

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 Initiation Procedures | 27 |
| 4.1.2 Due Process Rights | 28 |
| 4.1.3 Provisional Measures | 29 |
| 4.1.4 Countervailing Duties | 30 |
| 4.1.5 Retroactivity | 30 |
| 4.1.6 Reviews | 30 |
| 4.2 Multilateral Track | 31 |
| 4.2.1 Failure to Cooperate | 32 |
| 4.2.2 Retroactivity | 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 5.3 <i>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 <i>List of Relevant Appellate and Panel Report</i> | 41 |
| 7.1.1 Appellate Body Reports | 41 |
| 7.1.2 Panel Reports | 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 reviews 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.

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_10736

