation, imposition of preliminary and final measures
- Article 23* Judicial review

It falls outside the scope of this volume to discuss these procedural provisions in detail. However, the general tendency of Panels has been to interpret these provisions strictly and little deference is given to national implementation shortcuts that do not do justice to their plain meaning.

4.1.1 Initiation Procedures

Article 11 ASCM

A countervailing duty case normally starts with the official submission of a written complaint by the domestic industry to the importing country authorities

that injurious subsidization is taking place. This complaint is called the application in the ASCM. Article 11.2 contains requirements for the contents of this application.

Article 11.3 imposes the obligation on the importing country authorities to *review*, before initiation, the accuracy and the adequacy of the evidence in the application. However, as Article 11.3 does not provide any details on the nature of this review, it is difficult for Panels to judge whether importing country authorities have complied with Article 11.3.

Under Article 11.4 ASCM, importing country authorities must determine, *again before initiation*, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. As GATT Panels held several times that the failure to properly determine standing before initiation is a *fatal error*, which cannot be repaired retroactively in the course of the proceeding, this is a potentially outcome-decisive claim.

Article 13 ASCM

Article 13 ASCM requires an importing Member to engage in consultations with the exporting Member, prior to initiation, with the aim of clarifying the situation and arriving at a mutually agreed solution. Practice in jurisdictions such as the United States and the EC has shown that such consultations may be an important tool to limit the harassment aspect of a CVD investigation. Domestic industries tend to allege laundry lists of subsidy programmes in their applications and pre-initiation consultations may weed out programmes that are at face value non-countervailable (for example, because they are not specific or because they are not used by the exporters concerned).

“de minimis”

Article 11.9 contains the important *de minimis* rule that the investigation shall be promptly terminated if the subsidization margin is less than 1 per cent *ad valorem*. Similarly, prompt termination is required where the volume of subsidized imports, actual or potential, from a particular country is *negligible*. However, higher thresholds are provided for developing countries.

Article 11.11 provides that investigations shall normally be concluded within one year and in no case more than 18 months, after their initiation. The 18 months’ deadline appears to be absolute.

4.1.2 Due Process Rights

Article 12 and 22 ASCM

Articles 12 and 22 ASCM contain important due process rights of interested parties.

Article 22 obliges importing country authorities to publish public notices of initiation, and of preliminary and final determinations, with increasing degrees of specificity, as the investigation progresses. In addition, they must publish detailed explanations of their determinations. Conceptually, Article 12 violations will often be linked to substantive violations. Panel practice, however, is not entirely clear whether in such cases one or two violations exist.

Countervailing duty investigations, particularly at the company level, involve confidential and sensitive information because they require companies to submit to the importing country authorities company-specific information on customers, pricing and - sometimes - costing information in detail. In order to mount an optimal legal defence, interested parties ideally need access to the confidential information submitted by the opposing side (foreign producers and their importers versus domestic producers and vice versa). On the other hand, they will be extremely reluctant to provide their own confidential information to their competitors. Thus, to ensure fair play and equality of arms, a balance must be struck between these competing interests and a legal system must give opposing parties equal levels of access to information. Article 12.4 ASCM chooses the principle³⁶ that information which is by nature confidential or which is provided on a confidential basis shall, upon good cause shown, be treated as confidential by the authorities and shall not be disclosed without specific information of the party submitting it. However, the authorities shall require interested parties providing confidential information to provide meaningful non-confidential summaries thereof.

Other important due process rights in Article 12 include ample opportunity to present evidence in writing (Article 12.1), right of access to the file (Article 12.1.2 *jo.* 12.3), the right to a hearing (Article 12.2) and the right to be timely informed of the essential facts under consideration which form the basis for the decision whether to apply definitive measures (disclosure; Article 12.8).

Article 12.7 provides that in cases where an interested Member or party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

4.1.3 *Provisional Measures*

Provisional measures should preferably take the form of a security (cash deposit or bond) and may not be applied sooner than 60 days from the date of initiation and may not last longer than four months.

Article 18 ASCM

With regard to price undertakings, Article 18.1 envisages two types of undertakings: (a) an undertaking by the exporting country government to eliminate or limit the subsidy or to take other measures concerning its effects or (b) an undertaking by an exporter to revise its prices to eliminate the injurious effect of the subsidy or the amount of the subsidy itself, whichever is lower. Under the Agreement, imposition of anti-subsidy measures is discretionary and it is preferable that the measures are set at levels less than the subsidy margin, if such levels are adequate to remove the injury to the domestic industry.

³⁶ However, in an important footnote 17, Members recognize that in the territory of certain Members disclosure pursuant to a narrowly drawn protective order may be required. This is the case, *inter alia*, in the United States and Canada.

4.1.4 Countervailing Duties

Imposition of countervailing duties where injurious subsidization has been found is discretionary and use of a lesser duty rule is encouraged. Many WTO Members include a public interest clause in their national legislation to enable them to refrain from imposing duties, even where injurious subsidization is found.

If a countervailing duty is imposed, it must be levied on a non-discriminatory basis.

4.1.5 Retroactivity

Article 20 ASCM

Article 20 of ASCM provides for two types of retroactivity. First, where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

Second, definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days prior to the date of application of provisional measures in critical circumstances where for the subsidized product the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short time of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of the ASCM, and where it is deemed necessary, in order to preclude the recurrence of such injury, to assess countervailing duties retroactively on those imports.

4.1.6 Reviews

The ASCM recognizes three types of reviews of anti-dumping measures.

Article 19.3 ASCM

First, Article 19.3 requires importing country authorities to promptly – and in accelerated manner - carry out reviews requested by newcomers, *i.e.* exporters which are subject to a definitive countervailing duty, but which were not actually investigated (other than for refusal to cooperate).

Article 21 ASCM

Second, Article 21 provides for what can be called interim and expiry reviews. To start with the latter, definitive countervailing duties shall normally expire after five years from their imposition, unless the domestic industry asks for a review within a reasonable period of time preceding the expiry, arguing that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. During the five year period (hence the term interim review), interested parties may request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether

the injury would be likely to continue or recur if the duty were removed or varied, or both. In both cases, the measures stay in force pending the outcome of the review. In *US-Lead and Bismuth II*, the Appellate Body had the opportunity to expand on the nature of interim review investigations.

**Appellate Body
Report, US-Lead and
Bismuth II**

...we agree with the Panel that while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a “benefit” continues to flow from an untied, non-recurring “financial contribution”, this presumption can never be “irrebuttable”. In this case, given the changes in ownership leading to the creation of UES and BSplc/BSES, the USDOC was required under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a “benefit” accrued to UES and BSplc/BSES...³⁷

...We do not agree with the Panel’s implied view that, in the context of an administrative review under Article 21.2, an investigating authority must always establish the existence of a “benefit” during the period of review in the same way as an investigating authority must establish a “benefit” in an original investigation. We believe that it is important to distinguish between the original investigation leading to the imposition of countervailing duties and the administrative review. In an original investigation, the investigating authority must establish that all conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination.³⁸

Article 23 provides that Members, which do adopt countervailing duty legislation, must also maintain independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative final and review determinations.

4.2 Multilateral Track

Article 4 and 7 ASCM

Article 4 provides the remedies in case of prohibited subsidies while Article 7 provides the remedies in case of actionable subsidies. In both cases, the procedures have ‘teeth’, with short deadlines and workable remedies. As may be obvious, the procedure for dealing with prohibited subsidies is the strongest.

³⁷ Appellate Body Report, US- Lead and Bismuth II, para. 62.

³⁸ Appellate Body Report, US- Lead and Bismuth II, para. 63.

	<i>Prohibited subsidies</i>	<i>Actionable subsidies</i>
1	<i>Request for consultations, including statement of available evidence existence and nature of subsidy</i>	<i>Request for consultations, including statement of available evidence (a) existence and nature of subsidy (b) injury caused to domestic industry, nullification or impairment, or serious prejudice</i>
2	<i>Consultations as quickly as possible</i>	<i>Consultations as quickly as possible</i>
3	<i>If no solution within 30 days → referral to DSB for immediate establishment of Panel</i>	<i>If no solution within 60 days → referral to DSB for establishment Panel; composition of Panel and terms of reference within 15 days</i>
4	<i>Panel may request assistance PGE for binding advice on whether prohibited subsidy (this has not happened thus far)</i>	
5	<i>Circulation Panel report within 90 days of date of composition Panel/establishment terms of reference</i>	<i>Circulation Panel report within 120 days of date of composition Panel/establishment terms of reference</i>
6	<i>If prohibited subsidy, Panel recommends that Member withdraw subsidy without delay and specify the time period for withdrawal. Thus far, Panels have generally given 90 days.³⁹</i>	
7	<i>Within 30 days of circulation, report shall be adopted by DSB, unless appeal</i>	<i>Within 30 days of circulation, report shall be adopted by DSB, unless appeal</i>
8	<i>AB must normally issue decision within 30 days from notice of intention to appeal; in no event more than 60 days</i>	<i>AB must normally issue decision within 60 days from notice of intention to appeal; in no event more than 90 days</i>
9		<i>After adoption Panel/AB report finding adverse effects, subsidizing Member must take appropriate steps to remove the adverse effects or withdraw the subsidy</i>
10	<i>If DSB recommendation is not followed within time-period specified by panel (which commences from data adoption Panel/AB report), DSB grants authorization to complaining Member to take appropriate – proportionate – countermeasures.</i>	<i>If Member does not do so within six months from date of DSB adoption Panel/AB report, DSB grants authorization to complaining Member to take appropriate countermeasures, commensurate with degree and nature of adverse effects</i>
11	<i>Applicable DSU time-periods shall be half</i>	

4.2.1 Failure to Cooperate

Information concerning subsidization is in the hands of the Member providing the subsidies and often will not be publicly available. In the case of actionable subsidies, Annex V contains detailed provisions for unearthing all relevant evidence, including an admonition to the Panel to “draw adverse inferences

³⁹ *With the exception of the US-FSC Panel.*

from instances of non-cooperation”. While similar procedures are lacking in the context of prohibited subsidies, the AB has filled this lacuna.

**Appellate Body
Report, Canada-
Aircraft**

There is no logical reason why the Members of the WTO would, in conceiving and concluding the SCM Agreement, have granted panels the authority to draw inferences in cases involving actionable subsidies that may be illegal if they have certain trade effects, but not in cases that involve prohibited export subsidies for which the adverse effects are presumed. To the contrary, the appropriate inference is that the authority to draw adverse inferences from a Member’s refusal to provide information belongs a fortiori also to panels examining claims of prohibited exports subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.⁴⁰

4.2.2 Retroactivity

Article 4.7 provides that prohibited subsidies must be withdrawn without delay. The *Australia-Automotive Leather (Article 21.5-US)* Panel, in an Article 21.5 proceeding, determined that the term ‘withdraw’ encompasses repayment of the prohibited subsidy, thereby effectively adopting a retroactive remedy.

**Panel Report,
Australia-Automotive
Leather II (Article 21.5
– US)**

We believe it is incumbent upon us to interpret “withdraw the subsidy” so as to give it effective meaning. A finding that the term “withdraw the subsidy” may not encompass repayment would give rise to serious questions regarding the efficacy of the remedy in prohibited subsidy cases involving one-time subsidies paid in the past whose retention is not contingent upon future export performance...⁴¹

This decision was heavily criticized in the DSB and elsewhere. It went beyond what any of the parties to the dispute had argued, opened the door for retroactive remedies in violation of general WTO practice and might have far-reaching repercussions for future cases, if followed by other Panels. The Panel made much of the distinction between recurring and non-recurring (one-time) subsidies, but the United States position, advocating repayment only of the prospective portion, would have taken care of this. Furthermore, the Panel’s ruling arguably would create enormous liabilities for Members which granted prohibited recurring subsidies, for example, illegal duty drawback schemes. Interestingly, the United States and Australia in the aftermath of the report ignored the Panel decision and bilaterally settled the case by agreeing on repayment of the prospective portion only. Two subsequent Panels also declined to follow the road taken by the *Australia-Automotive Leather II* Panel.

⁴⁰ Appellate Body Report, Canada – Aircraft, para. 202.

⁴¹ Panel Report, Australia – Subsidies provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States (Australia – Automotive Leather II (Article 21.5 – US)), WT/DS126/RW and Corr. 1, para. 6.35.

**Panel Report, Canada-
Aircraft, (21.5 – Brazil)**

...Brazil has explicitly expressed the “hope” that the Panel does not consider itself bound to follow Australia - Leather Article 21.5. Indeed, Brazil “believes that the Panel in Australia - Leather [Article 21.5] reached a result that is not required by the language of the [SCM] Agreement”, and “does not believe that this or any other Panel should follow Australia - Leather [Article 21.5]”.

In light of these comments by Brazil, we consider that Brazil does not in fact want us to make any finding along the lines of Australia - Leather Article 21.5. The same is more obviously true of Canada. As noted above, we consider that a panel’s findings under Article 21.5 of the DSU should be restricted to the scope of the “disagreement” between the parties. In the present case, therefore, we do not consider it necessary to make any finding as to whether Article 4.7 of the SCM Agreement may encompass repayment of subsidies found to be prohibited.⁴²

**Panel Report, Brazil-
Aircraft (Article 21.5 –
Canada)**

...In this dispute, Canada has not claimed that the non-repayment, in whole or in part, of subsidies granted by Brazil represents a failure to “withdraw” the prohibited export subsidies in question. We recall that, under Article 3.7 of the DSU, the aim of the dispute settlement mechanism is to secure a positive resolution to a dispute, and that our role under Article 21.5 is to render a decision “where there is disagreement” as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations or rulings of the DSB. Accordingly, we shall address only claims that are put before us. Our silence on issues that are not before us should not be taken as expressing any view, express or implied, as to whether or not a recommendation to “withdraw” a prohibited subsidy may encompass repayment of that subsidy.⁴³

4.3 Test Your Knowledge

- 1. Before initiating an investigation, what procedural steps shall the importing countries authorities take? Could disregarding any of these steps lead to a substantial error?**
- 2. Which two types of price undertakings are foreseen in Article 18.1 ASCM?**
- 3. Under which condition can a final determination of threat of injury lead to retroactive application of the anti-subsidy measure?**
- 4. In the multilateral track, what different consequences are there between prohibited and actionable subsidies when a Member State does not comply with the recommendations adopted by the DSB?**
- 5. Explain the position taken by recent Panels with regard to repayment of prohibited subsidies as established by the Panel in *Australia – Automotive Leather II*.**

⁴² *Panel Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil)), WT/DS70/RW, paras. 5.47-5.48.*

⁴³ *Panel Report, Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 - Canada)), WT/DS46/RW, footnote 17.*

5. DEVELOPING COUNTRY MEMBERS/ECONOMIES IN TRANSITION

Article 27 ASCM

Article 27 ASCM provides special and differential treatment to developing countries in a number of ways. To properly understand the operation of this Article, it must be borne in mind that the ASCM distinguishes between two types of developing countries: Annex VII developing countries and other developing countries.

Developing Countries, Annex VII, ASCM

(a) Least developed countries designated as such by the United Nations which are Members of the WTO. Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached \$1 000 per annum:⁴⁴ Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.

5.1 Export Subsidies' Prohibition

Article 3.1 (a) ASCM

The Article 3.1(a) prohibition on export subsidies does not apply to Annex VII countries. Other developing countries have until 31 December 2002. However, these other developing countries must phase out their export subsidies within the eight-year period, preferably progressively. No developing country Member may increase the level of its export subsidies and it should eliminate them within a shorter period when the use of such export subsidies is inconsistent with its development needs.

Panel Report, Brazil-Aircraft

...The exemption for developing country Members other than those referred to in Annex VII from the application of the Article 3.1(a) prohibition on export subsidies is clearly conditional on compliance with the provisions in paragraph 4 of Article 27. Thus, we consider that, where the provisions in Article 27.4 have not been complied with, the Article 3.1(a) prohibition applies to such developing country Members.⁴⁵

Panel Report, Brazil-Aircraft

...we consider that, in order to assert and prove a claim of violation of Article 3.1(a) with respect to a Member that is a developing country Member within the meaning of Article 27.2(b), the Member asserting the claim must demonstrate that the substantive obligations contained in Article 3.1(a) of the SCM Agreement apply to the Member in question. In order to do this, the Member asserting the claim must demonstrate that the developing country Member concerned has not complied with the conditions stipulated in Article 27.4.⁴⁶

⁴⁴ Footnote 68 in ASCM: The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.

⁴⁵ Panel Report, Brazil – Export Financing Programme for Aircraft (Brazil – Aircraft), WT/DS46/R, para. 7.40.

⁴⁶ Panel Report, Brazil – Aircraft, para. 7.56.

If a developing country wishes to apply export subsidies beyond the eight-year period, it must enter into consultations with the Subsidies Committee not later than 31 December 2001. The Committee must determine whether an extension is justified on the basis of an examination of all the relevant economic, financial and development needs of the country in question. If the Committee agrees that an extension is justified, annual consultations must be held. If no determination is made, the developing country must phase out the remaining export subsidies within two years. The ASCM also introduces the notion of export competitiveness, defined as at least 3.25% in world trade of a given product (a section heading in the Harmonized System), for two consecutive years: where a developing country has reached such export competitiveness, it must phase out its export subsidies for that product within two years. However, Annex VII countries will then have eight years. Export competitiveness may be self-declared or determined on the basis of a computation by the WTO Secretariat at the request of a Member.

5.2 Import Substitution Subsidies

Article 3.1 (a) ASCM

The Article 3.1(b), prohibition on import substitution subsidies, did not apply to developing countries until 31 December 1999, and to least-developed countries until 31 December 2002.

5.3 No Presumption of Serious Prejudice

Article 6.1 ASCM

The Article 6.1, presumption of serious prejudice, does not apply to developing countries. Any finding of serious prejudice instead must be based on positive evidence. Regarding other actionable subsidies by developing countries, multilateral remedies may be authorized only where the subsidies result in nullification or impairment, in such a way as to displace or impede imports of a like product of another Member into the market of the developing country or unless injury to the domestic industry in the importing country market occurs.

5.4 Part III Actionable Subsidies

The Part III provisions do not apply to direct forgiveness of debt, subsidies to cover social costs, in whatever form, including relinquishment of government revenue and other transfer of liabilities when such subsidies are granted within and directly linked to a privatisation programme of a developing country, provided that both the programme and the subsidies involved are granted for a limited period, are notified to the Subsidies Committee and that the programme actually results in eventual privatisation of the company concerned.

5.5 De minimis/Negligibility

"de minimis"

For developing countries, the *de minimis* subsidy level is two per cent, while negligibility is defined as four per cent of total imports of the like product,

unless imports from developing countries together account for more than 9 per cent. For Annex VII countries the *de minimis* level is three per cent. It is emphasized that, as far as CVD action is concerned, this is the only special and differential treatment foreseen under the ASCM. The other exceptions discussed above only apply to the multilateral track. In other words, it is, for example, perfectly possible for Members to impose countervailing duties against export or import substitution subsidies.

5.6 Transition Economies

Article 6.1(d) ASCM

Transition economies have until 31 December 2001 to phase out export and import substitution subsidies. Until that same date, direct forgiveness of debt and grants to cover debt repayment within the meaning of Article 6.1(d) shall not be actionable and regarding other actionable subsidies, multilateral remedies may be authorized only where the subsidies result in nullification or impairment, in such a way as to displace or impede imports of a like product of another Member into the market of the developing country or unless injury to the domestic industry in the importing country market occurs.

5.7 Test Your Understanding

- 1. What are the different time limits for phasing out export subsidies when an Annex VII country has obtained “export competitiveness” in comparison to a developing country which is not included in Annex VII?**
- 2. Under what conditions can forgiveness of debts and subsidies to cover social costs be excluded from the application of Part III provisions?**
- 3. Under the unilateral track what is the only special treatment with regard to developing countries?**
- 4. Does this treatment apply to all developing countries under the ASCM regime?**

6. CASE STUDY

Country A is a Member of the WTO. In the year 2000, in order to boost the slumping domestic industry of cellulose, the government of country A issues certain measures. **These consist of:**

- A programme involving stocking of domestically produced ‘lumber’, setting a maximum price and guaranteeing supply of raw material;
- A scheme granting credit to exporters of finished paper to be offset against the payment of customs duties on subsequent imports;
- The reimbursement mechanism for production taxes is made more efficient for exporters. For cellulose exporters, the mechanism prescribes that when a company exports more than 60 per cent of its production, the tax payable on the cellulose sold on the domestic market is made payable at the end of the year instead of on a monthly basis;
- To 150 companies producing mainly cellulose, certain financial contributions, amounting to 0,9 per cent *ad valorem*, are made. The expressed purpose of these contributions is research and development, although it appears that some of the companies have used the financing for increased production.

Country B, an industrialized neighboring WTO Member, has a small domestically orientated cellulose industry with insignificant exports, producing 60 per cent of the country’s consumption of cellulose. Following the introduction of country A’s measures, domestic producers in country B experience a loss of market-share and a decrease in price of both cellulose and finished paper. Simultaneously, the world market share of country A and country A’s imports of cellulose in country B increase rapidly.

The producers in country B file a complaint before the competent authorities, and tension builds between the two countries.

- 1) You work for the government of country B and receive the complaint. You are made responsible for making a first evaluation of the situation. What is your position with regard to the following?
 - (a) The character of the four measures issued by country A. Do these measures fall under the definition of ‘subsidies’ provided by the ASCM?
 - (b) What are the possibilities to take action concerning the different measures, and can action be taken to stop the losses sustained by the finished paper industry in country B?
 - (c) If country A is a developing Country but does not figure in Annex VII of the ACSM, would your answer in (a) and (b) be different?

- 2) Suppose country C has an export oriented cellulose industry, originally mainly focused on neighbouring country A's market. Following the adoption of the measures in country A, country C's exports to country A registered a remarkable decrease. Can country D, neighbouring country of A and C, initiate countervailing duty action against country A alleging displacement of country C's exports of cellulose from country A to its own market?

7. FURTHER READING

- **Horlick, G and Clarke, P**, The 1994 WTO Subsidies Agreement, 17 World Competition, 1994, 41.
- **Jackson, J**, The World Trading System,
- **Quick**, Calculation of Subsidy, in Subsidies and International Trade, A European Lawyer's Perspective (ed. Bourgeois), 1991, 83 -
- **UNCTAD**, The Impact of Anti-Dumping and Countervailing Duty Actions on the Trade of Member States, In Particular Developing Countries. Main Issues and Areas of Concern that Need to Be Addressed in the Light of Concrete Experiences Presented by National Experts, Outcome of the Expert Meeting, TD/B/COM.1/EM.14/L.1, 12 December 2000.
- **UNCTAD**, Positive Agenda and Future trade Negotiations, Anti Dumping and Countervailing Duties, 2000, 287 – 308.
- **Vermulst, E and Graafsma, F**, WTO Dispute Settlement with respect to Commercial Defence Measures, Cameron May.
- **Vermulst**, EC Countervailing Duty Law and Practice Revisited: Leges bonae ex malis moribus proceantur, 27:3 Legal Issues of Economic Integration, 217 - 238 (2000)
- **Trebilcock, M., and Howse, R.**, The Regulation of International Trade, 2nd ed., Routledge

7.1 List of Relevant Panel and Appellate Body Reports

7.1.1 Appellate Body Reports

- Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations”- Recourse to Article 21.5 of the DSU by the European Communities (US- FSC (Article 21.5 - EC))* WT/DS/108/AB/RW, adopted 29 January 2002.
- Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 - Canada))*, WT/DS46/AB/RW, adopted 4 August 2000.
- Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil))*, WT/DS70/AB/RW, adopted 4 August 2000.
- Appellate Body Report, *Canada – Measures Affecting the Automotive Industry (Canada – Autos)*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000.

- Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US- Lead and Bismuth II)*, WT/DS138/AB/R, adopted 7 June 2000.
- Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” (US- FSC)* WT/DS/108/AB/R, adopted 20 March 2000.
- Appellate Body Report, *Brazil – Export Financing Programme for (Brazil – Aircraft)*, WT/DS46/AB/R, adopted 20 August 1999.
- Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft (Canada – Aircraft)*, WT/DS70/AB/R, adopted 20 August 1999
- Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut (Brazil – Desiccated Coconut)*, WT/DS22/AB/R, adopted 20 march 1997, DSR 1997:I, 167.

7.1.2 Panel Reports

- Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R and WT/DS234/R, circulated 16 September 2002
- Panel Report, *United States - Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, appealed 9 September 2002
- Panel Report, *United States – Section 129 (c) (1) of the Uruguay Round Agreement Act*, WT/DS221/R, adopted 30 August 2002
- Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/D213/R, appealed 30 August 2002
- Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R/Corr.1, adopted 29 July 2002
- Panel Report, *Canada – Export Credits and Loans Guarantees for Regional Aircraft*, WT/DS222/R/Corr.1, adopted 19 February 2002
- Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations”- Recourse to Article 21.5 of the DSU by the European Communities (US- FSC (Article 21.5 - EC))*, WT/DS108/RW adopted 29 January 2002, as modified by the Appellate Body Report WT/DS/108/AB/RW.
- Panel Report, *United States – Measures Treating Export Restraints as Subsidies (US-Export Restraints)*, WT/DS194/R, and Corr.2, adopted 23 August 2001.

- Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 - Canada))*, WT/DS46/RW, adopted 4 August 2000, as modified by the Appellate Body Report WT/DS46/AB/RW.
- Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil))*, WT/DS70/RW, adopted 4 August 2000, as modified by the Appellate Body Report WT/DS70/AB/RW
- Panel Report, *Canada – Measures Affecting the Automotive Industry (Canada – Autos)*, WT/DS139/R adopted 19 June 2000, as modified by the Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
- Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (US- Lead and Bismuth II)*, WT/DS138/R and Corr.2 adopted 7 June 2000, as upheld by the Appellate Body Report WT/DS138/AB/R.
- Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations” (US- FSC)*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report WT/DS108/AB/R.
- Panel Report, *Australia – Subsidies provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States (Australia – Automotive Leather II (Article 21.5 – US))*, WT/DS126/RW and Corr. 1, adopted 11 February 2000.
- Panel Report, *Brazil – Export Financing Programme for (Brazil Aircraft)*, WT/DS46/AB/R, adopted 20 August 1999, as modified by the Appellate Body Report WT/DS46/AB/R.
- Panel Report, *Australia – Subsidies provided to Producers and Exporters of Automotive Leather – (Australia – Automotive Leather II)*, WT/DS126/R, adopted 16 June 1999.
- Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry (Indonesia – Autos)*, WT/DS54/R and Corr. 1,2,3,4, WT/DS55/R and Corr. 1,2,3,4, WT/DS59/R and Corr. 1,2,3,4, WT/DS64/R and Corr. 1,2,3,4, adopted 23 July 1998.
- Panel Report, *Brazil – Measures Affecting Desiccated Coconut (Brazil – Desiccated Coconut)*, WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report WT/DS22/AB/R, DSR 1997:I, 189.