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Product and Service Subsidies in WTO Law: A Comparative Study

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Abbreviations

AB: Appellate Body

ASCM: Agreement on Subsidies and Countervailing Measures

BoP: Balance of Payment

DRAMs: Dynamic Random-Access Memories

DSB: Dispute Settlement Body

DSU: Dispute Settlement Understanding

EU: The European Union

EEC: European Economic Community

EC: European Communities

FSC: Foreign Sales Corporation

FSR: Foreign Subsidy Regulation

GATT: The General Agreement on Tariffs and Trade

GATS: The General Agreement on Trade in Service

GBER: General Block Exemption Regulation

GDP: Gross Domestic Product

GKN: Guest, Keen, and Nettlefolds

GOK: Government of Korea

HRS: Hot-Rolled Steel

IBRD: International Bank for Reconstruction and Development

IMF: International Monetary Fund

ITO: International Trade Organization

KEXIM: Export-Import Bank of Korea

LCA: Large Civil Aircraft

LDC: Least Developed Countries

MFN: Most Favored Nation principle

MTN: Multinational Trade Negotiations

MITI: The Ministry of International Trade and Industry

NMDC: National Mineral Development Corporate

NME: Non-Market Effect

OECD: Organization of Economic Cooperation and Development

ONIC: Office National Inter-professional des Céréales

PGE: Permeant Group of Exports

PROEX: The export financing support program of Brazil (Programa de Financiamento as Exportações)

SDF: Steel Development Fund

SOE: State-Owned Enterprise

SOCB: State-Owned Commercial Bank

S&D: Special and Differential Treatment

TFEU: Treaty on Functioning of European Union

UAE: the United Arab Emirates

UES: United Engineering Steels Limited

UK: The United Kingdom

US: The United States

USDC: The United States Department of Commerce

WTO: World Trade Organization

Acknowledgment

Abstract

Subsidies play a significant role in enhancing economies by providing financial assistance to specific firms or sectors of industry, stimulating economic growth, promoting innovation, and addressing market failures. Despite the positive effects of subsidies on domestic industries, they can also lead to negative consequences for international trade. When a country provides subsidies to its firms or industries on an unfair selective base, it can create distortions in global markets, giving them a competitive advantage over foreign competitors and hindering fair competition. This advantage can lead to trade disputes, retaliatory measures, and market distortions, ultimately impeding economic growth on a global scale. Therefore, striking a balance between the benefits of subsidies for domestic growth and the potential negative impacts on international trade is crucial, requiring careful consideration and coordination among countries to ensure a fair and prosperous global trading system.

In this regard, The World Trade Organization (WTO) is the essential body in addressing the impact of subsidies on international trade. It provides a platform for member countries to negotiate and establish rules governing subsidies to mitigate their negative effects. The WTO's Agreement on Subsidies and Countervailing Measures (ASCM) sets out guidelines and disciplines to ensure that subsidies do not distort international trade or harm other countries' industries. The WTO facilitates dispute settlement mechanisms to resolve conflicts arising from subsidies, allowing countries to seek remedies and maintain a fair trading environment.

The present research aims to address several challenges and complexities associated with the implementation and enforcement of the ASCM concerning product subsidies. Moreover, the essential need for international subsidy provisions in service-related sectors, along with the dearth of literature addressing this issue, provides a strong rationale for conducting this dissertation, which endeavors to fill this significant knowledge gap. To ensure the research questions raised in this dissertation are addressed comprehensively and systematically, doctrinal legal research has been conducted and both historical and comparative legal methods are employed as a research methodology.

This dissertation endeavors to analyze the legal challenges, deficiencies, and ambiguity in the definition of subsidies under the ASCM. That is to say, developing a solid definition of subsidies shall be treated as a priority because none of the ASCM's provisions can be applied unless the complaining Member demonstrates that the challenged measure constitutes a "subsidy" within the meaning of Articles 1 and 2 of the ASCM. Subsequently, the measure at hand can be classified and subject to other relevant provisions. For that purpose, this dissertation presents a comprehensive legal interpretation of the definition's terminologies. In particular, the "financial contributions", "entrustment and directions", "public body", "state-owned enterprises", "benefit", and "specificity". For instance, the proposed definition of public body combines three criteria: i) governmental control, with ownership and other elements mentioned by the Panel serving as substantial evidence; ii) the entity's reliance on public funds, public policies, or public objectives; and iii) the delegation of authority.

Additionally, this dissertation examines alternative market benchmarks for calculating the amount of benefit based on which the amount of subsidy shall be decided. It highlights some occasions when the commercial benchmark is not needed for the calculation, instead, theoretical reasoning is fully adequate. Furthermore, this dissertation explores the scenario where benefits from subsidies pass from an upstream producer (direct recipient) to another upstream producer (indirect recipient/beneficiary). It highlights that under specific conditions, subsidies can indeed exist in such cases. The research analyzes these conditions in detail to provide a comprehensive understanding of the complexities involved in determining the presence of subsidies in indirect recipient scenarios. Accordingly, this dissertation put forth the argument that specificity should be associated with the recipient of subsidies, irrespective of the final beneficiary. Moreover, this dissertation strongly advocates for the notion that addressing illegal subsidies requires more than merely satisfying the criteria of appropriateness or proportionality.

However, the ASCM is an important international agreement that regulates subsidies in the context of trade in goods, there is a growing need for a similar agreement that addresses subsidies and other forms of support in the context of trade in services. The importance of such an agreement cannot be overstated, as services have become an increasingly important

part of the global economy and international trade. Undoubtedly, the GATS is somewhat limited in its provisions regarding service subsidies. Rather than providing specific guidelines, the agreement simply calls on Member States to engage in negotiations to develop a set of rules to address service subsidies. Notably, there is no time limit specified for these negotiations, leaving the process open-ended and potentially subject to delays or uncertainty.

The four modes of service supply cut off the smooth flow of the negotiation rounds, particularly regarding the definition of service subsidies, the origin rule of service, and direct or indirect beneficiaries. Several additional factors complicated the discussion on service subsidy disciplines, such as concerns regarding the suitability of countervailing duties, and frequent use of subsidies for the purpose of achieving public policy and social goals. Therefore, during negotiation rounds, several key differences between products subsidies and service subsidies shall be considered. For instance, the impact of subsidies for services may be more difficult to measure, as the benefits may be more diffuse and less tangible than those of subsidies for goods. Further, this dissertation argues that the incentives on direct foreign investment (which can exist through Mode 3 of supply) should not be deemed as a "subsidy" unless they entail a transfer of financial resources from the government, directly or indirectly, to private businesses and embodied in a financial form such as tax exemptions, grants, etc.

This dissertation offers insights into the classification of service subsidies. Drawing inspiration from the EU State aid law, it proposes the creation of a "Permitted Subsidy" category, allowing certain subsidies for social and developmental purposes. Besides, the research highlights the significance of the "contingency test" in accurately determining the scope of prohibited subsidies. Regarding dispute settlement, the dissertation suggests following the phases outlined in the ASCM, as proposed by Switzerland. However, if the recommendations of the Dispute Settlement Body (DSB) are not implemented, the affected member may respond with retaliatory measures, such as the suspension or withdrawal of concessions specific to the subsidized sector.

Chapter 1: Introduction

1.1. Background of the research

1.1.1. Problem statement

The concept of a "night watchman state" emerged in the nineteenth century, particularly during the classical liberal movement. This concept refers to a minimal state whose functions are limited to providing essential services such as national defense, law enforcement, and the protection of property rights.[1] In other words, the night watchman state is based on the idea that the rule of government in society and economic practices should be minimized for human protection against force, fraud, and theft, and to secure the effective enforcement of various contracts. Thus, individuals should be free to pursue their own interests and make their own decisions without interference from the state.[2] This approach is mainly built upon the belief that, in the thought of Adam Smith as a classical liberal thinker, markets are self-regulating, and that government intervention can lead to inefficiencies and unintended consequences.[3] Additionally, Robert Nozick, a natural rights theorist, said "*Individuals have rights, and there are things no person or group may do to them (without violating their rights)*". He asserted that any form of redistribution in which the state chooses to interfere does indeed infringe those rights.[4]

The concept of the night watchman state has been influential in shaping political and economic perceptions, particularly in the United States (US) and other Western countries. However, some critics argue that the night watchman state fails to address issues such as inequality, poverty, and environmental degradation. It also can lead to the concentration of wealth and power in the hands of a few. For instance, Milton Friedman emphasized that the state should play a vital role in both social and economic regulations,

[1] Andrew Nestingen, 'From Punk to Social Democracy' in Mette Hjort and Ursula Lindqvist (eds.) *A companion to Nordic Cinema* (Willy Blackwell 2016) 307.
[2] Jonathan Wolff and Robert Nozick, *Property, justice and the Minimal states* (Polity Press 1991) 10.
[3] Feng Hui, 'On the economized state in the context of economic law science' in Jichun Shi (ed.) *Renmin Chinese Law Review* (Edward Elgar 2013) 53- footnote 5.
[4] James S. Coleman, Boris Frankel, and Derek L. Phillips 'Robert Nozick's Anarchy, State, and Utopia' (1976) 3 (3) Theory and Society, 437, 437.

like the cases of money supply for the economy, and charity for the poor.[5] As such, some economists have called for a more interventionist role of the government, addressing these issues and promoting greater social welfare.[6]

The call for stronger government intervention began to gain ground in the early twentieth century. For instance, in the US, Western Europe, and Japan, the expenditure of the government in the economy relative to the gross domestic product (GDP) significantly rose, from 12% in 1913 to 43% in 2018.[7] The post-World War II period saw the emergence of the welfare state in many Western countries, which involved a significant expansion of government programs and services aimed at promoting social welfare and reducing inequality. This approach was founded on the belief that government intervention was necessary to ensure social equity and economic stability.[8]

Nevertheless, the role of government in promoting social welfare and economic growth has remained a controversial and contested issue. Proponents of interventionist policies argue that they are necessary to address social and economic problems that the market cannot solve on its own, such as price control and wage control. However, critics of interventionist policies, like Mises, argue that they can lead to inefficiencies, distortions in the market, and a reduction in individual freedom.[9]

By means of explanation, subsidies, in the form of direct loans or tax exemptions, are the classical examples of supportive state intervention. As a case in point, when the government subsidizes (supports financially by loan or tax exemption for example) the domestic dairy producers over imported products, it certainly will affect both the domestic industry and the international trade of dairy products. Although it can lead to increased production and employment in the domestic dairy industry, it can also distort the market

[5] Brian Caterino and Phillip Hansen '*Critical Theory, Democracy, and the Challenge of Neoliberalism*' (University of Toronto Press 2019) 126.
[6] Feng Hui (n 3) 53.
[7] Gavin Poynter, *The Political Economy of State Intervention: Conserving Capital over the West's Long Depression* (Routledge 2021) 6.
[8] Gavin Poynter (n 7) 7.
[9] Sanford Ikeda, *Dynamics of the Mixed Economy, Toward a Theory of Interventionism* (Routledge 1996) 42.

by creating unfair competition with imports. This can result in a reduction in imports and a potential trade dispute with the countries that are affected by the subsidy.[10]

The World Trade Organization (WTO) negotiators have recognized such adverse effects of subsidies on international trade. Considering this, they have invested their efforts to establish a set of rules to regulate the use of subsidies and promote fair competition in international trade. One of the most significant agreements in this regard is the Agreement on Subsidies and Countervailing Measures (ASCM), which outlines rigorous rules to ensure a more controlled, regulated, and transparent application of subsidies by governments and to provide a framework for addressing related disputes. It is worth mentioning that only subsidies provided in the field of trade of goods fall under the ASCM.[11]

One current example of subsidies and their impact on other WTO countries is the ongoing dispute between the US and the European Union (EU) over subsidies to their respective aircraft manufacturers, Boeing and Airbus. Both the US and the EU have provided substantial subsidies to their respective aircraft manufacturers over the years, which has led to accusations of unfair competition and trade distortions.

On one hand, the US has provided billions of dollars in the form of subsidies to Boeing including tax breaks, research and development funding, and defense contracts. These subsidies enabled Boeing to offer its aircraft at a lower price, which harmed Airbus. When the competitive tensions between the US and the EU escalated, both sides filed complaints to the WTO. The US has argued that those subsidies are legal and necessary to support its aerospace industry.[12] In 2012, the WTO, however, ruled that some of these subsidies were illegal, then requesting the US to repeal the offending tax break subsidies.[13] Due to the US'

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[10] Luiz Carlos Bresser-Pereira 'Economic Reforms and Cycles of State Intervention' (August 1993) 21 (8) World Development, 1337, 1340.

[11] The Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [hereinafter ASCM].

[12] European Commission- Press Release, 'EU scores final victory in the WTO Boeing dispute' European Commission Official Website (March 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1892 > accessed 24 April 2020.

[13] *United States - Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) [2012] WTO Appellate Body Report 12 March 2012, WT/DS353/AB/R, paras. 1350 (iii) B -1352.

failure to comply with the WTO's ruling, the EU was granted permission, in 2019, to impose countervailing measures on US goods worth up to $4 billion annually in retaliation.[14]

On the other hand, the EU has also granted several subsidies to Airbus, including low-interest loans for new aircraft models, research and development funding, and government contracts.[15] In 2019, the WTO, once more, ruled that the EU had provided illegal subsidies to Airbus, allowing the US to impose countermeasures worth up to $7.5 billion on EU goods in retaliation.[16]

This ongoing dispute[17] highlights the negative impact of subsidies on other WTO countries, as they can distort trade and harm the competitiveness of unsubsidized firms. By way of illustration, the US estimated that the illegal subsidies granted by the EU had yielded economic advantages of around $200 billion in the interests of the EU.[18] In return, the EU claimed that the $23.7 billion provided by the US had caused serious prejudice, and therefore adverse effects to the interests of the EU and its Large Civil Aircraft (LCA) manufacturer (Airbus).[19] Moreover, this 17-year trade dispute also demonstrates the importance of evolving the effectiveness of the ASCM in governing subsidy policy and resolving disputes between countries with the aim of attenuating the proclivity for retaliation.

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[14] European Commission- Press Release, 'EU and US take decisive step to end aircraft dispute' European Commission Official Website (June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3001> accessed 24 April 2020.

[15] *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft* [2004] WTO Appellate Body Report 18 May 2011, WT/DS316/AB/R. 1412.

[16] European Commission- Press Release, 'EU and US take decisive step to end aircraft dispute' (n 14).

[17] One of the central factors contributing to the ongoing Airbus-Boeing dispute is the differing interpretations of what qualifies as a subsidy and whether the measures taken by the US or EU are adequate to align with the decision of DSB. However, the measures that have been taken to modify the disputed tax breaks and government contracts to comply with the requirements set forth by the WTO are insufficient to mitigate the distortion effects of subsidies as the parties claimed. See Stephen Shimada, 'EU-US airplane subsidy disputes: Airbus vs. Boeing '(PhD diss., University of Warwick, 2012) 210-211.

[18] DS353- *United States - Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, AB Report, para. 4.12.

[19] DS316- *European Communities and Certain member States - Measures Affecting Trade in Large Civil Aircraft*, AB Report, para. 4.515.

While the ASCM is an important international agreement that regulates subsidies in the context of trade in goods, there is a growing need for a similar agreement that addresses subsidies and other forms of support in the context of trade in services. The importance of such an agreement cannot be overstated, as services have become an increasingly important part of the global economy and international trade.

Trade in services has grown considerably in recent years, driven by factors such as technological advancements, globalization, and changing consumer preferences. The proliferation of new devices and improved communication networks has enabled professionals to provide advice remotely and monitor medical procedures through video conferencing. The availability of online information from around the world has opened new investment opportunities, while faster transportation has facilitated global business travel.[20] Services now account for a substantial and expanding role in the global economy, contributing significantly to both the GDP and employment. In developed economies, services make up approximately three-quarters of GDP. Over the period from 2005 to 2017, services trade demonstrated a remarkable average annual growth rate of 5.4%. This growth rate surpassed the rate of trade in goods, indicating the increasing importance and demand for services in international trade.[21]

The General Agreement on trade in service (GATS) acknowledges that services possess unique characteristics that distinguish them from goods. These characteristics include their intangibility, heterogeneity, customization, perishability, and the requirement for a physical presence. Unlike goods, services are delivered through interactions between people and may vary significantly in quality and characteristics, making it challenging to standardize and achieve economies of scale. To address these challenges, the GATS establishes rules and principles that ensure transparency, non-discrimination, and regulatory coherence. By recognizing the unique nature of services and providing a framework for their trade, the

[20] Nellie Munin, *Legal Guide to GATS* (Kluwer Law International 2010) 3.
[21] WTO Report, 'The Future of Service Trade' (Executive Summary, 2019) 7. <https://www.wto.org/english/res_e/booksp_e/executive_summary_world_trade_report19_e.pdf> accessed 25 April 2020.

GATS plays a crucial role in facilitating international trade in services and advancing global economic development.[22]

However, when it comes to service subsidies, the GATS is somewhat limited in its provisions. Rather than providing specific guidelines, the agreement simply calls on Member States to engage in negotiations to develop a set of rules to address service subsidies.[23] Notably, there is no time limit specified for these negotiations, leaving the process open-ended and potentially subject to delays or uncertainty. During negotiation rounds, several key differences between subsidies for services and subsidies for goods shall be considered. For instance, subsidies for goods are often easier to quantify, as they involve tangible products that can be measured and valued. Also, the impact of subsidies for services may be more difficult to measure, as the benefits may be more diffuse and less tangible than those of subsidies for goods. Moreover, subsidies for goods are often delivered through direct financial support, such as grants or tax breaks, whereas subsidies for services may take a more indirect form, such as regulatory or policy support. Hence, bearing in mind the unique nature of the services, the question might arise does the regulatory and policy support constitute a subsidy within the traditional meaning?

Overall, these differences highlight the complexity of challenges associated with regulating subsidies for services and underscore the need for specialized policies and regulations to ensure that subsidies are transparent and equitable and support the broader goals of economic growth and development.

1.1.2. Literature review

The literature on subsidies under the WTO, in particular the ASCM, is extensive and covers a wide range of topics. One important area of research has been to identify the different types of subsidies that exist, such as export subsidies, production subsidies, and research

[22] Nellie Munin (n 12) 6-7.
[23] Article XV of the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

and development subsidies.[24] Studies have also explored the effects of subsidies on trade in goods, including how they can distort markets and create unfair advantages for certain industries or countries, as well as the potential benefits they can provide to domestic industries and consumers by promoting fair competition.[25]

Singh demonstrated the difference between state aid, as a term used in EU law, and subsidy under the WTO. He deems the EU State aid as a primary aspect of subsidies.[26] From the perspective of the author of this dissertation, this description is fair enough. That is to say, despite the commonalities, several major differences can be found and made the scope of subsidies wider than the state aid.

Furthermore, Singh pointed out a dramatic dilemma that arises from the scarcity of balance between free trade and the environment. He added that in terms of subsidies, the ASCM is not sufficient to deal with this matter, since there is no unified provisions or environmental obligations that should be taken into consideration while granting any subsidy. In contrast, it is for the Member States to choose either trade or environmental standers. Credits are attributed to his suggestion to have a certain level of basic environmental obligations which would ensure harmony between free trade and sustainable development as objectives of the WTO.[27]

Moreover, Singh's book dives deeply into the classification of the subsidies under the ASCM (which categorizes them into three groups: prohibited, actionable, and non-actionable subsidies). In contrast, Singh divides them into two groups: justifiable and not justifiable subsidies, based on the legality of the action, and regardless of the right to impose countervailing measures.[28]

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[24] Jeong Yoon, Kangsik Choi, 'Why do export subsidies still exist? R&D and output subsidies' (2018) 45 Japan and the World Economy, 30. See also Mel Annand, Donald F. Buckingham, and William A. Kerr, 'Export Subsidies and the World Trade Organization' (Research paper No 1, 2001), and Sourafel Girma, Yundan Gong, Holger Görg, and Zhihong Yu. 'Can production subsidies explain China's export performance? Evidence from firm-level data' (2009) 111 (4) The Scandinavian Journal of Economics, 863.

[25] Gurwinder Singh, *Subsidies in the Context of the WTO's Free Trade System: A legal and Economic Analysis* (Springer, 2017), and Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press, 2014).

[26] Gurwinder Singh (n 25) 46.

[27] Gurwinder Singh (n 25) 283.

[28] Gurwinder Singh (n 25) 31.

Besides, Singh asserted that in order to determine whether or not subsidy exists within the meaning of the ASCM two major elements must be fulfilled, that are "financial contribution" and "benefit". He totally ignored the third main-factor which is the body entitled to grant this bounty. However, this dissertation emphasizes that those three elements must be deemed as one body that cannot be separated.[29]

Marc enriched the general understanding of the international law of subsidies. He introduced a new concept of attenuation of entitlement. This concept put forward that when subsidies, provided by a WTO Member, have the potential to harm the economy of another member, the injured Member retains the right to impose countervailing measures to alleviate the loss. Marc argued that while the right of members to protect their economy is important, it should not be exaggerated. As such, it can lead to undesirable economic and social outcomes. The legality of the attenuation can be discussed with respect to the developing countries. The discussion revolves around whether developing countries should be subject to the same strict regulations on subsidies as developed countries or if they require greater flexibility in their use of subsidies to promote economic growth and reduce poverty.[30] Both Marc[31] and Myers shed light on the positive goal of subsidy, direct or indirect, to support the industrial or economic sectors. After a deep analysis of the extent, causes, and consequences of perverse subsidies, they found out that the contradictory effect of the majority of subsidies can be traced to the "specificity" when the beneficiaries are limited. Thus, subsidies themselves are designed to assist firms in achieving the desired social and economic goals. However, due to their specificity, subsidies work in the opposite direction and cause damage.[32] That is to say the ASCM, unlike the State aid law, succeeded when it did not provide for a general prohibition of subsidies.

Additionally, Marc, in another book, addressed the question of whether an individual ruling of a panel or Appellate Body on a legal interpretation is decisive among the Member States. He argued that Members should not treat Panel and Appellate Body decisions as

[29] Gurwinder Singh (n 25) 84.
[30] Marc Benitah, *The law of subsidies under the GATT/WTO system* (Kluwer Law International B.V., 2001) 87-88.
[31] Marc Benitah (n 30) 274.
[32] Norman Myers and Jennifer Kent, *Perverse subsidies: how tax dollars can undercut the environment and the economy* (Island Press, 2001) 23-26.

precedential, because that was not the intended outcome at the time of acceptance of the Marrakesh Agreement. Rather, they should rely not only on the final finding but also on the analyses, reasoning, and circumstances in every case, especially when addressing issues arising from a member's imposition of countervailing duties.[33]

Furthermore, Marc asserted that the benefits of a subsidy can "pass-through" from the original beneficiary to another individual or entity, as demonstrated in scenarios such as changing the ownership of a firm. Marc referred to this concept as the "Successor Company" scenario and discusses three cases: the US-Lead and Bismuth II, the US-Countervailing Measures on Certain EC Products, and the US-Super Calendared Paper - in which this issue was addressed by panel and the Appellate Body under the WTO.[34] However, Marc did not delve into the reasoning or rationale behind the conclusions reached in these cases.

Hwang provided a practical analysis of one of the forms through which the subsidies can exist, in the context of the ASCM, which is when the government offers financial support to a private entity indirectly by entrusting or directing another private body. However, the ASCM says nothing about the interpretation of these terminologies. Therefore, this Article examined the legal meaning of the "Entrustment'" and "Direction" in the case law, in particular, the disputes involving Hynix, a South Korean manufacturer of semiconductors and memory chips.

The final finding of this Article is that stricter regulation and criteria should be required for the determination of "entrustment" than the determination of "direction". Stated differently, in the case of "direction" the addressee has no right to act according to its discretion, it must follow the command of the director. In contrast, under an entrustment, the addressee can have its discretion, so that the addressee can conduct various actions by its judgment under a given scope. Based on that, "directed subsidy" is limited to a certain financial contribution that is directed by the government. Conversely, "entrusted subsidy" extends to various financial contributions that are made at the discretion of the private body. Hence,

[33] Marc Benitah, *The WTO Law of Subsidies: A Comprehensive Approach* (Kluwer Law International B.V., 2019) paras. 4.3-7.10.
[34] Marc Benitah (n 33) para. 2.1.1.2.

the author agrees with the Appellate Body's finding, unlike the panel, that the factual findings on subsidies by government entrustment or direction are to be made based on an examination of the totality of the evidence, particularly in the analysis of circumstantial evidence.[35]

Dominic presented a comprehensive understanding of the underlying reasoning behind government subsidy provision. He addressed the inquiry of why governments resort to subsidization. Domonic posited several justifications, including income redistribution across regions, remedying market deficiencies, and modifying market outcomes, among others. Notwithstanding, this dissertation predominantly hinges on these rationales, aiming to scrutinize whether the ASCM has duly considered such valid justifications in the classification of subsidies.[36]

In the same speaking, Luca offered a conceptual analysis of the definitions of subsidy and State aid in the WTO and EU legal systems. His analysis did not only concentrate on the state of the law, but critically looked forward to suggesting new interpretations and law reform. He highlighted the strengths and weak points of the two notions. Especially, the general ban on State aid in the EU law that has no parallel in the WTO Agreement.[37] Several major differences can be found and made the scope of State aid wider than the subsidy. For instance, unlike the WTO Agreement, the State aid law covers both goods and services. In conclusion, the different goals of the two regulations, along with other factors, have a great influence in formulating the two definitions. He argued that both systems can learn valuable lessons from each other to achieve greater coherence and a more efficient regulatory system.[38]

Due to the increasing number of disputes on public subsidies, either before the WTO or the EU, enhancing international rules that regulate the state subsidies is an urgent need. Several authors have compared the WTO Subsidies and the European State aid, and Luengo's book

[35] Hyunjeong Hwang 'Entrusted or Directed Subsidies in WTO Disputes' (2018) 25 (2) Journal of International and Area Studies, 21, 33-34.
[36] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press, 2014).
[37] Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (OUP Oxford, 2009) 40.
[38] Luca Rubini (n 37) 34- 35.

is considered a successful attempt in this regard. In particular, the insight examination of the definitions of subsidy and State aid highlights the differences and similarities from a critical viewpoint and identifies the conflicts and challenges that arise from their interaction. He concluded that "*Although the EC State aid rules do not seek to comply with WTO obligations with respect to subsidies, the truth is that such rules may act as an effective filter to avoid possible conflicts that may arise with other WTO provisions*".[39]

Unfortunately, the scarcity of literature on subsidies in the service sector constitutes a significant gap in the academic discourse on international trade law. Despite the increasing importance of services in the global economy and the growing use of subsidies to support service industries, there has been a limited amount of literature on the legal and economic dimensions of service subsidies. The existing literature on subsidies has primarily focused on goods, with fewer studies examining the provisions and implications of subsidies for services. This dearth of literature may be attributed to several factors, such as the complexity and ambiguity of the legal framework governing service subsidies, the limited availability of data and information on service subsidies, and the lack of attention given to services in the broader context of international trade law. In addition, the existing literature on service subsidies may be fragmented across various disciplines, such as law, economics, and political science, which may hinder a comprehensive understanding of the issue. Despite these challenges, the limited literature on subsidies in the service sector highlighted the importance of further research to address this gap and to enhance the effectiveness of the regulation of service subsidies under the WTO.

The seminal book in this regard is "The Regulation of Subsidies within the Context of Service Subsidies" by Pietro Poretti. It is a comprehensive study of the legal and economic framework governing service subsidies in the context of the WTO. The book examines the provisions of the GATS in line with the ASCM. Thus, the author explored the complexities and ambiguities of the legal definitions of subsidies in general and the criteria for determining whether service subsidies can be classified as actionable or non-actionable under the ASCM. He also investigated the economic implications of service subsidies, such

[39] Gustavo E. Luengo, *Regulation of subsidies and state aids in WTO and EC law: conflicts in international trade law* (Kluwer competition law, 2007) 548.

as their effects on market competition, trade liberalization, and economic development. The book also includes case studies on service subsidies in various sectors, such as telecommunications, transportation, and financial services, to illustrate the practical challenges and opportunities of regulating service subsidies in international trade. The author suggested that a more comprehensive and coherent approach to regulating service subsidies is necessary to promote fair and open competition in international trade and to support the development of service industries in developing countries.[40]

Besides, Evans proposed a general outline that includes some elements to be taken into consideration while codifying any subsidy disciplines. For instance, the prohibition of subsidies that give competitive advantages for domestic products over imported ones. Additionally, GATT members, nowadays known as WTO members, may "notify" a subsidy maintained by another member and obtain a multilateral examination of its effects and its conformity with the rules.[41] Those recommendations were taken into account regarding the new provisions on the service subsidies in the fifth chapter of this dissertation.

1.2. Research design

1.2.1. Rationale of the research

In consideration of the previously discussed problems in line with the literature written on which, the research at hand is undertaken because of several challenges with the implementation and enforcement of the ASCM. Besides, both the necessity for international subsidy provisions in service-related sectors, and the absence of literature that addresses this topic constitute a compelling rationale for writing this dissertation that attempts to fill this knowledge gap.

Various drawbacks can be highlighted in the ASCM, such as the ambiguity in rules. The ASCM's rules on subsidies are complex and subject to interpretation, leading to disputes between member countries over the legality of certain subsidies. In particular, the meaning

[40] Pietro Poretti, *The Regulation of Subsidies within the Context of Service Subsidies* (Springer, 2018) 23-24-25.
[41] John W. Evans 'Subsidies and Countervailing Duties in the GATT' (1977) 3 (1) Maryland Journal of International Law, 211, 231.

of the terminology "public body" has often been a point of contention and can be unclear in some cases. As discussed in the third chapter, the term "public body" is used to describe entities that are controlled or owned by a government, and the rules surrounding subsidies for these entities are subject to interpretation.

One of the main disagreement points is whether certain subsidies provided by State-Owned Enterprises (SOEs) should be considered challenged subsidies or not. Another issue is the lack of clarity around what constitutes "control" of a public body. This can be mainly challenging in cases where the government owns only a minority stake in a company, or where there are complex ownership structures involving multiple layers of government control.

Moreover, the vague meaning of the term "benefit" and the method of calculating its amount is a complex issue. The ASCM does not provide a clear method, instead a guidance on how to calculate the "benefit" only regarding some forms of financial contribution. The calculation of the amount of the benefit can be sophisticated, as it may involve estimating the potential impact of the subsidy on the recipient's production costs, profits, or other economic indicators. The lack of clarity around the meaning of "benefit" and the methods of calculating its amount can make it difficult for member countries to determine whether a subsidy is "actionable" or "prohibited" under the ASCM, which can in turn lead to disputes and tensions between members. To address this issue, there have been ongoing discussions and negotiations among member countries to clarify the meaning of "benefit" and improve the transparency and consistency of subsidy calculations.[42]

Another justification for conducting research in this area is the possibility that the remedies available under the ASCM, such as countervailing duties, may prove to be insufficient in mitigating the harm resulting from subsidies. Furthermore, non-compliance with ASCM obligations by certain countries, including inadequate notification of subsidy programs or non-implementation of WTO-ordered remedies, may exacerbate the difficulties associated with addressing the negative effects of subsidies.

[42] Phillip Bentley QC and Aubrey Silberston CBE, *Anti-Dumping and Countervailing Action: Limits Imposed by Economic and Legal Theory*, (London: Sweet & Maxwell, 1984) 26-27-28.

The WTO Working Party on GATS Rules has been discussing services subsidies since 1996, but the negotiations have been slow and ultimately stalled. The lack of negotiating interest may have several underlying causes. For instance, subsidies are extensively employed to guarantee the provision of essential services, maintain viable public service sectors, attract foreign direct investment, or encourage research and development. Secondly, the discussions on possible disciplines for non-discriminatory, trade-distorting subsidies under the GATS have occurred in a context where trade-impeding barriers persist, such as quantitative market access restrictions, economic needs tests, and discriminatory barriers. It is noteworthy that the disciplines on subsidies related to goods trade only began to take hold after the gradual removal of the direct barriers to goods trade. Finally, identifying trade-distorting subsidies based on their actual impact on flows of services trade has posed a challenge in the past, partly due to the four different modes of supply in services trade.[43]

Research into these issues could help to identify ways to strengthen the ASCM and improve the regulation of subsidies in international trade. Moreover, the current dissertation could contribute new insights and understanding of the role of subsidies in supporting both trade sectors (goods and services) and provide valuable recommendations for policymakers and industry practitioners. By filling a crucial gap in the literature, such a dissertation could help inform and shape future research in this field and potentially have significant real-world implications for businesses and governments alike.

1.2.2. Research questions

The ASCM was not originated from scratch, rather the first Articles concerning the "subsidy" were initially included in the GATT 1947. Over the subsequent decades, there have been several developments that have contributed to the evolution of anti-subsidy provisions in international trade, leading to the current framework under the ASCM. Thus, the first question that this dissertation aims to examine is:

[43] International Monetary Fund, Organization for Economic Co-operation and Development, and World Bank, *Subsidies, Trade, and International Cooperation* (International Monetary Fund, 2022) 19-20.

What were the key legal challenges and deficiencies in the GATT system regarding subsidies that led the contracting parties to consider negotiating a new agreement?

Undoubtedly, the effectiveness of the ASCM is contingent upon the clarity and precision of its definition of "subsidy". Two of the factors that have brought about the ambiguity of the definition include the unclear meaning of "public body" and the interpretation of "benefit." By examining the nuances and complexities of the definition, scholars and policymakers can identify potential areas for improvement. It also contributes to the ongoing efforts to establish a more effective framework for regulating subsidies in international trade. Thus, the second question is:

To what extent does the definition of subsidy require refinement or enhancement to secure the effective implementation of the ASCM?

The ASCM provides various remedies to address the negative effects of different types of subsidies on domestic industries and international trade. These remedies include, among others, the withdrawal of the subsidy. Despite the availability of these remedies, there are limitations in their application. Neither the ASCM itself, nor its interpretation by the Dispute Settlement Body (DSB) has been able to determine the scope of these measures. This lack of clarity undermines the effectiveness of these remedial measures in mitigating the harmful impact of illegal subsidies. Consequently, there is a need for further clarification and guidance on the application of these remedies to ensure that they are implemented effectively and in a manner consistent with the objectives of the ASCM. Thus, the third key question is:

Are the remedial measures presented by the ASCM sufficient and adequate to counteract and indemnify the adverse effects of the different categories of subsidies?

Given that the objective of subsidy disciplines, such as the ASCM and EU State aid regime, is to prevent trade distortion, the Members of the GATS recognize that subsidies in the service sector are most likely to have distortive effects on trade. Hence, the GATS mandates

Members to engage in negotiations and information exchange regarding service subsidies. The goal of this cooperation is to develop multilateral disciplines and address countervailing procedures to cease the adverse effects of illegal subsidies in trade in services. However, negotiations have not yet yielded any significant results. Considering that establishing a framework for service subsidies in international trade is a crucial accomplishment, the last question addressed in this dissertation is:

> *What are the possible legal challenges associated with extending the ASCM to service subsidies within the GATS framework?*

By addressing those essential points along with several supporting questions, this research can achieve its goal and draw a well-founded conclusion.

1.2.3. Objectives and significance of the research

In light of the aforementioned research questions, the objectives of this research can be broken down in the following manner. This dissertation endeavors to analyze the legal challenges, deficiencies, and ambiguity in the definition of subsidies under the ASCM. That is to say, developing a solid definition of subsidies shall be treated as a priority because none of the ASCM's provisions can be applied unless the complaining Member demonstrates that the challenged measure constitutes a "subsidy" within the meaning of Articles 1 and 2 of the ASCM. Subsequently, the measure at hand can be classified and subject to other relevant provisions. For that purpose, this dissertation presents a comprehensive legal interpretation of the definition's terminologies. In particular, the "financial contributions", "entrustment and directions", "public body", "state-owned enterprises", "benefit", and "specificity".

Another pertinent objective of this dissertation is to enhance and strengthen the effectiveness of the remedial measures outlined in the ASCM to mitigate the adverse effects of different categories of subsidies, without creating additional trade barriers, as is currently happening. One approach used to achieve this goal is to emphasize the difference between countervailing measures imposed during and after the investigation phase. This dissertation

will also evaluate the potential impact of these measures on international trade and provide recommendations for improvement through analysis of numerous cases.

Furthermore, this dissertation attempts to develop a theoretical framework for the new anti-subsidy provisions in the service sector. Through a comprehensive analysis of the unique features of the GATS and the feasibility of extending the ASCM to the service sector. This study aims to provide recommendations and modifications to ensure the effective regulation of service subsidies under the umbrella of the WTO. It will contribute to the current literature by introducing a new category of subsidies called the "permitted category", including certain subsidies in the service sector. Additionally, this study highlights the importance of the "contingency test" in determining the scope of "prohibited subsidy".

1.2.4. Scope and limitation of the research

This dissertation covers the subsidy-related challenges within the framework of the WTO system. Precisely, the research addresses the subsidy issue in both products and services sectors, as a whole sectors of trade, with a particular focus on the ASCM. It is highly important to mention that this research does not dive into the details of any specific provisions concerning individual products or services.

To put it out clearly, the research consists of four key chapters, apart from the introduction and the conclusion chapters, that analyze the historical and legal development of subsidy provisions under the GATT, ASCM, and GATS. As such, this dissertation does address neither the Agreement on Fisheries Subsidies, which is limited to marine wild capture fishing and fishing-related activities at sea,[44] nor the Agreement on Agriculture, which is applied only to agricultural products.[45] For further explanation, the Agreement on Fisheries Subsidies was negotiated as part of the WTO's Doha Development Agenda, which was launched in 2001. The Agreement is a response to the growing recognition that overfishing is a significant threat to marine ecosystems and the livelihoods of millions of people who

[44] Article 1 of the Agreement on Fisheries Subsidies, adopted on December 15, 2020, WT/MIN (20)/15.
[45] Such as, raw silk and silk waste, wool and animal hair, essential oils etc. Annex 1 of the Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

depend on fishing for their income and food security. The Agreement seeks to address this threat by prohibiting certain types of subsidies that contribute to overfishing, such as subsidies for fuel, vessel construction, and fishing access fees. These subsidies can encourage unsustainable fishing practices by making them more profitable, leading to overfishing and the depletion of fish stocks. The work on fisheries subsidies was carried out in cooperation with relevant intergovernmental bodies to avoid over-capacity and over-fishing, and the goal is to clarify and strengthen disciplines under the ASCM with respect to such subsidies.[46]

Similarly, the Agreement on Agriculture was negotiated as part of the Uruguay Round of multilateral trade negotiations that led to the creation of the WTO in 1995. The Agreement aims to promote fair competition in agricultural trade by reducing subsidies and trade barriers that distort markets. The Agreement is limited to agricultural products because agriculture is a significant sector in many countries, and subsidies and trade barriers in this sector can have a significant impact on trade and market competition.[47] For example, Article 9 of the Agreement on Agriculture recognizes the special and differential treatment for developing countries in the context of agricultural subsidies. It acknowledges the need for developing countries to have flexibility in their use of subsidies to promote agricultural development and allows them to provide certain types of subsidies that are exempted from reduction commitments under the Agreement. These subsidies are referred to as "*de minimis*" measures and include subsidies that have minimal trade-distorting effects or are intended to assist low-income or resource-poor producers. Developing countries are also allowed to use subsidies to address food security concerns, such as providing food to vulnerable populations or supporting domestic food production.[48]

In summary, both the Agreement on Fisheries Subsidies and the Agreement on Agriculture were created to address specific issues related to subsidies regarding specific products for sustainable development and economic, and environmental purposes. Additionally, both

[46] Anja Von Moltke, *Fisheries Subsidies, Sustainable Development and the WTO* (Routledge, 2014) 140-141.
[47] Michael Cardwell, Margaret R. Grossman, and C. P. Rodgers, *Agriculture and International Trade: Law, Policy, and the WTO* (CABI Publishing, 2003) 32.
[48]Anwarul Hoda and Ashok Gulati, *WTO Negotiations on Agriculture and Developing Countries* (World Scientific, 2008) 31.

Agreements have not included specific provisions related to the definition, categories, or remedies of subsidies. Rather, both Agreements refers to the ASCM as the primary instrument for regulating subsidies in international trade. This reflects the recognition of the ASCM as a comprehensive framework for addressing the complex issues concerning subsidies and countervailing measures.

Moreover, it is crucial to emphasize that this research provides a comprehensive evaluation of the topic at hand from a legal perspective, but not from an economic viewpoint. That is to say, this research will not examine the direct economic effects of subsidies on industries or economies. While subsidies can have a direct impact on the competitiveness of industries and markets, their broader economic implications are complex and multifaceted. These broader economic implications fall outside the scope of this research. For example, subsidies can affect market competition by giving certain industries or companies an unfair advantage over others, which can lead to market distortions and hinder innovation. Additionally, subsidies can have an impact on consumer welfare by influencing the availability and prices of goods and services.

1.3. Research methodology

To ensure the research questions raised in this dissertation are addressed comprehensively and systematically, doctrinal legal research has been conducted and both historical and comparative legal methods are employed as a research methodology.

The doctrinal legal research facilitates the analysis of legal materials such as statutory instruments, legal treaties and agreements (such as the Treaty on Functioning of European Union (TEFU), the GATT, and ASCM, etc.), case law, and legal commentaries to gain an in-depth understanding and interpretation of legal concepts (for instance, public body, specificity, and de Minimis, etc.) principles, and rules that are pertinent to those research questions. Doctrinal legal research involves a rigorous analysis of legal materials that assist in obtaining the ability to think as a lawyer to deduce legal propositions based on legal reasoning and rationale. The use of the doctrinal method enables this dissertation to provide

an exhaustive and structured analysis of legal issues and guarantees the validity and reliability of the research findings.[49]

Historical legal method is implemented, particularly in the second and fifth chapters, to explore the circumstances that led to the adoption of existing agreements (GATT, GATS, and ASCM) and reveal why particular provisions of those agreements were articulated in the form in which they appear.

Moreover, the comparative legal method involves the comparative study of comparable laws from different jurisdictions and exhibits the lessons that can be learned from each other's failures and achievements. According to Mark Van, there are six commonly used comparative methods, including the functional, structural, analytical, law in context, historical, and common core methods. In this dissertation, the functional and analytical methods are employed. The functional approach involves identifying common legal issues and seeking solutions in compared legal systems. The meaning of legal concepts used in these legal instruments is significant when applying them to real cases. Therefore, the findings from functional comparison lack efficiency without analytical comparison. Mark Van explains the analytical comparison as discovering the same legal concept with different meanings in various legal systems. This dissertation aims to explore relevant concepts, their use, and their purpose in different jurisdictions using this methodology. The consulted sources include academic literature and judicial interpretations of legal instruments.[50]

In this dissertation, the comparison has been conducted in two forms. On the one hand, the aim of this research is to make some part of the internal coherence and harmonization in the WTO system regarding subsidies and to build a general framework for a new set of anti-subsidy rules in the services sector. Thus, the comparison is made among the WTO agreements without any external elements. Within the WTO system, the GATT is an essential agreement to be considered when examining the ASCM. While the GATT primarily regulates trade in goods, it also includes provisions on subsidies that are relevant

[49] Terry Hutchinson, 'Doctrinal Research: Reseaeching in Jury' in Dawn Watkins and Mandy Burton (eds), *Research Methods in-law* (Routledge, 2013).
[50] Mark Van Hoecke 'Methodology of Comparative Legal Research' (2015) Law and Method, 1. <file:///C:/Users/shady/Downloads/Methodology_of_Comparative_Legal_Research.pdf> accessed 14 October 2020.

to the ASCM. For instance, Article XVI of the GATT prohibits subsidies that increase exports or that are tied to the use of domestic goods. Besides, the GATS is another relevant agreement for comparison. While the ASCM focuses primarily on subsidies in the goods sector, the GATS regulates subsidies in the services sector.

On the other hand, this dissertation intends to enhance and develop the quality and sufficiency of the existing WTO anti-subsidy provisions, then it compares the WTO system of subsidy with the EU State aid regime as an important subsidy regime at the European level. Understanding the interplay between the WTO and EU subsidy regimes can provide insights into the implications for global trade dynamics, market access, and the overall functioning of the international trading system. Thus, this comparison provides a more comprehensive understanding of the regulation of subsidies in international trade. By identifying similarities and differences between the two regimes, it is possible to identify potential areas of conflict or cooperation, and to highlight various valuable lessons that can promote their effectiveness. It allows for a deeper analysis of the strengths and weaknesses of each system, leading to insights on how to improve and refine subsidy regulations globally.

1.4. Research structure

1.4.1. Chapter 2

Over the course of 50 years, the GATT was built on several principles to promote world trade liberalization and economic globalization, including non-discrimination, national treatment, most favored nation treatment, reciprocity, transparency, tariff reduction, and the elimination of quantitative regulations. However, after World War II, many governments used tariffs as a tool to protect their domestic industries, which had negative effects on international trade. The GATT focused on reducing tariffs and non-tariff trade barriers, including subsidies. The GATT introduced multilateral international rules on subsidized trade, as subsidies were found to have harmful effects on international trade.

The existing provisions, such as Articles VI, XVI, and XXIII of the GATT 1947 were exploited by contracting members who increasingly used subsidies to protect their

domestic products with preferential treatment. This led to the development of the Subsidies Code in 1979, which was insufficient in addressing all issues related to subsidies. This called for another agreement on subsidies, which resulted in the ASCM in 1995. This chapter analyzes the historical development of subsidy provisions under the GATT and ASCM, through examining critically the three mentioned Articles, the modifications made during the review session in 1955, and the gaps that led to the Subsidies Code. Additionally, a discussion on the Automobile Industry War between Japan and the US, which played a crucial role in the creation of the ASCM. The objective of this chapter is to examine whether the ASCM could successfully evade the previous legal drawbacks related to subsidies in international trade.

1.4.2. Chapter 3

This chapter attempts to evaluate the adequacy of the definition of "subsidy" under the ASCM. This definition is composed of four key elements that are subject to critical analysis in order to identify any loopholes or gaps that may impact the effectiveness of the Agreement. To do so, this chapter compares the definition in question with the European State aid definition and examines significant case-law.

The first Article of the ASCM defines subsidy as "*a financial contribution by a government or any public body within the territory of a Member... that conferred a benefit*." The analysis focuses on the three substantive elements that must be met for a subsidy to exist. It should be noted that subsidy, in itself, is not prohibited and cannot be subject to countervailing measures, unless a supplementary element has been fulfilled. Therefore, Article 2 of the ASCM provides for the additional factor of "specificity". That is to say, in order for subsidy to be illegal, it must be specific to an entity or group of entities, industry or group of industries, or entities or industries in a certain region.

The critical interpretation of the definition of subsidy provides valuable insights into the practical application of the ASCM. By identifying areas where improvements can be made, this analysis aims to create a more robust and comprehensive framework for regulating subsidies in international trade. Furthermore, this chapter provides a roadmap for future

research to address gaps or weaknesses in the Agreement and further improve its effectiveness.

1.4.3. Chapter 4

This chapter explores the three main categories of subsidies: Red, Green, and Amber, which are classified based on their trade-distorting effects. The Red Subsidies are prohibited, while Green Subsidies are non-actionable, and Amber Subsidies are actionable. The chapter examines each category in detail, outlining the specific disciplines and remedial provisions that apply to each. Hence, some recommendations are suggested to empower the effect of the remedies to eventually promote fair competition among Members.

Furthermore, the chapter highlights the special and differential treatment (S&D) provisions for developing nations, which are contained mainly in Articles 27 and 29 of the ASCM. These provisions vary depending on the level of economic development of the country and include measures to increase trading opportunities for developing nations. Finally, the chapter briefly discusses the European State aid law and its classification of State aid into three categories: prohibited, semi-permitted, and absolute-permitted. Moreover, the EU recognizes the possible challenges and distortions that might emerge due to subsidies from third countries, then introduced new regulation to tackle this concern known as Foreign Subsidies Regulation. The chapter draws parallels between the European State aid regime and the ASCM, and explores potential modifications to the ASCM provisions based on the European State aid framework.

1.4.4. Chapter 5

The GATS has three pillars: transparency and predictability of rules, providing a common framework of disciplines governing international transactions, and progressive liberalization. Despite some similar principles between the GATT and GATS, the National Treatment and Market Access have special provisions in the context of the latter. The primary objective of subsidy disciplines, such as the ASCM and the EU State aid law, is to prevent the adverse impact on trade caused by unfair subsidies. The GATS Members acknowledge that the subsidy may also have distortive effects on trade in services.

Accordingly, the GATS calls on Members to engage in negotiating and exchanging information on service subsidies to develop multilateral disciplines, and tackle countervailing procedures, taking into consideration developing countries. Despite negotiations, no fruitful achievement has been made yet. Bearing in mind that establishing a framework for service subsidies in international trade is a crucial victory, this chapter aims to analyze the unique nature of the GATS and the feasibility of extending the ASCM to the service sector from a legal perspective.

1.4.5. Chapter 6

The ASCM stands as a pivotal international agreement governing subsidies in the realm of trade in goods. An intriguing gap emerges when considering subsidies in the context of trade in services. It is important to recognize that services play an increasingly vital role in the global economy, and subsidies have become a prevalent means of supporting service industries. This chapter concludes the dissertation by emphasizing the challenges and complexities surrounding the implementation and enforcement of the ASCM. Moreover, it sheds light on the necessity for international subsidy provisions in service-related sectors. Additionally, it proposes the key points to clarify the ambiguity surrounding the interpretation of various concepts, such as "public body", "specificity", and "benefit". It also discusses three alternative benchmarks for the purpose of the calculation of benefits. It argues for the introduction of a "punitive countermeasure" that would exert greater pressure on defending Members to withdraw prohibited subsidies. Finally, it suggests that the provisions outlined in the ASCM can, to a certain point, be extended to the service sector. However, certain modifications are recommended to enhance their efficiency and optimal implementation.

1.5. Conclusion

In addition to the ongoing debate over the role of government intervention in the form of subsidies, it is clear that there is a need for greater regulation and oversight to ensure the optimal usage of subsidies and reduce their adverse effects. In recent years, there has been increasing concern over the unequal distribution of wealth and power, and the negative impact of globalization on vulnerable populations and the environment. These concerns

have led to calls for greater regulation of international trade and investment, as well as efforts to promote sustainable development and social justice.

Subsidies, as a form of supportive state intervention, can have both positive and negative effects on domestic and international trade, as demonstrated by the ongoing dispute between the US and the EU over subsidies to their respective aircraft manufacturers. The ASCM plays a crucial role in regulating subsidies and resolving disputes between countries. However, there is a growing need for a similar agreement that addresses subsidies and other forms of support in the context of trade in services, given the unique characteristics of services and their growing importance in the global economy. Therefore, specialized policies and regulations are needed to ensure that subsidies for services are transparent and equitable, and to support the broader goals of economic growth and development.

Overall, to address these challenges, there is a need for more significant international cooperation and coordination, as well as innovative approaches to ensure that subsidies and other forms of support are well articulated and monitored by the WTO to maximize their advantages.

Chapter 2: Legal and historical overview of the antecedents of the WTO subsidy agreement

Some phenomena, like the economic collapse that followed the two WWII in Europe and some other parts of the world, cannot be hidden or even ignored. Governments reacted promptly to the aftermath of World War II, taking action to address the economic, social, and political challenges that arose during this period. The leading nations have begun to work together to rebuild their economies and enhance international relations, especially in the field of trade.[51] One of these attempts was embodied in concluding the GATT.

In 1944, the US invited its alliances during wartime to participate in the Bretton Woods Conference, formally known as the United Nations Monetary and Financial Conference. It was named after holding it in Bretton Woods, New Hampshire, in the presence of delegates from 44 allied nations. It resulted in setting up two of the most important international economic institutions of the post-war period, namely the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF).[52] However, the negotiating parties could not fulfill the third main goal of the conference, which was the creation of an International Trade Organization (ITO) to control and organize cross-border trade.[53]

Although the ITO has not been brought into being, the desire to have an international system of trade has not diminished. Eventually, representatives of 23 countries, led by the

[51] Ronald Findlay and Kevin H. O'Rourke, *Power and Plenty: Trade, War, and the World Economy in the Second Millennium* (Princeton University Press, 2009) 473.
[52] Douglas Irwin, Petros C. Mavroidis, and Alan O. Sykes. 'The Genesis of the GATT' (2008) Research Gate, 53. < https://www.researchgate.net/publication/265001187> accessed 12 January 2020.
[53] Douglas Irwin 'The GATT in historical perspective' (1995) 85 (2) The American economic review, 323, 327.

US[54], Canada, and the United Kingdom (UK),[55] convened at a conference in the Palais des Nations in Geneva, Switzerland. The conference spanned from April to October 1947, and it resulted in concluding the GATT, as a multinational legal agreement on the trade of goods.[56] The essential aim of the GATT was to promote international trade by reducing or abolishing trade barriers like tariffs and quotas. This system of multilateral cooperation was adequate to ensure the flourishing of international trade for over half a century.[57] The GATT entered into force on January 1, 1948. It remained in effect until 123 nations signed the Marrakesh Agreement on April 14, 1994, which established the WTO.[58]

The GATT was articulated coherently and understandably and based on several fundamental principles. For instance, non-discrimination among member states, national treatment, most favored nation treatment (MFN), reciprocity, transparency, tariff reduction, non-discriminatory administration of quantitative restrictions, and general elimination of quantitative regulations. Accordingly, the GATT, over 50 years, was dedicated to promoting and enhancing world trade liberalization and economic globalization.[59]

Due to the adverse economic effects of World War II (1939-1945), the majority of governments used tariffs[60] as a less complicated measure to recover their economy. They used tariffs as a tool to raise revenue and protect domestic industries and currency value.

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[54] In the twentieth century, the US was the primary driving force behind globalization and trade liberalization worldwide. However, in the early twenty-first century, it lost its dominant position as the world's leading exporter. Consequently, its enthusiasm for promoting globalization and free trade also waned. Signs of this shift were evident during the Obama administration when the United States hindered the work of the WTO Appellate Body. Subsequently, under Donald Trump's presidency, the country withdrew from various free trade agreements and pursued policies that isolated it from global trade networks. President Biden's administration has not significantly deviated from this trajectory. See Zoltan Vig (ed.), 'Editorial: Challenges of international trade and investment in the 21st century' (paper presented at Challenges of international trade and investment in the 21st century, Ankara, Chișinău, Szeged, 2022) 1.

[55] The twenty-three countries engaed in the Geneva negotiations and signed the GATT in 1947 were Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, United Kingdom, and United States.
United Nations. Economic and Social Council, 'General Agreement on Tariffs and Trade' (official document E/PC/T/214 Rev.1, 1947) 1. < https://exhibits.stanford.edu/gatt/catalog/td900fc6256. accessed 10 April 2020.

[56] Richard Toye 'The Attlee government, the imperial preference system and the creation of the GATT' (2003) 118 (478) The English Historical Review, 912, 913.

[57] The preamble of General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

[58] Marc Benitah (n 30) 3.

[59] The WTO Secretariat, *From GATT to the WTO: The Multilateral Trading System* (Kluwer Law International B.V., 2000) 38.

[60] Tariffs are the duties on imports imposed by governments.

The formula was that raising the price of goods and services imported from another country would make the domestic consumers more interested in national products, and more likely to buy them instead of imported ones. Unfortunately, the rate of international trade reduced dramatically after adopting this kind of restrictive policy.[61] However, after the creation of the GATT, a series of multinational trade negotiations (MTN) focused on the elimination or reduction of tariffs as trade barriers and non-tariffs trade barriers, for example, licenses, import quotas, voluntary export restraints, and subsidies.[62]

Several national rules from the eighteenth century provided for remedies in case of imports being subsidized by foreign states. However, the development of multilateral international rules concerning subsidized trade began primarily with the GATT.[63] The harmful effects of subsidies on international trade have been witnessed since the contracting members exploited the weakness of existing provisions concerning subsidies (Articles VI, XVI, and XXIII of the GATT 1947 discussed below). Increasingly, they used to grant preferential treatment to their domestic production through various kinds of financial support. Thus, governments violated the set of principles listed in the GATT, which are non-discrimination and national treatment, and as a result, affected international trade. The deficiency in the GATT's provisions related to subsidy called for a necessary development to prohibit such harmful measures or at least subject them to stricter control and regulation.[64]

The present chapter evaluates the levels of development of subsidy provisions under the GATT. For this purpose, this chapter applies the historical method of comparative study to explore the vacuum in the GATT era regarding subsidies and to highlight the reasons that encouraged the contracting parties to consider creating new agreements on subsidies. The objective of this chapter is to assess whether the ASCM succeeded in addressing previous legal drawbacks related to subsidies contained in its antecedent agreements. To put it

[61] Michael A. Clemens and Williamson G. Jeffrey, 'A tariff-growth paradox? Protection's impact the world around 1875-1997' (Working paper No. w8459, National bureau of economic research, 2001) 3.
[62] Autar K. Koul, *Guide to the WTO and GATT* (Kluwer Law International B.V., 2005) 25.
[63] Kyle Bagwell and Robert Staiger w, 'Subsidy Agreements' (Working paper No. w10292, National Bureau of Economic Research, 2004) 6.
[64] Marc Benitah (n 30) 1-4.

differently, the chapter will examine the extent to which the ASCM has resolved the challenges and deficiencies that were identified in the GATT system regarding subsidies.

This chapter consists of four major sections, starting with the critical analysis of Articles VI, XVI, and XXIII of the GATT 1947, to build up the consensual framework of rights and obligations of contracting parties concerning subsidy and countervailing duties. It also provides guidance on the procedure of international dispute settlement mechanisms. The second part focuses on the modifications and improvements of the mentioned Articles in the review session which took place in 1955. It, therefore, highlights the gaps that made them insufficient and required contracting parties to launch a new MTN called the Tokyo Round. This round lasted for almost 7 years starting from 1973 till 1979. One of the outcomes of this Round was summarized in the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, known as the "Subsidies Code". Thirdly, this chapter scrutinizes the progress that has been made under the Subsidies Code. It highlights the defects that kept the problems related to subsidies unsolved, then called to conclude another agreement on subsidies. Finally, this chapter reaches its conclusion by providing a comprehensive analysis of the Automobile Industry War between Japan and the US. This dispute was a crucial catalyst for the development of more stringent rules on subsidies. It is worth mentioning that during the Uruguay Round, many GATT members were eager to establish new rules on subsidies, with the US particularly focused on preventing WTO Agreements from weakening its anti-dumping and countervailing duty laws.

2.1. The original GATT 1947: an overview of the subsidy provisions

Before the creation of the GATT in 1947, the twenty-three contracting parties realized the fact that not only tariffs and quotas can negatively influence the flow of international trade, but also the subsidies, as another governmental action, can damage it. Subsidy exists when the government decides to accord any kind of financial support to a specific firm or economic sector or sectors whether business or individual to promote economic and social policy.[65] For example, a government desires to encourage the production of wheat in its

[65] Norman Myers and Jennifer Kent (n 32) 10.

country. It may offer a subsidy to wheat farmers, which could take the form of loans, tax breaks, or other forms of financial assistance.[66] This would make it easier and more profitable for farmers to grow wheat, which would increase the supply of wheat in the market and reduce the price of wheat for consumers. Due to the economic effectiveness of subsidies as a means for developing industrial policies, it was deemed inappropriate to forbid their utilization. Thus, the optimal way to prevent the negative consequences and minimize trade distortion of a particular measure was by regulating its implementation and forcing different states to respect such regulation. That was achieved by incorporating anti-subsidy provisions into the GATT.

However, the developmental history of trade rules concerning subsidies shows how difficult it is to categorize subsidies that distort trade.[67] The original version of the GATT encompassed three provisions regarding subsidy. To start with Article XVI that stated:

> "If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports …. or to reduce imports …. it shall notify the contracting parties in writing ……."

After a deep reading, several loopholes can be found in the mentioned Article that decreases its effectiveness.

The primary concern is the ambiguity of the mentioned Article. It failed to provide a clear definition of "subsidy". Instead, it only alluded to certain actions that may qualify as subsidies, like price support, if they create or threat to create a competitive advantage for the national products. In other words, it would have been less problematic to address this complex kind of trade barrier, if a clear definition of subsidy had been used. The basic definition may determine the three major characters: donor, receiver, and type of support, rather than selecting broad terms such as "subsidies" and "contracting parties". For instance, at the very least, a subsidy could be defined as a fiscal benefit given by the

[66] This terminology was developed in the ASCM after establishing the WTO on April 15, 1994, by signing the Marrakesh Agreement. The ASCM initiates by defining the subsidy as "a financial contribution by a government or any public body within the territory of a Member". Article 1 of the ASCM.

[67] Chad.P. Bown and Doulgas A. Irwin, 'The GATT's Starting Point: Tariff Levels circa 1947' (Working paper No. 21782, National Bureau of Economic Research, Cambridge, 2015) 1-3.

government or through government sources to an individual, business, or institution.[68] Hence, the absence of a unified definition raised great problems, since each contracting party might set a different standard for what can be considered a subsidy based on its own interests without paying attention to whether or not the international trade is fully protected.

Nevertheless, the second part of this Article narrowed the autonomy of the state, because the state's actions (income or price supports) may not aim at increasing exports or reducing imports. It is clear that the "state or government" is the addressee of this provision. Thus, if a group of producers, for example, agree to support the export of a specific product through price reduction,[69] such conduct would not be deemed as a subsidy within the meaning of Article XVI, unless the government itself took part in such action. This shortcoming was not solved until the first review session of the GATT in 1955. When the contracting parties realized it and appointed, therefore, a Panel to consider the operation of the GATT notification procedure. The Panel, in its final report, clarified that in order to meet the meaning of Article XVI a subsidy must entail cost to the government.[70] The contracting parties had adopted this decision and excluded all subsidies afforded by private entities from the scope of this provision.[71]

Secondly, Article XVI did not ban or forbid the measure of subsidy. From the viewpoint of the drafters, this Article itself covers sufficiently both export and domestic subsidies.[72] To put it differently, the contracting parties are free to grant any aid to increase the export or reduce the import of products without any limitation, except the obligation of submitting written notification to other contracting parties. Additionally, the subsidizing country must specify, in the mentioned report, the extent and nature of the subsidy, the estimated number of imported or exported products that might be affected by the subsidy, and the

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[68] Jan Jakub Michalek 'Subsidies in the Context of the World Trade Organization' (2004) XLIII (1) Reflets et Perspectives de la Vie Economique, 25, 27.

[69] This action is known as a "cartel" which is illegal agreement among group of independent businesses or organizations in order to control the price of good or service.

[70] GATT Panel Report, 'Panel on subsidies and state trades' (Report L\1160, 23 March 1960) 445. < https://www.wto.org/gatt_docs/English/SULPDF/90730074.pdf> accessed 5 April 2020.

[71] John W. Evans (n 41) 223.

[72] General Agreement on Tariffs and Trade, 'analytical index of the general Agreement' (Analytical index MCT.10/53, February 1953) 51. <https://docs.wto.org/gattdocs/q/GG/MGT/53-10.PDF> accessed 5 April 2020.

circumstances making the subsidy necessary.[73] It can be said that such notification is worthless because it is not subject to any assessment process, which could lead as a result to ceasing such aid and avoiding its unfavorable effects.

Thirdly, this Article stipulated that in case the subsidy caused or threatened to cause "serious injury" to the interest of other contracting parties, the subsidizing country is required to discuss with the concerned party or contracting parties the possibility of reducing the subsidy. On the one hand, this rule puts the potential and existing injury on an equal footing. Thus, it can be described as preventive and not just curative provisions.[74] On the other hand, two drawbacks to this rule make it ineffective. The first point is that the obligation of negotiation is based on the request of the other contracting party.

In the viewpoint of the author of this dissertation, when states are granted the freedom to initiate trade negotiations without stringent oversight or accountability mechanisms, there is a risk that their actions may prioritize narrow state interests over the broader general interest of international trade. This viewpoint can be supported by arguing that the state that experiences the adverse effects of a subsidy may opt to disregard such harmful impacts as a means of exerting political pressure on the subsidizing state to reciprocate and extend similar forms of support in the future. Besides, after consultation, the subsidizing state is not obliged to eliminate or even reduce the level of subsidy or withdraw the subsidy if the negotiating states do not reach a mutual solution. Hence, the general provisions regarding the dispute settlement system will apply.[75]

In the same speaking, Article VI of the GATT permitted the imposition of countervailing duties to offset the effects of subsidies. The drafters gathered both anti-dumping[76] and

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[73] General Agreement on Tariffs and Trade, 'Analytical Index of the GATT, Text of Article XVI and Interpretative Note Ad Article XV' ('Analytical index) 449. <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art16_gatt47.pdf> accessed 6 April 2020.

[74] Article XVI of the GATT "….. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization."

[75] Article XVI of the GATT.

[76] Dumping is a terminology used in the field of international trade. It's when a country or undertaking exports a product at a price that is lower in the foreign importing market than the price in the exporter's domestic market.

countervailing duties[77] as means for compensating dumping and subsidized products, respectively. It can be posited that the distinction between these two concepts can be framed in the following manner: dumping, typically carried out by private entities, occurs when the price of imported goods is lower than the normal value of such goods in the exporting country. Conversely, subsidies are provided exclusively by governments, and entail the provision of financial assistance to domestic products imported or exported to foreign markets, with potentially comparable outcomes.[78]

The overlap between subsidization and dumping is likely to happen, as in the case of differential prices between domestic and foreign products. When a government grants subsidies exclusively for products destined for export markets, it effectively lowers the cost of production for those goods, making them cheaper for foreign buyers. Dumping occurs when exporters sell their products in foreign markets at prices below their domestic market value or below their production costs. In the context of subsidization, the artificially low prices of subsidized exports can be considered as a form of dumping.[79] The drafter of the GATT recognized this likely misunderstanding and stated that a contracting party may not impose both an anti-dumping duty and a countervailing duty to compensate for the same situation.[80] This rule is a perfect solution to avoid double jeopardy for the exporting country.

However, the Article in question, again, did illustrate neither the definition, the scope, nor the amount of countervailing duties. Instead, it indirectly referred to the national law of the contracting parties that already had regimes or regulations that permit the government to take countervailing actions against the foreign subsidized products imported into its territory.[81] Nevertheless, countervailing duties cannot be imposed randomly by the contracting party. Whereas the latter should give a piece of evidence that proves one of

[77] Countervailing duties are type of protectionist measures, that can take many forms such as tariffs and tax, imposed on imported goods to offset subsidies provided by government of exporting country.
[78] J.F. Beseler 'EEC Protection Against Dumping and Subsidies from Third Countries' (1969)6 (3) Common Market Law Review, 327, 334.
[79] Thierry D. Buchs, 'Selected WTO Rules and Some Implications for Fund Policy Advice' (Working paper WP/96/23, International Monetary Fund, 1996) 37. <file:///C:/Users/shady/Downloads/001-article-A001-en.pdf > accessed 13 April 2020.
[80] Article VI of the GATT.
[81] Ibid Article VI.

these two cases, a) subsidizations cause or threaten to cause material injury to an established domestic industry, or b) cause retardation materially for the establishment of a domestic industry.[82]

Moreover, the absence of any specific sanctions in the GATT on the violation of subsidy provisions does not necessarily imply the absence of general sanctions. The drafters in Article XXIII of the GATT set for equal treatment to all infringements committed by contracting parties to any provision of the Agreement. Under this provision, if a contracting party fails to meet its obligations or takes measures in violation of the Agreement, resulting in the nullification or impairment of any benefits accruing to another contracting party, the affected party may request negotiations and submit written representations or proposals to the parties it deems to be involved. If the result of the negotiation is negative, *i.e.,* no mutual solution has been reached, then this infringement shall be referred to the other contracting parties that shall start the investigation. They are allowed to consult any appropriate inter-governmental organization, and make appropriate recommendations for the concerned parties, or give a ruling on the matter as appropriate.

Furthermore, if the contracting parties consider that the circumstances are serious enough, they may authorize the affected party to suspend the application of the Agreement to the subsidizing party as appropriate.[83] If the application to any contracting party of any concession or other obligation has been suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the contracting parties about its intention to withdraw from the Agreement. This withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.[84]

In theoretical terms, it is notable the mentioned Article in the event of infringement, which might extent to exclude the concerned party from the Agreement, is serious and strict. However, in practical terms, sanctioning countries for subsidizing their industries can be a complex task because the rules related to subsidy are not clear. It can be difficult to

[82] Ibid Article VI.
[83] Ibid Article XXIII.
[84] Ibid Article XXIII.

determine whether a measure taken by a country constitutes a subsidy that could have negative effects on other countries. Furthermore, Article XXIII of the GATT did not provide clear guidelines to determine when a measure is serious enough to warrant sanctions, which means it has to be decided on a case-by-case basis.

2.2. GATT Amendment 1955: enhancing export subsidies

During the first review session of the GATT in 1955, Article XVI regarding subsidies was amended. This amendment has been embodied by adding special rules on export subsidies included in section B of the mentioned Article.[85] It is noted that the original text of Article XVI and section B had been derived from Article XXV,[86] and Articles XXVI, XXVII, and XXVIII of the Havana Charter which focuses on export subsidies.[87]

The new provision contains four paragraphs. The first one emphasized the negative influence of subsidization on exports. It stipulated that due to the export subsidy, the ordinary commercial interests of importing and exporting parties might be disturbed, and the fundamental goals of the GATT might deviate.[88]

Additionally, the second paragraph, unlike the original GATT, made notable improvement when it listed some occasions on which subsidies should be prohibited. This paragraph distinguished between two types of subsidies, domestic and export subsidies. Firstly, in terms of the domestic subsidy, the Panel in *the US – Upland Cotton* admitted that the text of Article XVI (3) itself is limited to export subsidies and does not address the rights and obligations of Members relating to other types of subsidies.[89] Thus, the only obligation for contracting parties is restricted to notifying the amount and the duration of the subsidy.

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[85] Panel Report (n 70) 2.
[86] The Havana Charter provided for the establishment of the ITO and set out the basic rules for international trade and other international economic matters. It was signed by 56 countries on 24 March 1948. It allowed for international cooperation and rules against anti-competitive business practices. Chia-Jui Cheng (ed), *A New Global Economic Order New Challenges to International Trade Law* (Brill Nijhoff, 2022) 39.
[87] United Nations Conference on Trade and Employment. (1948). Havana charter for an International Trade Organization, Mar. 24, 1948, including a guide to the study of the charter. [Washington], [US Govt. Print. Off.].
[88] W. P. Hogan 'Trade Policy And GATT: 1955' (1955) 27 (4) The Australian Quarterly, 23, 27.
[89] WTO Analytical Index, 'GATT 1994 – Article XVI' (DS Report) 3. <https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art16_jur.pdf > accessed 15 January 2020.

Accordingly, it can be said that this provision had no progress with respect to the domestic subsidy. The goal of such classification was only to limit and cease export subsidies.

Secondly, the nature of the product, whether primary or non-primary products, was the criterion for classifying and prohibiting export subsidies. Thus, the second paragraph contained a conditional, but not a full, prohibition for subsidies on exporting primary products. It stipulated that the subsidy on export primary product would be banned if these two conditions were met a) the subsidizing party increased the export of any primary product, and b) it had more than an equitable share of world export trade in that specific product. The second condition means that the party's competitive position becomes higher than the ordinary situation due to fiscal assist.[90]

Moreover, the concept of "equitable share" was meant to refer to share in the world export trade of a particular product and not to trade in that product in individual markets.[91] Therefore, in making such a determination the contracting parties should take into consideration:

- achieving the global requirements for the concerned commodities effectively and economically,
- all circumstances affecting the world trade share of the exporting country in those products during a previous representative period.[92]

However, two controversial points can be discussed here. On the one hand, the term "equitable share' sometimes is neither accurate nor justified. For example, in the case of the exporting country that had no exports over a certain period of time, it will not be able to obtain a trade share regarding the product in question. On the other hand, this partial prohibition would have been more successful, consistent, and rational, if it had covered the whole export subsidies, as the drafter did in the ASCM in 1995.[93] The permissive attitude

[90] Article 16 (3) of amendments of General agreement on trade and tariffs adopted in Review session in 1955, 20.
[91] GATT Panel Report, 'French Assistance to Exports of Wheat and Wheat Flour' (Report L/924- 7S/46 21 November 1958) 6, Para. 15. <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/58wheflr.pdf > accessed 17 January 2020.
[92] Ibid 6.
[93] It will be discussed in detail in the coming chapters.

towards primary products reflects political expediency that appeared to have prevailed over economic reasoning. This has contributed to significant distortions in agricultural trade, undermining the efficiency and fairness of the global market system.[94] Moreover, the bluer interpretation of primary products provided by the GATT caused several unnecessary conflicts.

To clarify the scope of primary products, which refers to goods in their raw or unprocessed form, it is necessary to identify the specific categories of products that fall under this term. In essence, what does the term "primary products" encompass? This question was debated in several cases because of the vague definition of this term within the GATT. Therefore, the meaning of the primary products needs to be clarified according to Interpretative Note 2 to Section B of Article XVI and some case laws.

Firstly, according to Interpretative Note 2 to Section B of Article XVI:[95]

> "a "primary product" is understood to be any product of the farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade."

The mentioned Note considers all goods that are available from raw materials without a manufacturing process as primary products. Such as oil, water, fish, fruit, crops, wood and so similar. The upcoming case serves as a good example of the application of this provision in practice. It was between the Government of Australia (complainant) and the French Government (defendant) in order to assess the compatibility of French subsidies on exports of wheat and wheat flour with Article XVI of GATT.

This case started in 1958 when the government of Australia claimed the inconsistency of the action of the French government with Article XVI (3) of the GATT. The ground of the claim was due to the financial aid afforded by the French Government to its exports of

[94] Chong-Hyun Nam 'Export-Promoting Subsidies, Countervailing Threats, and the General Agreement on Tariffs and Trade' (1987) 1 (4) The World Bank Economic Review, 727, 732.
[95] 'Analytical Index of the GATT, Text of Article XVI and Interpretative Note Ad Article XV' (n 69) 445.

wheat and wheat flour to Ceylon, Indonesia, and Malaya. Because of that Australia has lost both its trade share in those regions and the advantages that accrue under the GATT.

In detail, the French subsidy was granted based on the French law which permitted the Office National Inter-professional des Céréales (ONIC) to observe all processes concerning cereals including production, collection, storage, domestic sale and imports, and exports. The ONIC forced the producers of wheat and wheat flour to sell a specific quantity of their products at a legal domestic price. It was noted that this quantity was determined annually. Then, all quantities that exceeded the fixed quantum were not purchased at the guaranteed price. Thus, the producer received only that price which ONIC could obtain either by selling on the world market or at concessional prices on the domestic market. Since world prices were lower than French-guaranteed prices, the ONIC made a payment to the exporters designed to cover the difference. This deal made French wheat flour export prices, in those years, generally lower than those of other exporters. The French government justified this support by claiming that as long as wheat flour was ground, it was not considered a primary product anymore, so it could not be subjected to this Article.[96]

Nevertheless, the Panel rounded off this conflict by considering wheat as well as wheat flour to be a primary product. This finding means that the French support provided to exporters meets with the meaning of the prohibition of export subsidies on primary products.[97]

In contrast, during the consultation session on Article XXII (1) of the GATT on "*EEC-exports refunds for wheat flour*", the US had an opposing viewpoint. It argued that wheat flour is a non-primary product, but as a processed product, thus it cannot be subjected to export subsidies under Article XVI (2).[98] In the context of materials science and engineering, wheat flour would generally not be considered a primary product. The definition of "primary products" in this context typically refers to natural resources or raw materials that are used to create other materials or products through various manufacturing

[96] GATT Panel Report (n 91) 2.
[97] Ibid para 14.
[98] GATT Panel Report, European Economic Community - Subsidies on Export of Wheat Flour' (Report SCM/42, 21 March 1983) 2. < https://www.wto.org/english/tratop_e/dispu_e/gatt_e/81wheflr.pdf > accessed 7 February 2020.

processes. Wheat flour, although it can be used as an ingredient in the production of other foods, is itself a processed product that has undergone various milling and refining steps from its raw material form of wheat grain. Therefore, wheat flour would not be considered a primary product under this definition.[99]

This dissertation, however, does agree with the Panel's findings. This opinion is feasible because, according to the above-mentioned definition, the mere process of wheat milling cannot be considered a manufacturing process, but it is minimal processing that is required to make wheat suitable for substantial marketing in international trade. In order for the manufacturing features to be present within the meaning of Article XVI other elements/ingredients must be added to the main product (wheat). Thus, flour can be deemed a raw material in the aforementioned sense, and then subject to the prohibition of primary products.

Moreover, Article XVI (4) set out January 1, 1958, as a breakpoint at which all contracting parties do not have the right to provide, directly or indirectly, any support for the export of non-primary products (also known as manufactured products). In other words, from the mentioned date the export subsidies on non-primary products are prohibited. Nonetheless, this prohibition did not apply automatically to all the export subsidies on non-primary products. One condition should be met, which is the pricing difference for the like product between exporting and importing countries. Then, the subsidy should make the price of the subsidizing product in the foreign market lower than that in the domestic market.[100]

Additionally, this Article also provides for further prohibition that covers subsidies that already existed between January 1, 1955, and December 1, 1957. During this period, contracting parties must not extend the scope of any such support. This limitation did not only aim to keep the level of subsidization as low as possible but also to reduce it gradually during this period.[101]

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[99] James F. Shackelford, *Introduction to Materials Science for Engineers*, (4th ed.) (Pearson, 2017) 3.
[100] Article XVI (3) of amendments of General agreement on trade and tariffs adopted in Review session in 1955.
[101] Ibid Article XVI (4).

Consequently, this new section forbids the export subsidy on two occasions:

1) If it is granted to primary products and ends by boosting exports and enhancing the equitable share of the subsidizing party, and
2) If it is granted to non-primary products and causes variance in the price of the same product. Here, another loophole can be found when the export subsidy does not cause differential price[102] but still affects the domestic economy of the contracting parties, then limits the flow of international trade. This case can escape from the prohibition included in paragraphs (3) and (4) of Article XVI.

Nonetheless, the negotiating parties took into account the possibility of such gaps and requested a periodic review to assess the implementation of these provisions. This assessment should determine whether or not the amendment provisions promote the objectives of the GATT and prevent any trade-distorting subsidies that may harm the interests of the contracting parties.[103]

2.3. Tokyo Round 1973-1979: innovations in subsidy provisions and dispute resolution mechanisms

The first time the GATT negotiations were held outside of Europe was a significant milestone in the history of international trade. This landmark event marked a shift in the global trading landscape and highlighted the increasing importance of diverse perspectives and inclusion in shaping trade policies.[104] In September 1973, 102 nation-states, that were parties to the GATT, began the Tokyo Round negotiation, officially known as the Multilateral Trade Negotiations, was held in Tokyo, Japan. The equilibrium of the interests between the countries that had contrasting economic structures was an essential obstacle for the negotiators.[105] Nevertheless, the negotiation closed after achieving several goals. For instance, a series of tariff cuts, revisions of the GATT related to dispute settlement,

[102] Differential pricing is the strategy of selling the same product to different customers at different prices.
[103] Ibid Article XVI (5).
[104] World Bank Group Archives, 'General Agreement on Tariffs and Trade [GATT] - The Tokyo Round of Multilateral Trade Negotiations- Geneva - April 1979' (Report by the Director - General of GATT WB IBRD/IDA DEC-03-20, 1979) 1. <https://thedocs.worldbank.org/en/doc/451241565099544414-0240021979/original/WorldBankGroupArchivesFolder1207304.pdf > accessed 05 May 2020.
[105] Mario A. Kakabadse 'The Tokyo Round and after' (1981) 37 (7/8) The World Today, 304, 307.

differential treatment for Least Developed Countries (LDCs), trade restrictions for balance of payments reasons, five Codes to liberalize non-tariff barriers, a sectoral agreement for trade in civil aircraft, and essentially consultative arrangements for trade in dairy and bovine meat products.[106]

Owing to the limitations of the three Articles in the GATT[107] regarding subsidies and their inadequacy in effectively addressing the adverse effects of illegal subsidies on both domestic industries and international trade, the negotiators during the Tokyo Round recognized the need for a comprehensive framework to govern and facilitate the interpretation and implementation of government support measures. This endeavor has been embodied in creating the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, also known as the Subsidies Code. It entered into force on January 1, 1980.[108] The aim of which was not to cease the traces of the Articles in question. On the contrary, it pursued to clarify and expand their application and to create a rapid, effective, and fair resolution of disputes caused by the misuse of the subsidy policy.

Furthermore, this Code essentially aimed to ensure that the use of subsidy does not adversely affect or prejudice the interests of any signatory, countervailing measures do not unjustifiably impede international trade, and to provide equitable compensation to affected producers by illegal subsidy.[109]

This Code was the first unified international code on subsidy. It is written in three languages English, French, and Spanish, and each text being authentic. It is divided into seven parts that contain nineteen Articles along with an annex. The annex is an integral part thereof which illustrates a list of export subsidies. This Code applies only to 26 parties that ratified

[106] Alan V. Deardorff and Robert M. Stern 'Economic effects of the Tokyo Round' (1983) 49 (3) Southern Economic Journal, 605, 605.
[107] Articles. VI, XVI, and XXIII of the GATT.
[108] Article 19 (4) of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. [hereinafter Subsidies Code].
[109] See the Preamble of the Subsidies Code.

it,[110] but it shall be open for acceptance by signature or otherwise, by governments contracting parties to the GATT.[111] On the other hand, any signatory may withdraw from this Code after the expiration of sixty days from the day on which written notice of withdrawal is received by the Director-General to the contracting parties to the GATT.[112]

This section is going to analyze the provisions of the Subsidies Code. It tries to highlight its merits and demerits, and how the latter led to several conflicts. As a result, the flaws in the Code encouraged signatories to conclude a new agreement on subsidy in 1994, known as the ASCM.

Starting with Article 7 of the Code confirms the right of signatories to inquire information on the nature and extent of any subsidy granted or maintained by another signatory. In particular, if it makes a positive change, directly or indirectly, to exports or imports of any product from\into its territory. Besides, the obligation of the signatory the product of which is subsidized to provide all information required without any delay. In the case of non-compliance, any interested signatory may bring the matter in question before the committee on Subsidies and Countervailing Measures.[113]

However, neither the GATT nor the Code provided for a clear definition of Subsidy, but a few of the additional main characteristics have been added to the Code. For example, the GATT did not clearly specify the body that should grant such aid and used a very general term "the contracting party". In contrast, the Subsidies Code sets out explicitly those bodies when it states that "*the term subsidies shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory*". Nonetheless, the Code did not determine the meaning of the public body.[114] This unclear terminology seriously has flouted the Subsidy provisions and been the source of significant disputes in which China has been the main player.[115]

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[110] Snape H. Richard, 'Export-promoting Subsidies and what to Do about Them' (Policy Research Working Paper Series 97, World Bank Publications, 1988) 22.
[111] Article 19 (2) of the Subsidies Code
[112] Ibid Article 19 (8).
[113] For further information, see the section of Conciliation below.
[114] Footnote 22 of Article 7 of the Subsidies Code.
[115] It is discussed deeply in the following chapter.

2.3.1. Classification of Subsidy

The Code divided subsidies into two main categories; a) export subsidies that include primary and non-primary products, and b) subsidies other than export subsidies.

2.3.1.1. Export subsidies

The Code, unlike the GATT, prohibited any export subsidy on non-primary products irrespective of their price effects. It authorized the contracting parties the right to impose countervailing duties whenever such subsidies have proved to cause or threaten to cause a "*material injury*" to a domestic industry.[116] It is worth noting that this Code omitted the requirement of dual pricing, which had been required in the GATT Article XVI (4), as a base for applying the countervailing measures. Besides, the inclusion of minerals under the non-primary product category is a new development in this regard.[117] Moreover, the Code established the prohibition rule which can be described as more stringent than that outlined in the GATT provisions. For example, Article 9 (1) of the Code states that *"signatories shall not grant export subsidies..,*". Whereas Article XVI (4) of the GATT stipulates that *"contracting parties should seek to avoid the use of subsidies on the export ...".*

As for the primary products, the Code prohibited the use of any export subsidies on certain primary products[118] only if it results in having more than an equitable share of world export trade in such products. The assessment of shares should be in the light of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which affected or may affect the trade in such product.[119] According to the Panel report on the notification about subsidies, it should include "*Statistics of production, consumption, imports, and exports: for the three most recent years for which statistics are available;…. for a previous representative year, which, where possible and*

[116] Article 9 of the Subsidies Code.
[117] Ibid Footnote 29 of Article 9.
[118] "Certain primary products" means the products referred to in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words "or any mineral". As follow *"primary product" is understood to be any product of farm, forest, or fishery, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.*
[119] Article 10 of the Subsidies Code.

meaningful, should be the latest period preceding the introduction of the subsidy or preceding the last major change in the subsidy."[120] The period mentioned refers to the timeframe used to assess the effects of a subsidy. When determining whether a subsidy has caused adverse effects, the investigating authority typically examines the impact over a specific period. The Code, however, did not determine such a period. Thus, the Panel suggested that, where feasible and meaningful, this period should be the latest one preceding the introduction of the subsidy or the most recent significant change to the subsidy. Then, it is understood that the determination of this period should be made on a case-by-case basis. The specific circumstances of each dispute may warrant different timeframes for assessing the effects of the subsidy.

For example, in the sugar dispute between the European Economic Community (EEC) and Australia, the panel compared various alternative periods, while the EEC argued for a specific five-year period.[121] Additionally, in the dispute between the US and EEC regarding subsidies maintained by the latter on the export of wheat flour. The delegate of the US claimed that the term "more than equitable share" has no clear definition either in the Code or in the GATT. Therefore, the Panel should comprise all circumstances in which the exports of any signatory have been replaced by the export subsidies of another signatory.[122] In the mentioned case, the US figured out that over a 20-year period, the EEC's shares had increased by 46%.[123]

2.3.1.2. Subsidies other than export subsidies

The signatories agreed that subsidies other than export subsidies are allowed. Thus, the contracting parties are free to grant such subsidies either regionally or by sector, because of their vital role in promoting the national policy objectives. Some examples of justifiable objectives are the elimination of industrial, economic, and social disadvantages of specific regions, encouraging research and development programs, especially in the field of high-

[120] GATT Panel Report, 'Subsidies- Notifications Pursuant to Article XVI:1', (Report L/7162, 11 January 1993) <https://www.wto.org/gatt_docs/English/SULPDF/91670149.pdf > accessed 7 February 2020.
[121] GATT Panel Report (n 98) 3.
[122] Ibid 3.
[123] Ibid 3.

technology industries, the implementation of economic programs and policies to promote the economic and social development of developing countries, etc.[124]

Moreover, Article 11 (3) of the Code named several forms of legal subsidies that should be taken into consideration during the assessment of challenged subsidies. This distinction is crucial in distinguishing legitimate government support from potentially unfair or illegal practices that could distort market dynamics. For instance, government financing of commercial enterprises including grants, loans, or guarantees, government provision or government-financed provision of utility, supply distribution, and other operational or support services or facilities, and government financing of research and development programs. These are recognized and permissible methods through which governments can provide support to industries. They are within the boundaries of the established rules and regulations governing trade and competition.

However, the freedom of the contracting parties to afford this type of subsidy is restricted to:

- avoid causing or threatening to cause injury to a domestic industry of another signatory, or
- serious prejudice to the interests of another signatory, or
- nullify or impair benefits accruing to another signatory under the General Agreement.

In other words, this kind of subsidy would be banned, if it adversely affected the conditions of normal competition.[125]

2.3.2. Alternative dispute resolution mechanism

In the case of infringement of the provisions of the Code by any of the signatories, the Code offered a more comprehensive framework for preventing and resolving conflicts related to subsidies.

[124] Article 11 (1) of the Subsidies Code.
[125] Ibid Article 11(2).

2.3.2.1. Consultation

If the signatory has adequate evidence on the illegality of export subsidies because either:

- it is inconsistent with the provisions of the Code, or
- the subsidy either causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the GATT, or serious prejudice to its interests.

The complainant signatory has the right to call the signatory the conduct of which is alleged for a consultation. The goal of the consultation is to clarify the facts of the situation and to arrive at a mutually acceptable solution. The consultation request should include a statement of available evidence about the existence and nature of the subsidy in question. In addition to the available evidence of the adverse effects caused to the interests of the signatory requesting consultations.[126]

If a mutually acceptable solution has not been reached in a fixed period of time starting from the request of consultation, any signatory party may refer the matter in question to the Committee for conciliation as a second measure. Lastly, Article 13 of the Code sets out two different periods, that can be extended by mutual agreement of parties, based on the reason for the dispute:

- in 30 days in the case of contravention of the Code's provisions, or
- in 60 days in the cases of causing injury to its domestic industry, nullification or impairment of benefits accruing to it under the GATT, or serious prejudice to its interests.[127]

2.3.2.2. Conciliation

In this phase, the Committee, through its good offices, shall immediately review the facts about the alleged subsidy. Then, it shall encourage the signatories involved to develop a mutually acceptable solution. Signatories shall make their best efforts to reach a mutually satisfactory solution throughout the conciliation. However, if no deal has been reached,

[126] Ibid Article 12.
[127] Ibid Article 13.

then any signatory involved may, in 30 days after the request for conciliation, ask the Committee to create a panel to start the investigation.[128]

One of the new developments of this Code is creating a private Committee on subsidies and countervailing measures. The Committee shall include a delegate of each signatory who shall pick out one of them as a chairman. They have to assemble at least twice a year and when it is necessary upon the request of any signatory. One of the key functions of the Committee is to carry out periodic reviews of each signatory's subsidy programs and policies. These reviews are intended to promote transparency and accountability among signatories and to ensure that their subsidy programs are consistent with the provisions of the Code. In order to carry out its functions professionally and accurately, the Code allowed it the right to set up subsidiary bodies that are free to require supplementary information from any source considered appropriate. It is worth saying that establishing a committee dedicated to monitoring subsidies is a significant step forward that can lead to more efficient investigations and timely resolution of disputes. By having a specialized body focused on overseeing subsidies, the process of assessing their impact can be streamlined and expedited. The committee's expertise can also contribute to more accurate and informed decision-making.[129]

2.3.2.3. Dispute settlement body

If the consultation and conciliation failed, the Panel should be established within 30 days of a request by signatories or within less time in an urgent situation based on the Committee’s request. The Panel shall consist of three or five preferentially governmental members. Establishing the Panel is subject only to one condition as the Panel’s members shall not be citizens of the countries that are parties to the dispute at hand. The Panel should review the facts of the case and submit the descriptive part of its report to the parties concerned along with its conclusions, or a summary thereof. The final report should be submitted to the Committee within 60 days after its creation.[130]

[128] Ibid Article 17.
[129] Ibid Article 16.
[130] Ibid Article 18.

It is likely to happen, that the parties to a dispute have failed to come up with a satisfactory solution. On such an occasion, the Panel shall submit a written report to the Committee within 60 days after its establishment. The Committee, in return, should consider the findings, the reasons, and the basis thereof. Finally, the Committee may make recommendations to the parties to resolve the dispute. In the case the Committee's recommendations are not followed within a reasonable period, the Committee may authorize the imposition of appropriate countermeasures. However, the countermeasures may include withdrawal of the GATT concessions or obligations based on the nature and degree of the adverse effect found to exist. The Committee's recommendations should be presented to the parties within 30 days of the recipient of the Panel report.[131]

2.3.3. Countervailing Measure

Countervailing measure is the result of the interaction between the willingness of exporting countries to provide subsidies to their industries and the necessity in importing countries for the protection of domestic industries against subsidized imports.[132] Therefore, according to the Code, the contracting party whose industry is affected shall request, in writing, the Committee to initiate the investigation. The countervailing duties can only be imposed based on the outcome of the investigation.[133] Furthermore, the initiation of investigation shall not preclude the right of signatories for a consultation to clarify the situation and attain a mutually agreed solution.[134]

The request for investigation shall contain sufficient evidence of the existence of:

- a subsidy and, if possible, its amount,
- alleged injury[135], and

[131] Ibid Article 18.
[132] Themistoklis K. Giannakopoulos, *A Concise Guide to the EU Anti-dumping/anti-subsidies Procedures* (Kluwer Law International B.V., 2006) 143.
[133] Article 2 of the Subsidies Code.
[134] Ibid Article 3.
[135] Ibid Article 6.

- a causal link between the subsidized imports and the alleged injury.[136]

The investigating authorities should be appointed by the affected signatory and shall investigate according to its domestic procedures.[137]

During the investigation, all interested signatories affected by the subsidy in question shall have a reasonable opportunity, upon request, to see all relevant information. This right is limited to document that is not confidential either by nature or provided on a confidential base.[138] They also have to present in writing, and upon justification orally, their views to the investigating authorities.[139]

The investigating authorities may carry out investigations in the territory of other signatories as required. They may pursue the investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the signatory in question is notified and does not object.[140]

However, the investigation shall terminate when the investigating authorities are satisfied either that a) no subsidy exists or the effect of the alleged subsidy on the industry is not such as to cause injury, or 2) confirmed the existence of the prohibited subsidies.[141] Finally, public notice shall be given of any preliminary or final finding whether affirmative or negative.[142]

After the termination of the investigation, signatories shall report without delay to the Committee all preliminary or final actions that have been taken with respect to countervailing duties.[143] As for the amount of countervailing duties, some criteria should be taken into consideration:

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[136] Ibid Article 2. Alleged injury means the material injury that shall include an objective examination of both (1) the volume of subsidized imports and their effect on prices in the domestic market for like products, and (2) the consequent impact of these imports on domestic producers of such products.
[137] Ibid Article 2 (2).
[138] Ibid Article 2 (6).
[139] Ibid Article 2 (5).
[140] Ibid Article 2 (8).
[141] Ibid Article 2 (12).
[142] Ibid Article 2 (15).
[143] Ibid Article 2 (16).

Firstly, it must be determined by the authority of importing signatories, but it cannot be more than the amount of subsidy. It should be calculated in terms of subsidization per unit of the subsidized and exported product.[144] Besides, it should be less than the amount of subsidy if it is adequate to remove the injury to the domestic industry.[145]

Secondly, it shall be imposed on a non-discriminatory basis. That means all sources of subsidized products that cause the injury must stand on equal footing before such duties. Two exceptions can be found to this rule if a) the country has already waived any subsidies in question, or b) the country has accepted undertakings under the terms of this agreement.[146]

Moreover, one of these two cases is enough to suspend or eliminate the countervailing duties:

- if the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or
- if the injurious effect of the subsidy is eliminated through decreasing the prices of subsidized products by the exporter, but after the importing signatory has (1) initiated an investigation under the provisions of Article 2 of this Code, and (2) obtained the consent of the exporting signatory.[147]

Notably, the undertakings shall not remain in force any longer than countervailing duties could remain in force under this Agreement.[148] Article 4 (9) states that "*A countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury*". The continued imposition of the duty is reviewable upon a request of either investigation authorities or an interested party. Another notable achievement, the Code's detailed provisions on countervailing measures represent a

[144] Ibid Article 4 (2).
[145] Ibid Article 4 (1).
[146] Ibid Article 4 (3).
[147] Ibid Article 4 (5).
[148] Ibid Article 4 (7).

significant improvement over the more general provisions of the GATT. These provisions enhance the fairness, transparency, and effectiveness of countervailing measures.

In brief, the countervailing actions adopted by major advanced industrial countries, such as the US, have significantly increased, especially against products exported from developing countries. That can be traced to the narrow range of the application of the Subsidies Code because not all GATT's signatories are party to the Subsidies Code. For instance, the US did not apply the injury test, which is required under the Subsidies Code but not under GATT, to imports from non-signatories to the Subsidies Code, and most of which were developing countries.[149] It is important to note that several provisions of the ASCM, which will be discussed in the following chapters, have their origins in the Subsidies Code. Emphasizing this connection between the two agreements can provide valuable insight into the development and implementation of trade rules aimed at regulating subsidies.

2.3.4. Special treatment for developing countries

As mentioned explicitly in Article 14 (2), developing countries are awarded preferential treatment to adopt any measure or policy that might enhance their industries, including those aimed at export promotion. It is not, however, entirely unconditional. Bearing in mind that the export subsidies shall not be used in a manner that causes serious prejudice to the trade or production of another signatory.[150] Also, they are obliged to enter a commitment to reduce or eliminate export subsidy if it is inconsistent with their competitiveness and development needs.[151] It is worth noting that, the meaning of competitive and development needs remains unexplained and subject to the Committee evaluation. Besides, once this commitment is adopted, the countermeasures against any export subsidy provided by a developing country shall be banned.[152]

[149] Chong-Hyun Nam (n 94) 733.
[150] Article 14 (3) of the Subsidies Code.
[151] Ibid Article 14 (5).
[152] Ibid Article 14 (6).

Although developing countries have the right to subsidize their exports, they are likely to be subject to countervailing duties if their use of subsidies causes material damage to another country's markets.

Finally, the Subsidies Code determines the obligations of developing country signatories more than their rights. The Code may have fallen short in addressing the imbalances in power and resources between developed and developing countries. Developing countries often have limited resources, technical capacity, and legal expertise compared to their developed counterparts. This disparity may have made it challenging for developing countries to effectively participate in the negotiations, comply with the Code's requirements, or defend their interests in subsidy-related disputes. As a result, developing countries may have faced difficulties in fully realizing the benefits or protections envisioned by the Code. Thus, this Code may give developing countries some advantages in subsidy measures, but, in return, it reduces their freedom to apply trade and industrial policies. It is probably the essential reason why the Subsidies Code failed to attract many developing countries to sign.[153]

However, according to the author of this dissertation, there are two specific instances in which the Code can be criticized, especially concerning developing countries.

Firstly, the Code employs a dual classification system for export subsidies, which means that the same measure can be classified differently based on the country undertaking the measure (subsidy) instead of the inherent characteristics of the measure itself. This implies that the measure does not constitute as an export subsidy only because it is provided by a developing country. The same measure, however, would be deemed an export subsidy if it were granted by a developed country.

[153] Starting from 1 June1986, several developing nations had become signatories to the Code. These countries encompassed Brazil, Chile, Egypt, Hong Kong, India, Indonesia, Israel, Korea, Pakistan, the Philippines, Portugal, Turkey, and Uruguay. In addition, Yugoslavia has signed, but with acceptance pending. Chong-Hyun Nam, 'Export Promoting Policies Under Countervailing Threats: GATT Rules and Practice' (Discussion Paper Development Policy Issues Series ERS9,1986) footnote 12. < https://documents.worldbank.org/en/publication/documents-reports/documentdetail/557011468184128736/export-promoting-policies-under-countervailing-threats-gatt-rules-and-practice > accessed 02 September 2021.

Secondly, the Code rejects the general presumption that export subsidies provided by developing countries automatically have adverse effects. Instead, the Code requires the presentation of positive evidence to demonstrate that such subsidies are causing harm. This means that the burden of proof falls on those alleging harm, and they must provide substantial evidence to substantiate their claim.[154]

2.4. The role of the Automobile industry dispute in shaping the ASCM

After World War II, Japan, like other affected countries, paid great attention to the ideal strategies to recover its economy. The venture was quite challenging. Several obstacles and barriers hindered its goal. Fortunately, due to the successful economic policy, that was adopted by the Japanese Government, and the significant role of the Ministry of International Trade and Industry (MITI), Japan was able to heal its economic problems and rapidly became the world's second-largest economy after the US. This achievement is known as the "Japanese economic miracle".[155]

The question arises; what are the key factors of this successful economic policy? This question could be answered by analyzing the long-term automobile industry war between Japan and the US. Because of this tension, the US raised its voice in the eighth round of the GATT (known as the Uruguay Round - launched in September 1986, in Punta del Este, Uruguay), and called for a new set of provisions on subsidies. The results of this round have been satisfying. The round closed after adopting a long list of about 60 agreements, annexes, decisions, and understandings, such as the Agreement Establishing the WTO and the Agreement on Subsidies and Countervailing Measures.[156]

The automobile industry war began in the late 1970s, when the Japanese auto exports into the US market were increasing gradually. Whilst the US auto industry was in a deep recession. In 1973, only 740,000 Japanese passenger cars were sold in the US, representing

[154] Ibid Article 14 (4)
[155] Richard Katz, *Japan, the system that soured* (Routledge, 2015) 3.
[156] *WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization,* Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), Annex 1, 11. [hereinafter Marrakesh Agreement or WTO Agreement].

6.5% of the market. After five years, sales almost doubled and reached 1.9 million units by 1980, which equaled 21.3% of the market.[157]

The Japanese economic policy for supporting the auto industry was oriented toward both domestic use and worldwide export. Japanese automakers launched a bevy of new small cars in their domestic market. These tiny automobiles usually featured very small engines to keep taxes much lower than larger cars.[158]

Japan levied a tariff of 30%-40% on imports and imposed a Value Added Tax that applied to both imported and domestically produced cars. These taxes varied between 15% and 40% based on the car's size and capacity. These taxes were in favor of the small domestic Japanese cars. Thus, the typically large American cars would be taxed at 40% (plus the tariff), while the small domestic Japanese cars, which made up practically all of the Japanese production at the time (and were not subject to the tariff since they were produced domestically), would only be subject to a tax of 15%.[159]

Besides, a semi-annual automobile tax was assessed on large cars at a rate of five times that applied to small ones. The effects of these and other obstacles to importing automobiles can be measured by the fact that in 1966, Japan imported a mere 15,244 cars, 485 trucks, and 3 buses against a total domestic production of 2,286,399 vehicles.[160]

Japan justified the tariffs and the non-tariff tax differential treatment between large and small cars based on the arguments that they were necessary to further the growth of their industries and did not aim to prevent American producers from selling cars in Japan. Two essential reasons were claimed: a) large cars were luxury items, plus, since Japan's infrastructure consisted at the time of very narrow streets and highways, it was appropriate

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[157] Masao Satake "Trade conflicts between Japan and the United States over market access; the case of automobiles and automotive parts" (Asia Pacific Economic Papers 310, Australia-Japan Research Centre, Crawford School of Public Policy, The Australian National University, 2000) 3. <https://ideas.repec.org/p/csg/ajrcau/310.html > accessed 10 November 2019.

[158] Masayoshi Tanishita, Shigeru Kashima, and William J. Hayes 'Impact analysis of car-related taxes on fuel consumption in Japan' (2003) 37 (2) Journal of Transport Economics and Policy (JTEP), 133, 6.

[159] William C. Duncan, *US-Japan automobile diplomacy: A study in economic confrontation* (Ballinger, 1973) 1.

[160] Ibid 2.

for larger vehicles to be taxed at higher rates,[161] and b) American producers did not take into consideration the Japanese traffic law and did not produce suitable vehicles. In particular, driving on the left side of the road requires the steering wheel to be placed on the right-hand side of the vehicle.[162]

Additionally, Japan's MITI over this time was supporting almost all industry sectors for the growth of the national economy. Thus, the tariffs and the non-tariff tax differential treatment between large and small cars, in-fact, can be considered as a subsidy in favor of domestic products. Moreover, Japanese automakers got a differential treatment through several kinds of subsidies. For instance, low-interest loans, subsidies for technological development, and import tariff exemptions for imported equipment and machinery.[163]

Neither the US authority nor the American auto producers and traders were satisfied with the trade practices of Japan that were deemed unfair because it resulted in the significant rise of Japanese auto exports and harmed the US economy. Therefore, the US decided to enter into bilateral negotiations with Japan in order to reach a mutual solution to reduce Japanese tariff and non-tariff barriers and to facilitate the accession of US auto products into the Japanese market.

In 1981, the US began the negotiation by making a semi-official request for a quota on Japanese exports. Japan responded positively to create a three-year export quota of 1.68 million vehicles starting in the same year, with two reservations:

- In the second year of the agreement, the quota can be increased only in the case of expanding the US domestic car market.

- In the third year, the Japanese government would be allowed to set out its limit.[164]

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[161] Ibid 5.
[162] Masao Satake (n 157) 9.
[163] Mathew Trever and John Ravenhill, 'The Neo-Classical Ascendancy: The Australian Economic Policy Community and Northeast Asian Economic Growth' (Working paper, Australian National University, 1994) 5-7.
[164] Gregory S. Kurey "GATT and the VRA: Japanese Automobile Imports and Trade Protectionism' (1987) 5 (1) Penn State International Law, 51, 55. < http://elibrary.law.psu.edu/psilr/vol5/iss1/4 > accessed 16 November 2019.

It is obvious that the US was seeking, by this agreement, to buy time to avoid foreign competition, boost domestic sales through decreasing imports, and provide sufficient fiscal recourse to cover the cost of producing small and fuel-efficient cars. Unfortunately, these goals could not be reached, since the US focused only on how to fix the number of cars imported into its market. On the other hand, Japan found the optimal way to compete with the US auto producer in their market and in the area where they were traditionally most successful, which is big and expensive cars. Japan began producing luxury vehicles by which succeeded in increasing the value of vehicle shipments to the US while conforming to the voluntary limit.[165]

However, more than 25 years of difficult and ultimately unsuccessful negotiations were devoted to reducing barriers and increasing imports of American cars. The deep cultural, social, and economic divide separating the US and Japan, a lack of understanding, which seems to have played a major role in preventing the Japanese and American automobile negotiators from reaching meaningful agreements during the 1970s, 1980s, and 1990s.[166]

It is notable that, despite the huge support that had been given to the auto industry by the Japanese government, Japan was not the only country that granted such subsidies and affected international trade. South Korea and Taiwan also followed the same approach in order to upgrade their industries. For instance, in the 1970s the government of South Korea conferred subsidized loans and tax incentives to investments, tariff exemption for imported materials, and export subsidies, including export promotion loans, that enabled Korean cars to be sold in foreign markets at less than half of the domestic market price.[167]

In brief, the Code was not prepared for inventive industrial policies in countries that began fighting to develop for the sake of development and economic prosperity. The Subsidies Code of 1979, which was the most recent international agreement aimed at regulating

[165] Ibid 57.
[166] Ibid 66.
[167] John Ravenhill, 'From National Champions to Global Partnerships: The Korean Auto Industry, Financial Crisis and Globalization' (Working paper, University of Edinburgh, 2001) 5 < https://dspace.mit.edu/handle/1721.1/16569 > accessed 16 November 2020.

subsidies, proved to be inadequate in addressing the aforementioned issues of subsidy violations, due to various reasons:

Firstly, it was called "Code" because it was not accepted by all the GATT members. Thus, it was only applicable to the members that signed and ratified it.[168] The Code did not have the status of a treaty or a self-executing agreement, and it was not adopted through legislation. Also, the Code was signed by a limited number of developed countries, and not by the countries that were flooding the US market with inexpensive export goods such as South Korea and Taiwan.[169]

Secondly, the Code did not provide a clear definition of what constitutes a subsidy, nor did it specify the forms in which subsidies can exist. This lack of clarity made it difficult to determine whether or not certain government policies or actions constituted a subsidy under the Code. Japan had a highly complex tax system that includes a variety of tax incentives, deductions, and exemptions. Some of these tax measures were specifically designed to support the auto industry, while others were more broadly applicable. This made it difficult to determine with certainty which tax measures were intended as subsidies, and which were not.[170] Therefore, it could be argued that there was no effective discipline on subsidies in place. Despite multiple rounds of negotiations and consultations, no agreement was reached on the issue at hand.

Thirdly, it is important to note that the subsidy provisions of the GATT and the Code only apply to subsidized goods such as automobiles and automotive parts. As a result, subsidies granted to services related to the automotive industry, such as auto maintenance services, retail, and wholesale, are not regulated or protected under the Code. This means that the service industry for automobiles was largely unregulated.

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[168] WTO Official Website, *The GATT years: from Havana to Marrakesh*, <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm > accessed 1 April 2020.
[169] Kenneth S. Komoroski 'The Failure of Governments to Regulate Industry: A Subsidy under the GATT' (1988) 10 (2) Houston Journal of International Law, 189, 190-191.
[170] Gregory S. Kurey (n 161) 65-67.

Fourthly, the right to rely on the provisions of the Code is granted solely to states and not individuals.[171] Therefore, neither American auto manufacturers nor traders had an effective role to play in the dispute resolution process regarding the tax treatment of Japanese automakers under the GATT framework.

Given the absence of a successful bilateral agreement between Japan and the US regarding the tax treatment of Japanese automakers, and the lacunas in the GATT and the Subsidies Code of 1979, the US strongly advocated for more stringent subsidy disciplines during the Uruguay Round of negotiations. The goal was ultimately achieved in April 1994 with the signing of the Marrakesh Agreement, which included the ASCM. The ASCM aimed to establish a more effective framework for regulating subsidies and countervailing measures related to international trade. The agreement entered into force on January 1, 1995, marking a significant milestone in the development of international trade law and the regulation of subsidies.[172]

The ASCM is an instrument for the classification of subsidies and policy coordination. It addresses two separate, but closely related issues: multilateral disciplines regulating the provision of subsidies, and the use of countervailing measures to offset the injury caused by subsidized imports.[173] The ASCM consists of 11 parts, which include 32 Articles, and 7 annexes. One essential point is that the scope of the ASCM is limited only to the trade of goods.[174] Consequently, service subsidies remain unregulated and continue to distort international trade, however, this will be discussed, exhaustively, in the coming chapters.

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[171] This aligns with the nature of the GATT, which is an international agreement primarily focused on regulating trade relations among sovereign states. These processes involve the participation of states as the main actors, while private entities, such as American auto manufacturers or traders, may have an interest in the outcome of trade disputes, they typically do not have direct standing to initiate or participate in the dispute resolution process under the GATT. On the contrary, private entities have the right to initiate disputes before national courts regarding potential unlawful State aid at the EU level. If the national court finds a possible violation, it can raise the issue to the European Commission, which conducts its own investigation and may take action to ensure compliance with EU State aid rules. That is to say, granting private entities the right to draw the attention of their states, under strict conditions, could enhance the application of the rules by promoting greater accountability and participation.

[172] Sub-paragraph 7 of declaration of the Marrakesh Agreement.

[173] Gurwinder Singh (n 25) 33.

[174] Annex 1A of the Marrakesh Agreement.

2.5. Conclusion

This chapter reviewed the development of the GATT rules concerning the subsidy system for the trade of goods. These rules are contained in the original GATT of 1947, the Review session amendments to the GATT in 1955, and the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, known as the Subsidies Code in 1979. Several issues highlight the inadequacy of mentioned rules in regulating the use of subsidies and addressing the harmful effects of subsidized trade. These include the following: both the GATT and the Subsidies Code failed to provide an effective definition of subsidy. Therefore, the determination of whether the measures adopted by the contracting parties constitute a subsidy are up to the more powerful parties. Additionally, the issue of domestic subsidies deserves special attention. Due to the lack of internationally agreed rules on domestic subsidies, the number of countervailing duties increased significantly. While the GATT did not deal with this matter, the Subsidies Code suggested a negative list of illustrative examples of export subsidies and a positive list of objectives under which the domestic subsidies might be used. Unfortunately, it was insufficient in practice. It is noted that the US countervailed several domestic subsidies, irrespective of its objectives, just because of the inconsistency with its interest.[175]

Furthermore, two factors have contributed to the manipulation of countervailing measures by contracting parties. The first factor is the lack of a clear definition of what constitutes material injury and the absence of a causal link between subsidies and injury. This ambiguity allowed parties to manipulate the countervailing measures to their advantage. The second factor is that the US applied the injury test only for subsidized imports from signatories to the Subsidies Code. This action constitutes a violation of the Most Favored Nation (MFN) principle of the GATT. Consequently, developing countries that did not sign the Code have been put at a significant disadvantage in trade relations. This situation stresses the need for greater clarity and transparency in the regulation of subsidies and the

[175] Gurwinder Singh (n 25) 38.

development of effective remedies to address the negative impacts of subsidized trade on the global economy.[176]

Additionally, it is important to note that the Subsidies Code was not universally accepted and implemented by all contracting parties. Rather, it was a multilateral agreement that only those countries that chose to participate in it did so. This limitation significantly reduced the effectiveness of the Code, particularly in cases where a dispute arises between a contracting party and a non-contracting party. In such situations, the Code was insufficient to address the negative effects of subsidies on international trade, highlighting the need for further efforts to strengthen the regulation of subsidies at the global level.

Finally, The Subsidies Code introduced a distinction between developing and developed countries. It granted developing countries more favorable treatment and less stringent rules. This differentiation did not exist in the original GATT. On the one hand, this development is positive because it recognizes the low economic level of developing countries and the urgent need to promote economic growth. On the other hand, it is controversial in some cases. For example, the Code provided different characterizations of the same action depending solely on whether it is conducted by a developing or developed country. This can be seen as unfair, as it creates a double standard for certain actions based on the economic status of the country in question.

[176] Stephen D. Krasner 'The Tokyo Round: Particularistic Interests and Prospects for Stability in the Global Trading System' (1979) 23 (4) International Studies Quarterly, 491, 518.

Chapter 3: The definition of subsidy in the context of the Agreement on Subsidies and Countervailing Measures

As noted earlier, one of the essential drawbacks of the Subsidies Code, like in the GATT, was the absence of the definition of "subsidy". On count of that deficiency, the Members were unrestricted to determine whether the challenged measure constituted a subsidy. This led, in absolute terms, to a broad and imprecise implementation of the Code, and hence insufficient application of the countervailing measures.

This chapter focuses on the definition of subsidy in the ASCM. This definition comprises four key elements, which are subject to critical analysis in order to identify any loopholes or gaps that may influence the effectiveness of the Agreement. The analysis is conducted by examining significant case-law and comparing the ASCM definition with the European State aid definition. While the latter is considered as an existing module without being subject to meticulous criticism. The comparison highlights the differences and similarities between the two definitions, allowing for a more comprehensive understanding of the issue at hand.

The critical interpretation of the definition of subsidy provides valuable insights into the practical application of the ASCM, identifying areas where improvements can be made. It also endeavors to answer the question *of to what extent the definition of subsidy requires refinement or enhancement to secure the effective implementation of the ASCM.* This is important for ensuring that the Agreement remains relevant and effective in the face of changing economic, political, and social conditions. By highlighting the potential weaknesses of the current definition, the chapter provides a roadmap for future research to address these issues and further enhance the performance of the ASCM. Ultimately, the goal is to create a more robust and comprehensive framework that governs subsidies in international trade and fosters fair competition among nations.

The rationale for making a comparison stems from several reasons: a) the concept of "subsidy" is defined both in the laws of the WTO and European Union, regardless of the fact they are named differently; b) considering the legal, political, and economic differences can lead to a better understanding and shed light on practical dimensions based

on which the recommendations should be given; c) identifying commonalities between the two legal frameworks is of significant importance as it allows for examining the issue from a fresh standpoint, to avoid problems that have already arisen under one legal system, and exploring the possibility of developing and expanding the scope of the WTO's definition.

3.1. The definition of subsidy

The first phase for the accurate implementation of any anti-subsidy provision is to determine the meaning of the term "subsidy", which was one of the unique and major achievements of the ASCM. The Subsidies Code and the GATT before could not provide an evident clarification of a subsidy, at the same time, the ASCM invented the first world-wide definition. It has been referred to in the US tariff Act,[177] and has gotten a confirmation by the European Commission as it goes, to a certain point, in line with the meaning of State aid regarding trade in goods.[178]

Starting with the language of the first Article of the ASCM which presents the subsidy as: *"a financial contribution by a government or any public body within the territory of a Member... that conferred a benefit."*

According to this definition, three substantive elements must be met in order for a subsidy to exist:

a) The subject is "financial contribution",
b) The donor is "the government or any public body",
c) The result is "enjoying a benefit".

It should be noted that a subsidy in itself is not prohibited and cannot be subject to countervailing measures, unless a supplementary element has been fulfilled.[179] Article 2 of the ASCM provides for the additional factor which is "specificity". Thus, the subsidy must

[177] Article 1671 of the United States Code, 2006 Edition, Supplement 4, Title 19 - Customs Duties Contained Within Title 19 - Customs Duties Chapter 4 - Tariff Act of 1930.
[178] It maintains one exception as a financial contribution in the form of a purchase of services._European Commission- Press Release, 'Foreign Subsidies: Commission welcomes political agreement on Regulation on distortive foreign subsidies' European Commission Official Website (June 2022) < https://ec.europa.eu/commission/presscorner/detail/e%20n/ip_22_4190 > accessed 03 October 2023.
[179] Article 1 (2) of the ASCM.

be specific to an entity or group of entities, industry or group of industries, or entities, or industries in a certain region. However, Article 3 of the ASCM outlines two exemptions to the fourth condition: 1) export subsidies, and 2) subsidies on the use of domestic over imported goods. These forms of subsidies are only prohibited if the preceding three criteria are met. That is because they, most likely, have an adverse effect that aims to distort the trade of other members.[180] That distortion effect contradicts the object and the purpose of the Agreement, which is to protect the flow of international trade and reduce distortion effects caused by subsidy, as the Panel stated in its decision in *the Brazil- Aircraft* dispute.[181]

This chapter analyzes these four elements in order.

3.1.1. The subject is "financial contribution"

The interference of government in market life and economic activities has been a global phenomenon since the 1970s,[182] while the inherent standard was the separation between state and economy. This extraordinary transmission has been known as "Economic interventionism".[183] From the economists' viewpoint, it can be traced to a number of reasons, such as enhancing economic growth, increasing employment, and promoting wages. It also can be embodied in various forms that attempt to lead or control the commercial activities of firms or individuals.[184] Importantly, it would be fair to say that government intervention can be classified into two major categories:

a) Economic regulations and policies: the traditional theory of economic regulation stipulates that the government's actions aim to offset the market inefficiency and

[180] WTO Analytical Index, 'Guide to WTO Law and Practice' (Working paper 1st (ed) (2) 2003) 899 < https://docs.wto.org/gtd/analytical/AI_WTO_Vol_2.pdf > accessed 07 September 2021.
[181] *Brazil - Export Financing Programfor Aircraft* [1999] WTO Appellate Body Report 2 August 1999, WT/DS46/AB/R, para 26.
[182] Nikolaos Karagiannis 'Key Economic and Politico-Institutional Elements of Modern Interventionism' (2001) 50 (3/4) Sir Arthur Lewis Institute of Social and Economic Studies, University of the West Indies, 17, 20.
[183] Ibid 31.
[184] Edward J. Balleisen, David A. Moss, *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, 2010) 19.

failures and to maintain the equitable outcomes of the market.[185] For instance, imposing price controls on most of the main utilities such as telecommunications, electricity, and gas,[186] enforcing or removing rules or restrictions on economic activities, like tariffs and quotas.[187] On these occasions, the governments' interventions can be justified by public interest, fair competition, equal distribution of wealth, and maximizing economic welfare.[188]

b) Financial assistance: to protect and enhance economic growth, the government may provide certain enterprises or sectors of industry with fiscal support, such as loans, guarantees, tax forgiveness, and purchasing goods or services. Regardless of the reason either promoting the domestic industry or enhancing the production of certain undertakings over other (foreign) competitors. It, more likely, does that on a discriminatory basis.[189] It is worth saying that, through these actions, favorable treatment is more likely to exist and to distort the market competition, thus meeting the definition of subsidy under the ASCM.

Nevertheless, the ASCM, as outlined in its initial article, specifies multiple practices that can be considered as indications of the existence of financial support. Indeed, these activities, in the list, are not exhaustive, since they are supposed to include all the government intervention in the market, where the governments, in practice, can always invent different instruments to come up with a financial contribution.[190] Therefore, an account should be given to decisions of the Appellate Body which is responsible for reviewing the legal aspects of panel reports and interpreting the provisions of WTO agreements and providing authoritative interpretations that guide the implementation and

[185] Joe Wallis and Brian Dollery, *Market Failure, Government Failure, Leadership and Public Policy* (Springer, 1999) 9.
[186] Christopher Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (Cambridge University Press, 2014) 3.
[187] Junji Nakagawa, *International Harmonization of Economic Regulation* (Oxford University Press, 2011) 2.
[188] Stephen James Bailey, *Public Sector Economics: Theory, Policy and Practice* (Macmillan International Higher Education, 1995) 18.
[189] Ludwig Von Mises, *Interventionism: An Economic Analysis* (Liberty Fund, 2011) 59.
[190] DS353- *United States - Measures Affecting Trade in Large Civil Aircraft* (Second Complaint), AB Report, para. 613.

enforcement of those agreements. Its decisions are binding on the parties to the dispute and have a significant impact on the interpretation and application of WTO rules.[191]

3.1.1.1. Direct or potential transfer of funds or liabilities

The basic form of subsidy is the transfer of funds or liabilities. The ordinary meaning of "transfer" is to move something from one place to another or to change something's physical status in another. The legal understanding refers to moving the property of an asset from one person or entity to another.[192] Additionally, the "fund" indicates the amount of money that has been saved or to be spent for a particular purpose. The Appellate Body has found that the term 'funds' includes not only 'money' as a cash flow, but also any form of financial resource.[193] This finding was later emphasized/quoted in the dispute between *the US and India*, when the former claimed that the 'scrips'[194] provided by the Indian government to its exporters are considered as 'funds', then as a base for a subsidy.[195] The Panel concluded that as long as the scrips enable the recipient to pay the money back to the government and they can be sold to a third party, they almost[196] have the same value and function as cash.[197] Thus, they are a financial resource that can serve as 'funds' within the meaning of Article 1 of the ASCM. In a nutshell, the 'transfer of funds' within the meaning of Article 1 of the ASCM exists when the government provides the private entity with the amount of capital, in any form, that is sufficient to upgrade its economic value among other competitors.

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[191] Yang Guohua, Bryan Mercurio, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (Kluwer Law International, 2005) 210. Article 17 (6) and (7) of the *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226. [hereinafter DSU].
[192] West Group, *West's Encyclopedia of American Law, Volume 2* (West Publishing Company, 1998). <https://legal-dictionary.thefreedictionary.com/transfer > accessed 07 September 2021.
[193] (*footnote original*) *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea (DRAMs)* [2006] WTO Appellate Body Report 28 November 2007, WT/DS336/23, para. 250. Also, DS353-US - Measures Affecting Trade in Large Civil Aircraft (Second Complaint), AB Report, para. 614.
[194] "Scrips" are paper-based notes that can be used to pay for basic and additional customs and certain other charges and fees owed to the Government to fulfil one's export obligations. Scrips are "freely transferable". *India - Export Related Measures* [2018] WTO Panel Report 31 October 2019, WT/DS541/R. para 7.161.
[195] Ibid para. 2.2.
[196] Because it can be used only for certain purpose which is fulfilling the government dues.
[197] DS541- *India- Export Related Measure*, Panel Report, para. 8.1.e.

The transfer of funds might have distinct patterns such as grants, loans, equity infusions, loan guarantees, *etc*. However, those practices are not mentioned in an exclusive list. This result is evident from the language of Article 1 of the ASCM which initiates the list with the expression 'for example' as '*e.g*.'. The Appellate Body (AB), *in the US- Large Civil Aircraft* (second complaint), provided an explanation of these practices. Starting with the 'grant', that is an amount of money or money's worth that is conveyed to a recipient and causes cost to the government. In other words, the 'grant' exists when the government donates a bunch of money or in-kind property to a private entity without expecting any reward.[198] In contrast, 'loan' is given for an agreed interest and to be refunded.[199] Moreover, with regard to the equity infusion, when a government provides capital to a recipient, it does so with the expectation of acquiring shares in the recipient enterprise. This means that the government becomes an investor in the enterprise by contributing funds in exchange for ownership stakes in the form of shares. That is stated clearly by the AB as:

> a government's provision of capital to a recipient is made in return for the acquisition of shares. The provider of the capital thereby makes an investment in the recipient enterprise and will be entitled to the dividends or any capital gains attributable to that investment.[200]

For further discussion, the *Japan- Korea DRAMs* dispute might provide a valuable explanation of the direct transfer of funds. This dispute started in 2001 when the Japanese government imposed a 27.2% punitive duty on imports of certain Dynamic Random-Access Memories (DRAMs) from Korea, in particular the DRAMs produced by Hynix Semiconductor. In this dispute, Japan claimed that the modification of the terms of pre-existing loans such as reduction of interest rate, or extension of the due date (deferral) and conversion of the debt into equity should be considered a transfer of funds. Korea maintained that in all the above measures the creditor did not afford any additional money, but it was a mere change in the form of its existing demands.[201] Therefore, the measures, in question, might be classified as a "foregone revenue" as long as there are no monetary

[198] DS353- US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint), AB Report, para. 616.
[199] Ibid para. 616.
[200] Ibid para. 616.
[201] *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea (DRAMs)* [2006] WTO Panel Report 13 July 2007, WT/DS336/23, paras. 4.18- 4.63.

assets that are transferred from one person to another, but only one person (the creditor) waives its claims or reconstructs them in a different mold.[202]

Obviously, Korea's explanation is so literal and ignores the fact that the list in Article 1(1)(i) of the ASCM is just an illustrative list that gives some examples without being restricted.[203] Moreover, Korea's argument is also inconsistent with the recommendation of the AB not to attenuate the interpretation of the 'financial contribution' provisions that would lead to the non-implementation of subsidy disciplines of the ASCM.[204] Furthermore, the US, as a third party, supported Japan's claim and rejected Korea's argument based on the fact that the forgone revenue can be done with regard to public revenue like taxes, and duties, but not for any income or profit by the creditor.[205]

Moreover, the European Communities (EC), as a third party, stated that:

> A subsidy exists at the moment it is granted, even if there has not yet been a direct transfer of funds. The subsidy does not only come into existence at some later date when, for example, an amount of money is actually paid to the recipient pursuant to the terms of the grant.[206]

From the author of this dissertation's viewpoint, there are two concerns about the EC's argument. On the one hand, it is not accurate, and it is paradoxical with its argument in another dispute and with the final finding of AB.[207] On the other hand, the grant on its black letter without any physical transfer of money would motivate and stimulate the private entities, but not necessarily be sufficient to make a real economic change, and then confer a benefit. Additionally, this argument has the potential to create confusion in relation to two specific points; Firstly, the calculation of the benefit, in particular, if the time gap between the written grant and the actual transaction is considerable. Secondly, the written

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[202] DS336- *Japan- DRAMs*, Panel Report, para. 4.103.
[203] *Korea - Measures Affecting Trade in Commercial Vessels* [2002] WTO Panel report 7 March 2005, WT/DS273/R, para. 7.412.
[204] DS336- *Japan- DRAMs*, Panel Report, para. 4.63.
[205] Ibid para. 5.97.
[206] Ibid para. 5.56.
[207] For more explanation, check the next case (DS46- *Brazil - Export Financing Program for Aircraft*) as discussed in p 80 of this dissertation.

grant is at the discretion of the government and might be withdrawn before the completion of the transition.

Furthermore, the EC suggested that the mere modification of the government practice should be deemed as a new practice that might constitute a subsidy only if it meets the conditions required under the ASCM, especially favorable treatment and benefit.[208] This argument is partially consistent with the opinion of the author of this dissertation. From the author's perspective, if the essential measure is deemed as a subsidy, then all the subsequent favorable modifications are complementary measures and an integral part of the main action. Thus, they must be included in the benefit calculation. In the case that the essential measure is not deemed as a subsidy, it should be treated as a separate government measure that should include the four subsidy elements. The author justifies his argument by claiming that the extension of loan maturities, the reduction of the interest rate, and loan-equity swaps are sufficient in themselves to constitute a transfer of funds because even if there is no ordinary transaction of money, this money, which belongs to the government, remained in the recipient's hand in various forms and entail enrichment of the recipient on a discriminatory base.

Finally, the AB confirmed the Panel's finding that the transactions at issue could be classified as a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement.[209]

Another point to explore in this regard is the distinction between direct and potential transfer of funds. One of the best examples to discuss is the Brazilian export financing program for aircraft.[210] In the dispute between Brazil and Canada, the latter claimed that the interest equalization payments[211] supplied by Programa de Financiamento as

[208] DS336- *Japan- DRAMs*, Panel Report, para.5.57.
[209] Ibid para. 280(h).
[210] The Programa de Financiamento as Exportações (PROEX) (The export financing support programof Brazil) was established by the government of Brazil in 1991 for the interest of Brazilian regional aircraft. PROEX provides two kinds of support either as a direct financing or an interest rate equalization payment.
[211] The interest equalization payment covers the difference between the agreed interest with the seller and the total cost required by the manufacturer. This aid occurs when the manufacturer submits to the alleged committee a prior approval of a final contract with the buyer. According to that approval, the PROEX adhere to supply the aid contained in the request for approval after the Aircraft is exported and paid for by the seller. For more clarification, the payments are formed as non-interest bonds issued by Brazilian National Treasury,

Exportações (PROEX) to Brazilian exporters are export subsidies within the meaning of Article 3 of the ASCM. Canada also stated that "*the level of PROEX expenditures has increased since 1 January 1995 and, as a result, the level of Brazilian export subsidies has increased since that date*."[212]

The EC, as a third party, argued Canada's claim on considering the payments as a direct transfer of funds, and stated that such a claim would result in withdrawing all subsidies even if not yet issued. This would certainly entail an adverse effect on the private parties (purchaser and suppliers) that would have to pay a higher price than that fixed in the contract.[213] Therefore, it is more accurate to deem this payment as a potential transfer. Hence, the formula would be like this subsidy is awarded at the time when the PROEX commitment is made. On the other hand, the use of the subsidy is at the discretion of the purchaser.[214] This argument has been accepted by the Panel and upheld by the Appellate Body as the subsidy through PROEX is deemed to be provided when the National Treasury bonds are issued, not when the letter of commitment is given.[215]

3.1.1.2. Tolerance in the collection of government revenue (public dues)

The second act through which the government can afford financial support to a private undertaking and serves as an alleged base of a subsidy is the case of amnesty in collecting the government revenue that is otherwise due. For efficient analyses, two essential issues should be highlighted: Firstly, the meaning and scope of government revenue. Secondly, the various forms and implementation of 'forgiveness'. Accordingly, the starting point should be the interpretation of government revenue.

In order for residents of any state to enjoy a wide range of public services and good infrastructure, the government should allocate great monetary power to fulfill their expectations. Undoubtedly, the government, through its revenues, can pay to provide

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through mediator banks, to the lending bank financing the transaction. *Brazil - Export Financing Program for Aircraft* [1999] WTO Panel report 14 April 1999, WT/DS46/R. paras. 2.2- 2.5- 2.6.

[212] Ibid para. 3.1.c.

[213] Ibid para. 5.7.

[214] Ibid para. 5.12.

[215] DS46- *Brazil - Export Financing Program for Aircraft*, Appellate Body Report, para. 196(c)(ii).

services, enhance the infrastructure, and run commercial activities.[216] The best resources, but not the only ones, to sustain and promote government revenue are taxes, tariffs, and trade activities.[217] Taking into consideration the fact that the higher quality of services the greater government revenue is required. Generally, the revenue resources can be divided into two main categories: a) tax revenue, and b) non-tax revenue:

- Tax revenue:

By way of explanation, 'taxes' are obligatory fiscal charges levied by a government on individuals and undertakings (both called 'taxpayer'), directly or indirectly, on different bases, such as income, wealth, property, etc., aiming to enrich the government revenue.[218] They are the core-stone of the government revenue.[219] Additionally, 'tariffs' are a kind of tax that is imposed particularly on the movement of goods and services while crossing state borders, also known as customs duties.[220]

- Non-tax revenue:

This category comprises both the administrative and commercial revenue, for instance, 'fees' that are charged for the enjoyment of certain services, such as issuing a passport, driving license, *etc*.[221] 'Fines and penalties' are sanctions imposed in case of law infringement and failure to comply with some regulations.[222] Notedly, they are not a main source of revenue. Furthermore, 'Commercial revenue' includes the surplus of the public

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[216] Monica Bhandari, *Philosophical Foundations of Tax Law* (Oxford University Press, 2017) 1. Also, William McCleary 'The Earmarking of Government Revenue: A Review of Some World Bank Experience' (1991) 6 (1) The World Bank Research Observer, 81, 82.

[217] The fourth resource was 'Tribute' which is a gift or payment presented regularly by state or ruler to show respect, gratitude, and interest. It was a fundamental income to the government, but became out-of-date, and revenue cannot rely on it anymore. Daniel Tarschys 'Tributes, Tariffs, Taxes and Trade: The Changing Sources of Government Revenue' (1988) 18 (1) British Journal of Political Science, 1, 1.

[218] Daniel N. Shaviro, *Tax, Spending, and the US Governemtn's March Toworad Bankruptcy* (Cambridge University Press 2006) 9.

[219] Daniel Bunn and Cecilia Perez Weigel, 'Sources of Government Revenue in the OECD 2023' Tax Foundation (23 February 2023) < https://taxfoundation.org/data/all/global/oecd-tax-revenue-by-country-2023/ > accessed 14 May 2023.

[220] WTO Official Website, 'Tariffs' <https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm> accessed 08 March 2023.

[221] Donald C. Shoup 'The ideal source of local public revenue' (2004) 34 (6) Regional Science and Urban Economics, 753, 764.

[222] F. Philip Manns Jr 'Internal Revenue Code Section 162 (f): When Does the Payment of Damages to a Government Punish the Payor?' (1993) 13 Faculty Publications and Presentations, 271, 276.

enterprises that are involved in a commercial transaction, for example, utilities (gas, electricity, *etc*.), railway, banking, *etc*.[223]

Thus, those various resources fund the 'government revenue' which refers, within the meaning of Article 1(a)(1)(ii) of the ASCM, to the payment that should be paid by undertakings and demanded by the government, on the base of public purpose, either by law, like tax or due to a commercial transaction, like the interest of a loan. Consequently, the remission in collecting any of these public dues constitutes a financial contribution that can be deemed as a subsidy if the other elements have been materialized.

However, footnote 1 of the ASCM sets forth two situations in which the exemption of an exported product from duties or taxes is permitted and does not constitute a subsidy. Firstly, when the like product, allocated for domestic use, bears the duties or tax instead of the exported product. For example, consider a country X that produces and exports automobiles. The government of country X imposes a 10% tax on all domestically sold automobiles to generate revenue for public services. However, to promote the export of its automobiles and make them more competitive in international markets, the government has decided to exempt exported automobiles from this 10% tax. Instead, they shift the burden of the tax onto domestically sold automobiles. In this scenario, the exemption of the exported automobiles from the tax does not constitute a subsidy under the ASCM. This is because the like product (domestically sold automobiles) bears the duties or tax instead of the exported product. The government's measure is aimed at supporting the export sector by relieving the tax burden on exported automobiles, while still maintaining revenue through the tax levied on domestically sold automobiles. Secondly, when the percent of remission is less than the actual amount due. In this regard, the Panel in *India – Export Related Measures* relied on the liability as a factor to differentiate between the 'exemption' and the 'remission'. In the latter, in contrast to the former, the liability to pay was annulled after it had risen.[224] Additionally, remission includes a refund or rebate, either fully or partially, of the taxes or other charges.[225]

[223] Daniel Tarschys (n 217) 8.
[224] DS541- *India- Export Related Measure*, Panel Report, para. 7.169.
[225] Footnote 58 of the ASCM.

Exploring in more detail, footnote 1 states that "*In accordance with…the provisions of Annexes I through III of this Agreement…*". That means the exceptions must not be interpreted independently, but rather in line with the three annexes. Taking in mind the three annexes,[226] it can be noted that they are designated for listing exported products. By reading the exceptions along with the three annexes, the outcome evidences the finding of the AB in *EU – PET* (Pakistan) that not just the first, but both exemptions address only the exported product.[227] Therefore, neither tax remission for the domestic product nor all cases listed through the three annexes fall within the exception, and then they can be deemed as a subsidy.

The issue at hand is explained comprehensively through the dispute between the US and EC on tax treatment for Foreign Sales Corporation (FSC).

The FSC means any corporation that is established or regulated either under the law of a qualified foreign country or under US possession[228].[229] A FSC attains a tax exemption on an amount of its "foreign trade income"[230] that is earned by the corporation run outside of the US. Additionally, there are two types of administrative pricing rules that apply. The first rule grants the FSC an exemption on 23% of the combined taxable income earned by both the FSC and the related supplier. This means that a portion of the income generated through their business relationship is not subject to taxation. The second rule allows the FSC to consider 1.83% of the total gross receipts from foreign trading activities as a basis for

[226] Annex 1 of the ASCM stipulates an illustrative list of export subsidies. Annex 2 is a guideline on the inputs consumed in the production process to obtain the exported product. Additionally, Annex 3 is a guideline on the determination of substitution drawback systems as export subsidies.
[227] *European Union - Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan* [2014] WTO Appellate Body Report 16 May 2018, WT/DS486/11, para. 5.97.
[228] The term US possession means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the US Virgin Islands. Legal Information Institute (LII) Electronic Code of Federal Regulations (e-CFR) Title 26 - Internal Revenue Chapter I—Internal Revenue Service, Department Of The Treasury Subchapter A - Income Tax Part 1- Income Taxes Research Credit - For Taxable Years Beginning Before 1 January 1990, <Definition: US possession. from 26 CFR § 1.6038D-1 | LII / Legal Information Institute (cornell.edu) > accessed 06 September 2021.
[229] There are some certain requirements must be fulfilled, such ac a) FSC may not have more than 25 shareholders at any time during the taxable year. b) A FSC must conserve an office outside of the United States and maintain a set of permanent books of account (including invoices or summaries of invoices) at such office. Ibid 24 CFR 1.921-2- Foreign Sales Corporation- general rules. <https://www.law.cornell.edu/cfr/text/26/1.921-2 >
[230] It means the gross income which are generated by qualifying transactions that involve the sale or lease of "export property".

determining its transactions. This means that the FSC can use this percentage to calculate the financial aspects of its transactions related to foreign trade.[231]

The panel was established in 1998 upon the request of the EC, a complainant, due to the failure of the consultation with the US respondent. The EC alleged that both the tax exemptions and special administrative pricing rules provided by the US to the FSCs are subsidies contingent upon export performance. Canada, a third party, has confirmed the EC's claim by stating that:

> The tax reduction offered to United States exporters through the FSC program clearly represents tax revenue which would otherwise be due were it not for the operation of the FSC program. By foregoing such revenue, the United States is conferring a benefit on the users of the FSC program by allowing them to retain funds that would otherwise be collected in taxes. Since such tax relief is contingent on export performance, i.e. the sale, lease, or rental of "export property", the program is in obvious contravention of Article 3.1(a) of the SCM Agreement.[232]

Firstly, the US has justified its rules of tax exemption regarding FSC by claiming that Article 3 of the ASCM, on export subsidies, must be implemented in the light of the Illustrative List of Export Subsidies contained in Annex I to the Agreement. In particular, subparagraph (e), which deals with the issue in question. It stated that the "*full or partial exemption, remission, or deferral specifically related to exports, of direct taxes*" is a probable export subsidy for purposes of the SCM Agreement. Footnote 59, referred to in the mentioned subparagraph excluded one case from the scope of this provision, which is the measures aimed at avoiding the double taxation of foreign-source income. The US FSC tax rules meet this exemption.[233] Additionally, the US approved its arguments by relying on the principle set forth in the GATT's original ban on export subsidies which is articulated in the authoritative 1981 decision of the GATT Council.[234] This principle declares that the

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[231] *United States - Tax Treatment for "Foreign Sales Corporations"* [1997] WTO Panel Report 8 October 1999, WT/DS108/R, paras. 2.5 - 2.6 respectively.
[232] Ibid para. 5.11.
[233] Ibid para. 4.93.
[234] This decision was adopted by the GATT Council based on the reports of four Panels. Those Panels were established, in 1972, to solve the dispute between the US and the EC on direct taxation. The US applied a differential tax treatment scheme, such as exempting the Domestic International Sales Corporation (DISC) from corporate income tax. Micheal Daly, 'The WTO and direct taxation' (Discussion Paper 9, 2005) 5.

decision not to tax the earnings that are obtained from businesses allocated outside the tax jurisdiction of a country is not a prohibited subsidy.[235]

On the flip side, the EU contended that justification in three points. Essentially, the members of the Organization of Economic Cooperation and Development (OECD) and many non-member countries have adopted various bilateral double taxation treaties and the US is a party to many of them.[236] Secondly, the US has created comprehensive tax rules, in order to avoid double taxation, based on the principle of "capital-export neutrality" that encourages the investors, who are willing to lunch their businesses domestically or more global scale, not to take into account the local or foreign tax considerations.[237] Thirdly, the decision, on which the US relied, a) is not obligatory and does not ban the GATT's Members from levying taxes on cross-border profits, b) does not adjust the GATT's provisions regarding the taxation of the exported goods, and c) neither deprives the Member form enjoying their rights nor abolish or reduce their obligations.[238]

Furthermore, the Panel started by illustrating the meaning of the adjective 'due', according to the Oxford English Dictionary, as a debt that is 'owing or payable'. Then, it suggested that government revenue is otherwise 'owing or payable' shall be determined by reference to that government's own tax regime.[239] In other words, the determination of whether the government revenue is otherwise due must include a comparison of the situations before and after the measure has been implemented.[240] For that comparison, the 'but for' test should be applied.[241] The major question that should be asked is would the foregone amount be payable in the case of elimination of the challenged measure? By applying this test to the FSC scheme, it is obvious that the FSC scheme protects from the taxation of

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[235] DS108- *US- Tax Treatment for "Foreign Sales Corporations"*, Panel Report, para. 4.352.
[236] Ibid para. 4.166. For more information, see the US Department Of The Treasury Official Website <Treaties | US Department of the Treasury > and OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (OECD, 2019).
[237] This argument was supported by Canada that discussed thoroughly and accurately the US tax law and emphasized the absolute intent of the FSC program to promote the US exports. DS108- *US- Tax Treatment for "Foreign Sales Corporations"*, Panel Report, para. 4.167. For more details, see paras. 5.7- 5.42.
[238] The statement of the Chairman of the Council which was attached to the 1981 decision. Ibid para. 7.54.
[239] Ibid para. 7.42.
[240] *Indonesia - Certain Measures Affecting the Automobile Industry*, [1996] WTO Panel Report 2 July 1998, WT/DS54/R-WT/DS55/RWT/- DS59/R-WT/DS64/R, para 14.155.
[241] As the panel suggested the application of this test requires panels to apply their best judgement on a case-by-case basis. DS108- *US- Tax Treatment for "Foreign Sales Corporations"*, Panel Report, para. 7.93.

income that would be taxed in the absence of the FSC scheme. For instance, in the absence of the FSC scheme, the income taxes on dividends earned from foreign trade would be paid by the parent of a foreign corporation.[242]

As for the 1981 Council's decision, the Panel concluded that although the decision at hand is a binding legal text, it does not oblige the Members not to charge the profit earned from transboundary businesses. Rather, it denies the absolute classification of such measure as a prohibited subsidy. The panel based its finding on the surrounding circumstances of the mentioned decision, in particular, the Chairman's statement: *"Finally, [the Chairman] noted that the adoption of these reports together with the understanding does not affect the rights and obligations of contracting parties under the General Agreement."*[243]

Moreover, the Panel recognized that the FSC scheme includes various exemptions that are deemed as foregoing of revenue that is otherwise due and thus constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.[244] The evidence supporting this finding was presented in an OECD report concerning tax expenditures. The report highlighted the "revenue foregone" amounting to $1.4 billion in 1995 resulting from the "exemption of income derived from foreign sales corporations".[245]

Finally, the AB, like third parties Canada and Japan, upheld the finding of the panel and concluded that

> The FSC measure creates a "subsidy" because it creates a "benefit" by means of a "financial contribution", in that government revenue is foregone that is "otherwise due". This "subsidy" is a "prohibited export subsidy" under the SCM Agreement because it is contingent upon export performance.[246]

3.1.1.3. Participating in economic activities other than general infrastructure, or purchasing goods

[242] Ibid para.7.98.
[243] Ibid para.7.68.
[244] Ibid para.7.102.
[245] OECD, *Tax Expenditures – Recent Experiences* (OECD, 1996) 107.
[246] DS108- *US- Tax Treatment for "Foreign Sales Corporations"*, Panel Report, para. 180.

As stated earlier, the subsidy is assumed to exist when the government or any public body decides to maintain a benefit to an undertaking or sector of industry through a financial contribution.[247] The third method to provide financial support is embodied in Article 1.1(a)(iii) of the ASCM as follows "*a government provides goods or services other than general infrastructure, or purchases goods"*. In simple words, two practices are contained in this paragraph. On the one hand, engaging in economic practices that exceed ordinary government activities. On the other hand, acquiring goods at artificial prices. This type of transaction intends to increase the revenues of the enterprise through purchasing its product at a price higher than its actual value. Thus, this form of subsidy does not represent ordinary market transactions.[248] It is worth saying that this type of financial contribution has not yet been challenged under the ASCM before the WTO Settlement Body.[249]

Opining the discussion with the question what does "infrastructure" exemplify? In this direction, 'Infrastructure' is a compound word from the Latin 'infra' which means below or underneath, and 'Structure', from the Latin "structura", which means the mode of buildings. Both together mean the constructions on which any system is based.[250]

Generally, the 'infrastructure' has been used in the military sector to indicate the permanent installations.[251] In the field of economy, various scholars have proposed diverse classifications of infrastructure. For instance, Tinbergen has distinguished between two groups. The first group, known as infrastructure, includes the essential public services, such as medical services and education. The second group, known as superstructure, combines economic and competitive activities such as manufacturing, agriculture, and mining.[252] Moreover, the unbalanced growth theory of Hirchman suggests that public infrastructure

[247] Article 1 of the ASCM.
[248] Roland Steenblik, *Subsidy Primer* (Global Subsidies Initiative of the International Institute for Sustainable Development, 2007) 26.
[249] Rüdiger Wolfrum, Peter-Tobias Stoll, and Michael Köbele, *WTO - Trade Remedies* (BRILL, 2008) 440.
[250] Online Etymology Dictionary, https://www.investopedia.com/terms/i/infrastructure.asp#citation-2
[251] Piotr Krzykowski ' Defence Infrastructure - an attempt at identification' (2018) 22(5) Security and Defence Quarterly, 71, 93.
[252] Jan Tinbergen, *Shaping the World Economy, Suggestions for an International Economic Policy* (Twentieth Century Fund, 1962) 133.

investments comprise all the basic investments in the fields of education, medical care, transportation infrastructure, etc.[253]

Furthermore, Nijkamp has introduced various essential features that should be fulfilled by any infrastructure as follows: a high degree of publicness; a high degree of immobility (the relocation of the infrastructural facilities is extortionate); a high degree of indivisibility (the costs of such public capital are extremely high which usually cause the problems of over- or under capacity); a high degree of stabilization that makes it not subject to alternative or complementary uses.[254]

Additionally, the United Nations Department of Economic and Social Affairs defines the term infrastructure as "*The system of public works in a country, state or region, including roads, utility lines, and public buildings*".[255] The US National Research Council has applied the term 'Public Works Infrastructure', in its report on Infrastructure in the 21st century, which involves, for example, highways, airports, Telecommunication, and water.[256]

However, various commonalities can be noted among the mentioned viewpoints. For instance, infrastructural goods and services can be funded either by the government or a private entity, or a combination of public-private partnerships.[257] Usually, the fund of infrastructural projects is collected from the government, due to the great capital required and low profits obtained compared with the ordinary economic activities.[258] The infrastructure is available to all members of the society. In conclusion, the "infrastructure"

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[253] P. Nijkamp 'Infrastructure and regional development: A multidimensional policy analysis' (1986) 11 Empirical Economics, 1, 3.
[254] Ibid 4.
[255] United Nations Department of Economic and Social Affairs, Statistics Division, *Handbook on Geographic Information Systems and Digital Mapping* (UN, 2000) 188.
[256] National Research Council, *In Our Own Backyard: Principles for Effective Improvement of the Nation's Infrastructure*' (The National Academies Press, 1993) 20.
[257] BOT stands for Build-Operate-Transfer, which is a type of public-private partnership model used for infrastructure development projects. In Europe it is called Concessions. In a BOT arrangement, a private entity (usually a consortium or a company) is granted a concession by the government to finance, design, construct, operate, and maintain a specific infrastructure project for a defined period of time. The infrastructure project can include roads, bridges, airports, power plants, ports, or other public facilities. See Sidney M. Levy, *Build, Operate, Transfer, paving the way for tomorrow's infrastructure* (John Wiley & sons inc., 1996) 18-19.
[258] Robert S. Radvanovsky, and Allan McDougall, *Critical Infrastructure: Homeland Security and Emergency Preparedness* (Second Edition) (CRC Press, 2009) 244.

can be defined as physical commodities and services provided at a national level to facilitate, maintain, and promote the life of humankind.

The quality of infrastructure, in particular transportation and related services, has a great influence on the growth of international trade.[259] Therefore, the subsidy might appear within this regard, if the government either a) goes beyond the public purpose of its infrastructure such as port services provided to a single importer or exporter, or b) manipulates the price of the goods.

Before any further discussion, a contradiction between Article 3.8(b) of the GATT and the sub-clause of Article 1.1(a)(iii) of the ASCM should be highlighted. On one side of the coin, the sub-clause of Article 1.1(a)(iii) of the ASCM defines the financial contribution that constitutes a subsidy as the *governmental purchase of goods*. Then, this measure, when all the other requirements are met, can be deemed as prohibited or actionable subsidies that are banned under the ASCM. On the flip side of the coin, Article 3 of the GATT provides for equal treatment between domestic and imported products regarding internal taxation and other charges, laws, regulations, and any other requirements affecting the trade of the products. Additionally, paragraph 8(b) of the Article at hand gives an exception as follows "*The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers … and subsidies effected through governmental purchases of domestic products*". Thus, the question arises here can the WTO Members rely on this exception to provide subsidies in the form of purchasing domestic products?

However, the *lex specialis* doctrine answers this question. This doctrine applies to both domestic and international law. It means that when the same issue is regulated under two sets of rules (law), the law governing a specific subject-matter prevails over the general law which governs that subject-matter.[260] This doctrine has been indicated in several WTO disputes. For instance, the Panel in *Indonesia- Certain Measures Affecting the Automobile Industry* ruled that the tax incentives provided by the Indonesian government through 1993

[259] WTO Secretariat, 'Infrasteucture in Trade and Economic development' (Annual Report, 2004) 114 < https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf > accessed 06 January 2022.
[260] Federico Ortino and Ernst-Ulrich Petersmann, *The WTO Dispute Settlement System, 1995-2003* (Kluwer Law International B.V., 2004) 332.

and 1996 programs constitute subsidies, then fall within the scope of the ASCM that provides a level of specificity in addressing subsidies that surpasses that of the GATT. Thus, the ASCM is *lex specialis* for this dispute.[261]

The best example of financial contribution in the form of goods or services other than general infrastructure is the dispute between the *US and Canada*. This conflict started when the US Department of Commerce (USDC) imposed a countervailing duty with respect to certain softwood lumber from Canada. While Canada requested the establishment of the Panel and claimed that the USDC erred in imposing countervailing duties on practice that does not constitute countervailable subsidies, then violated its obligations under the ASCM.[262]

A brief discussion of the dispute at hand: Canada has subsidized the production of lumber of which 60% was exported to the US and affected its lumber industry.[263] Generally, the natural resources of Canada, such as forests, are managed through the transfer of real property interests and exploitation rights. Forestry management, including harvesting trees, relies mainly on various tenure and licensing agreements that have common rights and obligations. For example, the right to harvest standing timber on Crown land or "stumpage"; service and maintenance obligations (*e.g.,* roadbuilding, protection against fire, disease, and insects); payment of "stumpage charge" that is levied upon the exercise of the harvesting right.[264]

Moreover, the stumpage program provides the harvesters the right to stand a timber[265] either through a real property right (known as *profit à prendre*) that transfers a non-possessory interest in the land to the recipient; or a license that is a revocable right to do something on the land of another that would otherwise not be permitted.[266] Thus, the challenged subsidy has existed, as the US claimed, when the Canadian government

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[261] DS54- *Indonesia - Certain Measures Affecting the Automobile Industry*, Panel Report, paras. 5.130- 5.131.
[262] *United States- Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (Softwood Lumber), [2002] WTO Panel Report 29 August 2003, WT/DS257/R, para.4.4.
[263] Ibid para. 4.66.
[264] Ibid paras. 4.5- 4.6.
[265] Oxford Dictionary, the word timber is derived from an English word *timbrian* which means to build. Timber provides the trees that are grown to be used in building or for making things.
[266] DS257- *US- Softwood Lumber*, Panel Report, para. 4.7.

provided the harvesters the right to access natural resources. The US considered natural resources, in particular harvesting trees (so-called timber), as goods, thus the whole practice goes beyond the general infrastructure and meets the meaning of Article 1.1(a)(iii) of the ASCM.[267]

Canada opposed the US' claim and declared that the meaning of "goods' does not include every object that has economic value,[268] instead, they are items that can be tradable, locally or cross-border, with an actual or potential customs classification. Besides, the right to exploit the natural resource from its original place, like exploiting oil, cannot be traded beyond borders. Then, the right to harvest provided through the Stumpage program is excluded from the scope of goods.[269]

Conversely, the EC, a third party, corroborated the US argument and emphasized that the word "good', regularly, refers to "property or possessions; movable property, saleable commodities, merchandise, wares" or "tangible or moveable personal property, other than money. Additionally, the expression "infrastructure' within Article 1.1(a)(iii) of the ASCM covers roads, railways, channels, *etc*. that are immovable objects and considered "goods' unless they are "general' (which means having a public purpose). Therefore, the term "goods' involved not only the movable but also immovable objects, including lands.[270]

Finally, the Panel concluded that there is no difference between the right to harvest a tree and the right to own the harvested tree.[271] The only possible way to obtain one of the mentioned rights is by concluding a stumpage agreement with the province (government) that owns the forests and the trees grown in them.[272]

Moreover, the Panel explored the meaning of "goods' and stated that "*the ordinary meaning of the term "goods" as "tangible or movable personal property other than money*" is thus very broad and includes standing timber, as trees are tangible objects which are capable of being owned. The Panel emphasized its result by indicating the meaning of "goods' in

[267] Ibid para. 4.71.
[268] Ibid para. 4.109.
[269] Ibid para. 4.14.
[270] Ibid paras. 5.2- 5.4.
[271] Ibid para. 7.14.
[272] Ibid para. 7.15.

Black's Law Dictionary as "*an identified thing to be severed from real property*", thus Standing timber indeed is an excellent example of this meaning.[273]

Thus, the panel decided that the Canadian government, through the stumpage program, provides the harvesters with goods (standing timber (trees)) other than general infrastructure, then meets the meaning of financial contribution under Article 1.1(a)(iii) of the ASCM. However, Canada appealed this finding and requested the AB to concur with its definition of "goods'. The terms "goods' and "products' are synonyms and used interchangeably in the GATT. Then, they are tradable items capable of bearing tariff classifications. Thus, timbers fall outside the ambit of this definition.[274]

In sum, the AB accepted the Panel's findings and stated that "goods" in Article 1.1(a)(1)(iii) of the ASCM and "products" in Article II of the GATT 1994 are different words that need not necessarily bear the same meanings in the different contexts in which they are used."[275] The AB confirmed that unharvested trees are "goods' in line with the dictionary interpretation as "*an identified thing to be severed from real property*". Bearing in mind, the stumpage timber is limited to a certain number of trees that exist in a specific area. Plus, the Stumpage fee is paid, by the harvester, based on the exact quantity of the harvested trees.[276] Consequently, the AB, like the Panel, found that "the USDOC's determination that the Canadian provinces are providing a financial contribution in the form of the provision of goods by providing standing timber to the timber harvesters through the stumpage programs' is consistent with Article 1.1(a)(1)(iii) of the ASCM.[277]

3.1.1.4. Disbursement to funding mechanism, or direct or entrust a private body in order to conduct any of the above activities

Generally, "*the object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines 'on the premise that some forms*

[273] Ibid para. 7.24.
[274] *United States- Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (Softwood Lumber), [2002] WTO Appellate Body Report 19 January 2004, WT/DS257/AB/R, para. 31.
[275] Ibid para. 63.
[276] Ibid para. 66.
[277] Ibid para. 167(a).

of government intervention distort international trade, [or] have the potential to distort [international trade]".[278] Accordingly, the government intervention, either through direct transfer of funds or any other form discussed before, is perceivable and then might constitute a subsidy. With the implication, the measure shall be conducted by the government, conferred a benefit, and probably have a trade distortion effect.

In contrast, although the financial support provided among private entities can distort international trade, it does not meet the definition of subsidy due to the absence of government intervention. This point was highlighted by both Canada during the negotiating session on subsidies under the GATT in 1989[279] and the Panel through its report on subsidies in 1959, as "*The GATT does not concern itself with such action by private persons acting independently of their governments except insofar as it allows importing countries to take action under other provisions of the Agreement*".[280]

However, the fourth form of financial contribution indicates the broad ambit of subsidy. Hence, subsidies, as defined in Article 1 of the ASCM, include not only the direct financial contribution by the government or public body, but also indirect contribution. That occurs when the government or public body "*make payments to funding mechanism, or through directing or entrusting the private entity to carry out one or more of the type of functions illustrated in (i) to (iii) above*'.[281]

For a better explanation, *payments to funding mechanism*s mean that a government transfers funds from its treasury to a monetary institution that redistributes these funds to the final recipients (private economic actors). Hence, financial support is conveyed indirectly from the government to the private actor through an intermediary (financial

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[278] *Canada - Measures Affecting the Export of Civilian Aircraft*, [1997] WTO Panel Report 14 April 1999, WT/DS70/R, para. 9.119

[279] Canada stated that "a basic condition for countervailability of a given measure should be the existence of a financial contribution by government". Group of Negotiations on Goods (GATT), 'Framework for Negotiations Communication from Canada' (Report MTN.GNG/NG10/W/25, 28 June 1989) 4. <https://docs.wto.org/gattdocs/q/UR/GNGNG10/W25.PDF > accessed 26 February 2022.

[280] GATT Panel Report (n 70) para. 12.

[281] Article 1.1(a) (1) (iv) of the ASCM. The word above includes the three forms of financial contribution as '*(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) (iii) a government provides goods or services other than general infrastructure, or purchases goods'*.

institution). The Panel in *the US-export Restraints* declared that the intermediary in such indirect payment by the government can be either a financial institution or a private entity.[282]

Subsequently, the government or public body can grant a subsidy to a firm or industry through the way of delegation of authority[283] to a private economic entity. On one hand, the subsidy is embodied in several forms, as explained before, like loans, equity infusions, purchase of goods, *etc*. On the other hand, delegation of authority has two forms either "direction" or "entrustment". Notably, in the situation of indirect fiscal support through directing or entrusting a private entity, the government aims to escape from the jurisdiction of the ASCM. Especially, neither the ASCM nor the WTO DSB introduces a coherent approach concerning the definition of "direction" or "entrustment".[284] In the same speaking, the European definition of "State Aid" states that "*any aid granted by a Member State or through State resources*".[285] Based on this definition, the question that arises is whether government subsidies result in a financial burden for the government? In plain English, shall subsidy be financed from the public funds? The AB answered this question in *Canada-Aircraft* as the cost to the government is a mandatory requirement for the financial contribution to exist, with only one exception, the situations where the private body is directed or entrusted by the government.[286] Nevertheless, various fundamental characteristics of "direction" and "entrustment" can be deduced from the AB's findings.

Starting from scratch, the dictionary meaning of "entrusting" is to give somebody responsibility for doing something or taking care of someone.[287] Likewise, "directing" means to control or be in charge of an activity.[288] Conjointly, the AB stated that

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[282] DS194, US-export restraint- P R. Para. 8.32.
[283] Group of Negotiations on Goods (GATT) (n 279) 4.
[284] *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, [2003] WTO Appellate Body Report 27 June 2005, WT/DS296/AB/R. para. 138.
[285] Article 107 of the Treaty on the Functioning of the European Union (TFEU). European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, Official Journal of the European Communities C 115/01.
[286] *Canada - Measures Affecting the Export of Civilian Aircraft*, [1997] WTO Appellate Body Report 2 August 1999, WT/DS70/AB/R, para. 160.
[287] Cambridge Dictionary (online) <https://dictionary.cambridge.org/dictionary/english/entrust > accessed 23 June 2022.
[288] Cambridge Dictionary (online) < https://dictionary.cambridge.org/dictionary/english/direct?q=directing > accessed 23 June 2022.

"*entrustment and direction require the government to give responsibility to a private body—or exercise its authority over a private body—in order to effectuate a financial contribution*."[289] Furthermore, despite the difficulties in determining exactly which government acts constitute "entrustment" or "direction, the government's act must involve *effective participation* in controlling the private entity on a case-by-case basis. Thus, the mere acts of encouragement or policy pronouncements do not meet the purposes of Article 1.1(a)(1)(iv) of the ASCM.[290]

Moreover, in *Japan-Korea-DRAMs*, the Government of Korea (GOK) gave indirect fiscal support to Hynix (a Korean manufacturer) during its restructuring process, by entrusting four of Hynix's creditors.[291] Accordingly, due to the Korean pressure, the creditors offered better arrangements[292] than they would normally have done on the market.[293]

In sum, the AB found that not commercial reasonableness is indispensable for the determination of entrustment or direction, but the intent of the government must be considered. In other words, positive evidence of the intention of the government to grant subsidies shall be submitted, such as political reasons, and previous support attempts.[294] Therefore, the AB accepted the evidence provided by Japan's investigating authorities,[295] such as the GOK had an intent to save Hynix from financial collapse, and had already provided subsidies to Hynix through direct involvement in the December 2002 restructuring. Besides, the GOK had the capability to control the four creditors through its shareholding power.[296]

3.1.1.5. Any form of income or price support which entails improvement of export or minimization of import

[289] DS296- *US- Countervailing Duty Investigation on DRAMs*, Appellate Body Report, para. 113.
[290] Ibid para. 114.
[291] Korea Exchange Bank (the "KEB"), Woori Bank, Chohung Bank, and National Agriculture Cooperative Federation (the "NACF"). DS336- *Japan- DRAMs*, Panel Report, para. 7.50.
[292] Such as reduction of interest rate, or extension of the due date (deferral) and conversion of the debt into equity.
[293] DS336- *Japan- DRAMs*, Panel Report, para. 4.3.
[294] DS336- *Japan- DRAMs*, Appellate Body, para. 138.
[295] Ibid 280. (a)(ii).
[296] Ibid 14.

In addition to the previous four forms through which subsidy can be materialized, sub-paragraph 2 of Article 1 of the ASCM presents the fifth form by indicating Article XVI of the GATT 1994. By reading the mentioned Articles together, it is understood that subsidy also occurs when there is "*any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory*".[297] To put it in another way, for the sake of subsidy to exist the government action shall: a) have the form of income or price support; b) necessitate export increase or import reduction of any product.

Notedly, the preparatory works of the GATT showed that the aim of this provision is to include any monetary support provided by the government in order to strengthen its competitive position at the domestic and international levels.[298] Accordingly, the term "*form of income or price support*" is extensive and can include numerous government measures just because they affect the income or price. This criticism is emphasized in literature, in particular, from the viewpoint of Luengo. He opines that the export restraints on a specific product allow domestic purchasers to buy the product at hand at a reduced price. Thus, according to this broad term, these export restraints constitute a subsidy in the form of indirect income support.[299] Conversely, the Panel in *the US-Export Restraint* did not consider the export restraint as a subsidy.[300]

However, income and price support have several forms that vary from fixing the domestic price of a product at a level higher or lower than the world price level. This case occurs, for example, when the government purchases a product and resales it at a lower price. Thus, the government bears the loss of these transactions that comprise a subsidy. [301] Additionally, the contracting parties to the Havana Charter, from which Article XVI of the GATT had been derived (as explained in the second chapter), agreed that exempting certain domestic industries from the internal tax would constitute a subsidy only if the same tax was levied

[297] Article XVI of the GATT.
[298] Valiyaveettil Abdulazeez Seyid Muhammad, *The Legal Framework of World Trade* (Praeger, 1958) 219.
[299] Gustavo E. Luengo, (n 39) 120.
[300] *United States - Measures Treating Export Restraints as Subsidies,* [2000] WTO Panel Report 29 June 2001, WT/DS194/4, para. 9.1.
[301] Conversely, maintaining the domestic price of a product lower than the world price by law and through quantitative restriction for example. In this case, the government action causes no loss to the government and then does not constitute a subsidy. GATT Panel Report (n 70) para. 11.

on the imported like products.[302] Cutting the local transport charges on products, that are fixed to be exported, fulfills the meaning of subsidy if it results in growing the rate of export of any product higher than the ordinary rate in the case of the absence of the subsidy.[303]

In sum, due to the countless amount of government measures that fall within the scope of this provision, if the direct or indirect effect approach has been followed, a stricter and narrower approach limiting this scope is needed. Therefore, the author of this dissertation stands by the approach that the nature of and the intent of the government action should be considered, rather than the uncertain effects of this action. For further explanation, the price support should only include the government actions that are intended to fix the price at a particular level, such as surplus production.[304] This is especially relevant in circumstances where there is excess production, or an abundance of goods in the market. In such situations, price support measures are employed by governments to prevent prices from falling too low due to the surplus. The focus is on addressing the specific issue of surplus production and its potential impact on market prices. On the other hand, this narrow approach would exclude the price support action that occurred indirectly as a side effect of the government action, like the case of tariffs and quantitative restrictions. Thus, increasing the domestic prices, through the mentioned measures, is only a side effect.[305]

3.1.2. The donor is "government or any public body"

The second fundamental element of subsidy is the granting body. According to Article 1.1(a)1 of the ASCM, the subsidy must be provided by the "*government or any public body*". Thus, two initial points can be understood from the language of this provision. Firstly, two types of entities are entitled to grant a subsidy. Secondly, "public purpose" or "public activity", or "public authority" is the common characteristic between them. This common characteristic is in line with the ASCM that makes a kind of equalization between

[302] GATT Analytical Index (n 73) 52.
[303] United Nations Economic and Social Council, 'Second Session of The Preparatory Committee of The United Nations Conference on Trade And Employment' (Report E/PC/T/127, 12 July 1947) 1. <https://docs.wto.org/gattdocs/q/UN/EPCT/127.PDF > accessed 24 April 2022.
[304] *China - Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel (GOFES) from the United States*, [2010] WTO Panel Report 15 June 2012, WT/DS414/19, para, 8.85.
[305] Ibid para. 8.87.

government and public body when it refers to both as a "government". [306] Accordingly, it is undoubted that the granting body has narrow and broad interpretations.

On one hand, the narrow interpretation involves the ordinary meaning of government indicated in the Shorter Oxford English Dictionary, the government includes "*The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry*".[307] Besides, the Drafts Articles on Responsibility of the States defines the government as national, regional, and local organs of a state regardless of their functions, judicial, executive, or legislative, and their positions in the organization of that state.[308] In this regard, the financial contribution can be supplied by the government either directly or indirectly through directing or entrusting a private entity (as explained before). Notedly, the ambits of this interpretation are conspicuous and not controversial.

However, although the term "*Government*" has never been challenged before the WTO Dispute Settlement Body (DSB), the term "government agencies" was a subject matter in the *Canada-Dairy dispute*.[309] This term is introduced in Article 9.1 of the Agreement on Agriculture as:

> 1. The following export subsidies are subject to reduction commitments under this Agreement:
>
> (a) the provision by governments or their agencies of direct subsidies,…[310]

Thus, the AB, like the Panel, decided that an entity constitutes a "government agency", when two requirements are met. The first element is the functional requirement that exists when the entity carries out a governmental function. The second element is the source

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[306] Article 1.1(a)1 of the ASCM "*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*".
[307] L. Brown (ed.), *Shorter Oxford English Dictionary* (Vol. I) (Claredon Press, 1993) 1123.
[308] Article 4 of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, <https://www.refworld.org/docid/3ddb8f804.html > accessed 30 September 2023.
[309] *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* [1997] WTO Appellate Body Report 13 October 1999, WT/DS103/AB/RW ; WT/DS113/AB/RW, para. 93.
[310] Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

requirement that exists when the power to act is sourced (delegated) by the government.[311] Moreover, regarding the governmental function, the AB referred to the Black's Law Dictionary and found that "*…that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens*."[312] The author of this dissertation fully agrees with the AB's approach because the two-mentioned requirements are distinctive features of a government that serve as the keystone in distinguishing between the government (and its associated bodies) and the private body. Besides, the private body is not able to perform the governmental function without a legal delegation (in-law delegation) by the government. Otherwise, the indirect delegation (in-fact delegation) would be understood as directing or entrusting a private body under Article 1.1(a).1(iv) of the ASCM.

On the other hand, broad interpretation expands the scope of the granting body to involve every public body. Yet, the ASCM gives neither a definition nor a clear illustration of how to determine whether the entity constitutes a public body. Therefore, the case law, in particular the Appellate Body's opinions, is the most sufficient source for structuring the meaning of the term "*public body*".[313] This term has raised several disputes some of which are discussed briefly in this dissertation.

3.1.2.1. What does "public body" stand for?

The WTO is an intergovernmental organization[314] that includes 164 member states.[315] It coordinates international trade and stipulates the rights and obligations of the Members through 60 agreements and decisions, which are up to 550 pages.[316] Those legal instruments are directly designed to and implemented by the Member States. Bearing in

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[311] DS103/113- *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* Appellate Body Report, para. 98.
[312] Ibid para. 97.
[313] Isabelle Van Damme 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 (3) European Journal of International Law, 605, 1.
[314] Intergovernmental organization means that it Composes primarily of sovereign states. Michael Wallace and J. David Singer 'Intergovernmental organization in the global system, 1815–1964' (1970) 24 (2) International Organization 239, 240.
[315] WTO Official Website, 'who we are' <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm > accessed 17 October 2022.
[316] WTO Official Website, 'WTO Legal Text' <https://www.wto.org/english/docs_e/legal_e/legal_e.htm#:~:text=There%20are%20about%2060%20agreements,Agreement%2C%20services%20and%20accession%20protocols > accessed 17 October 2022.

mind that international trade transactions are mainly conducted not solely by the states (public actors) but also by the private economic actors that escape from the execution of the WTO agreements and decisions. Therefore, distinguishing between the public and private actors (bodies) is of a great level of importance to precisely determine the spectrum of the WTO provisions, particularly, the subsidy provisions at hand. Thus, the case law has raised questions such as are the SOEs deemed as a public body? Then, what are the criteria for such a determination?

Opining the discussion with a summary of factual aspects of three principal cases. On June 11, 2003, the EC (complainant) asked for the establishment of the Panel[317] to scrutinize the existence of prohibited subsidies maintained by Korea (defendant) through various measures as follows:

- Korean exporters of capital goods were financed at preferential rates by the Export-Import Bank of Korea (KEXIM). [318]
- The pre-shipment loan (PSL) Program is provided by KEXIM. The loans are granted to Korean export companies as a contribution to finance production. The benefit exists in this program when the Korean exporters enjoy privileged places due to the favorable interest rates. [319]
- Advance payment refund guarantee (APRG) Program to Korean shipbuilding companies established by KEXIM.[320] Guarantee means a 100% refund of any advanced payment to a Korean exporter to be paid to any foreign buyer, in the case contractual obligations have been breached by the exporter. The benefit is conferred based on the more advantageous terms that otherwise would have been not obtained.[321]

[317] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 1.3.
[318] Ibid para. 3.1.
[319] *Korea - Measures Affecting Trade in Commercial Vessels* [2002] First Written Submission of the Parties (Annex A), WT/DS273/R, paras. 26-28.
[320] Ibid para. 14.
[321] Ibid paras. 23-24.

- Corporate restructuring measures, for instance, debt forgiveness, debt and interest relief, and debt-to-equity swaps, affect specific firms.[322]

Moreover, EC claimed that the legal base of alleged subsidies is that benefits occurred due to the financial support provided by KEXIM which constitutes a public body. Then, they meet the definition of subsidy stipulated in Article 1.1(a)(1) of the ASCM.[323]

The second crucial dispute on the meaning of "public body" has arisen due to the anti-dumping and countervailing duties imposed by the US on certain Chinese measures. The Panel was requested by China (complainant) to rule that the US duties were inconsistent neither with the ASCM nor the GATT 1994.

According to the countervailing duties investigations conducted by the UNDOC, the US claimed that China provides subsidies regarding Hot-Rolled-Steel (HRS) production[324] through both a) SOEs when private trading companies had purchased the HRS from state-owned producers and/or suppliers at favorable prices;[325] and b) State-Owned Commercial Banks (SOCBs) that had granted a particular producer (East Pipe) preferential loan. Hence, both SOEs and SOCBs constitute a public body that is sufficient to provide a financial contribution according to Article 1.1 of the ASCM.[326]

Additionally, in 2012, the Panel was established, based on a request form India (complainant), to examine the US (defendant) countervailing duties levied on certain hot-rolled carbon steel flat products from India.[327] This deems the third landmark dispute on the issue at hand. The US aligned the imposition of such duties based on the claim that India afforded various financial aid for less than adequate remuneration.[328] These aids had

[322] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 3.1.
[323] *Korea - Measures Affecting Trade in Commercial Vessels* [2002] First Written Submission of the Parties (Annex A), WT/DS273/R. para. 15.
[324] Includes four products (i) Circular Welded Carbon Quality Steel Pipe ("CWP"); (ii) Certain New Pneumatic Off-the-Road Tires ("OTR"); (iii) Light–Walled Rectangular Pipe and Tube ("LWR"); and (iv) Laminated Woven Sacks ("LWS"). DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 2.1.
[325] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, [2008] WTO Panel Report 22 October 2010, WT/DS379/R. para. 2.4.
[326]Ibid para. 2.5.
[327] *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, [2012] WTO Panel report 14 July 2014, WT/DS436/R, para. 1.1.
[328] Ibid para. 7.3.

been granted by Public Bodies in several forms, for example, National Mineral Development Corporate (NMDC) permitted certain steel producers the right to mine iron ore and coal for their private use (goods other than general infrastructure).[329] Steel Development Fund (SDF) provided several loans (direct transfer of funds).[330]

Furthermore, these aids were *de facto* specific to certain enterprises, for instance, Essar, ISPAT, JSW, and Tata.[331] Thus, these financial aids met the definition of subsidy according to Article 1.1 of the ASCM and constitute prohibited subsidies according to Article 3 of the ASCM. Accordingly, the US has the right to compensate for the adverse effect of such action by imposing countervailing duties.[332]

However, in accordance with the arguments of the main and third parties in the above-mentioned cases, three criteria can be recognized as a benchmark between the public and private body as follow:

3.1.2.1.1. Governmental Control Standard

This standard was first adopted by the Panel in *the Korea-Commercial Vessel* dispute. The Panel defined the public body as an entity controlled by the government (or other public bodies). Thus, any activity that has been conducted by a government-controlled entity is attributable to the government and should, therefore, fall within the scope of Article 1.1(a)(1) of the ASCM. Accordingly, the Panel considered KEMXN as a public body due to the control of GOK. To demonstrate such control, the Panel relied on the fact that the KEMXM is 100 % owned by the GOK and operates under government control.[333] The Panel cited the AB's finding that meaningful control by the government can render an entity public in nature. However, for determining meaningful control, a combination of government shareholding and other sufficient factors must be materialized.[334] The Panel added that besides ownership criterion, public policy objective, establishment through

[329] Ibid para. 7.220.
[330] Ibid para. 7.267.
[331] Ibid para. 7.3.
[332] Ibid para. 7.206.
[333] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.50.
[334] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Panel Report, para. 7.81.

public status,[335] appointing the Governor, Vice Governor, and Directors…, confirming the entity's annual operation plan, etc.…[336] are fundamental criteria for proving the existence of government control.

The US is one of the greatest proponents of this standard. From the US perspective, the term "public" means "*belonging to, affecting, or concerning the community or nation*". Besides, the word "private", which is a complete contradiction to the word "public", refers to services or businesses that are supplied or owned by an individual instead of a State or a public body. Thus, the term "public Body" should include any entity that is owned by the State or another public body rather than any private economic actor.[337] Further, the term "public entity", which is stipulated in the GATS, should be interpreted and implemented only with issues concerning the GATS but not the ASCM that have a distinct scope of application.[338]

Furthermore, the US asserts that the inclusion of the word "any" before the term "public body", carries two different indications. Firstly, a public body can take on various forms or exist in different organizational structures. Secondly, the public body has a distant connotation from the government.[339] Therefore, if the public body is not equivalent to the government, then it does not enjoy the government authority and does not carry out the same governmental functions.[340]

Additionally, the US argues that the entity should be deemed as a public body if it is controlled by the government. Bearing in mind, that government ownership is a sufficient indicator to determine such control.[341] This control can reach the extent of using the

[335] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.55.
[336] Ibid para. 7.172.
[337] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 8.19.
[338] Ibid para. 8.24.
[339] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, [2008] Executive Summaries of Second Written Submissions of the Parties (Annex C2), WT/DS379/R paras. 3-6.
[340] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 8.22.
[341] Ibid para. 8.30.

resources of that entity by the government as it was a public fund.[342] For the US, this standard goes in line with the purpose and object of the ASCM because "*subsidizing governments cannot hide behind their ownership interests, while at the same time not treating any entity with which a government has a merely tangential relationship as a public body*".[343]

Argentina, Canada, Mexico, and Turkey (third parties) support the US argument on government control. Argentina, for instance, contends that the terminology "public body" within Article 1 of the ASCM should be interpreted according to the form of control of the entity, rather than the nature of goods of services provided by that entity. It explained that some private goods can be produced by public entities. In contrast, many private entities might produce public goods.[344]

3.1.2.1.2. Governmental Function Standard

Korea's voice was raised against the EU on an accurate definition of "public body". Korea, after referring to Webster's New Twentieth Century Dictionary, interpreted the term "public" as "*[a]cting in an official capacity on behalf of the people as a whole; as a public prosecutor*".[345] Besides, Korea based its argument on Article 5 of the Draft Articles.[346] It alleged that a public body might exist only if the entity is lawfully authorized to conduct elements of government authority in the particular instance. Taking into consideration, "in the particular instance" means that the act must be "*undertaken pursuant to the specific grant of government authority*".[347] Thus, an entity constitutes a public body if it carries out its activity in an official capacity or participates in governmental functions.[348] Finally,

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[342] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Panel Report, para. 7.71.
[343] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 8.31.
[344] Ibid paras. 8.42-8.45-8.49-8.52, respectively.
[345] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.37.
[346] Article 5. "*Conduct of persons or entities exercising elements of governmental authority:*
The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance". International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 308).
[347] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.39.
[348] Ibid para. 7.37.

Korea argued that KEXIM is not a public body as the EC claimed, instead, it is a financial institution that provides private financing and seeks to make a profit. This private institution does not lunch any governmental function and has neither power to regulate nor to control the other private actors (manufacturers and borrowers).[349]

However, Korea is not the only state that supports this standard. Moreover, Brazil (third party), for example, declared that an entity shall perform typical governmental functions to be deemed as a public body.[350] Additionally, Norway and Saudi Arabia (third parties) believed that the benchmark for determining whether the body is "public" or "private" is exercising governmental functions.

In contrast, the Panel rejected the governmental function approach due to its unreliability. The Panel contended that this approach would not lead to a certain classification of an entity because it relies on the nature of the actions conducted by the entity within the market. These classification might change from a governmental action (providing grants) to a private action (financial services) day-to-day.[351] Moreover, the dictionary meaning "official capacity" is not precise form the Panel's perspective. It explained that the official capacity will not be suspended when an entity applies market commercial principles. For instance, police officers, who get extra remuneration from the football club, for providing security services, do not lose their official capacity.[352]

3.1.2.1.3. Comprehensive Governmental Authority Standard

> just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.[353]

[349] Ibid para. 7.40.
[350] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 44.
[351] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.45.
[352] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.48.
[353] *United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, [2012] WTO Appellate Body report 8 December 2014, WT/DS436/AB/R. para. 4.37.

The introduction of a third criterion for defining the term "public body" can be attributed to the EC. For the EC, three requirements must be accomplished for considering an entity as a "public body" within the meaning of Article 1.1 of the ASCM as follows: (i) government control, (ii) having a public policy objective, and (iii) funding from the state resource.[354] In response, Korea contested the three requirements.[355] Firstly, the public policy objective is not sufficient to distinguish between public and private bodies. That is because this objective is not limited to a public body, but also a private body sometimes can have it. In contrast, some public bodies are established for industrial and commercial purposes and then enter a fair competition with private bodies.[356] Secondly, the benefit from the government resource is not an adequate indicator that makes the beneficiary a public body. Simply, there is a scenario where the beneficiary, which is still a private body, is receiving a subsidy from the government resource.[357]

Furthermore, China evolved this standard by highlighting the "functional equivalency" between "government" and "public body". At the same time, it maintained that these two terms are not interchangeable due to the conjunction "or".[358] Instead, a "public body" is "*an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character*".[359] By way of explanation, two elements in this definition can be found as (i) government authorizing the power to an entity. (ii) deploying this power for undertaking governmental functions.

Therefore, China emphasized, like Japan (third party)[360], that as long as the governmental control standard is not capable solely of evidencing the existence of the public body. The government-owned entity will constitute a public body only if it is exercising delegated authority to perform governmental functions.[361]

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[354] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.32.
[355] For the first requirement, see Korea's opinion about the Government Control Standard in section 3.1.2.1.1 of this dissertation.
[356] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.38.
[357] Ibid para. 7.41.
[358] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 8.9.
[359] Ibid para. 8.55.
[360] Ibid para. 8.47.
[361] Ibid para. 8.6.

Additionally, the AB, in the *US – Countervailing Duty Investigation on DRAMS,* repudiated the Panel's finding that a "public body" is "*any entity controlled by the government*".[362] The AB recalled the dictionary meaning of the term "public body". Hence, the word "public" means "*belonging to, affecting or concerning the community or nation*", or "*authorized or representing the community*". While the word "body" refers to "*artificial persons created by legal authority*". Thus, the compound term "public body" can involve: On one hand, any entity that is vested with or exercises government authority. On the other hand, any entity belongs to the community or nation. Notedly, both definitions comply with the French and Spanish meanings.[363]

Regarding the argument on the object and purpose of the ASCM, the AB concluded that the meaning of "public body" cannot be determined by such object and purpose.[364] As for the argument on the Draft Articles, also the AB decided that according to the *lex specialis* rule, Article 1 of the ASCM shall prevail and set aside the Draft Articles.[365]

Further, the AB emphasized that using the cumulative term "government" as a general term that refers to both government and public body, can be only understood as a method to facilitate the drafting of the ASCM. Besides, the highlighted words in this phrase "**a** government **or any** public body" have only one indication that "government" is different than the "public body"[366] but they share some similarities.[367] The AB added that when the government exercises its functions, which are to regulate, control, and supervise the individuals, by a legal authority. Due to the similarities, the public body, then, should enjoy a certain level of such functions and authority.[368] Accordingly, a "public body" is "*an entity that Possesses, exercises, or is vested with government authority*". Remarkably, India grounded its argument against the US and demanded that for considering the NMDC as a public body, it was more sufficient for the US to prove whether the NMDC has been vested

[362] Ibid para. 322.
[363] Ibid para. 285.
[364] Ibid para. 303.
[365] Ibid para. 314. Article 55 of Draft Articles "*These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*".
[366] Ibid para. 289.
[367] Ibid para. 317.
[368] Ibid para. 290.

with the power and authority to perform governmental function, rather than concentrating on the government ownership of NDMC.[369]

Undoubtedly, no one can deny the importance of the AB's finding, which arguably is consistent with the wording and context of the ASCM, but also the "authority" test imposed through this definition will likely be more difficult to implement than the "control" criterion established by the Panel.[370] From the viewpoint of the author of this dissertation, the AB has partially succeeded in defining the public body. By way of explanation, the AB by adding the conjunction "or" to the definition, means that every element is adequate, on its own, to demonstrate the existence of the public body. Unfortunately, that is not accurate because the entity that possesses the authority might not use it in its conduct. Taking into consideration the fact that the government itself, sometimes, carries out an economic activity without enjoying the public authority. In this case, one cannot say that this entity is a public body within the meaning of the ASCM because the reason behind the prohibition provided by the mentioned Agreement is to avoid any favorable treatment derived from exercising public authority. This favorable treatment will not exist when a public body cedes its power and stands on an equal footing with other companies in a fair economic competition.

Moreover, the AB mentioned that one of the meanings of the word "public" is "belonging to the community or nation". That means the community or nation should have control over that entity. While the AB body ignored this fact in its findings. For a deep discussion, the assumed object and purpose of the ASCM, from the Panel's view, is to strengthen the provisions to cease the distortion effect of government intervention into the market which is also known as Non-Market Effects (NMEs).[371] When China decided to access the WTO, it adhered to several amendments to its market policies. One of them was about the SOEs

[369] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Panel Report, para. 7.70.
[370] The Panel adopted the approach that public body includes any entity controlled by the government and the ownership is sufficient evidence for such control. Francois-Charles Laprévote and Sungjin Kang, 'Subsidies Issues in the WTO – An Update' (2011) 10 (3) European State aid Law Quarterly, 445, 448.
[371] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, footnote 117.

which is a form of Non-Market Economics[372] (NME).[373] Apparently, the majority of Chinese public policies are achieved by the Chinese SOEs.[374] Thus, if the ASCM aims to protect the market from NMEs, the SOE should be examined under the meaning of the term "public body". Considering the fundamental feature of the SOE is being owned and subject to the control of the government.

Besides, the author asserts that by adding an alternative to the government, the Agreement seeks to extend the spectrum (ambits) of its application and to include more than merely the government. In that sense, the Agreement intends to create a new body that stands in between the government and private body, named as a semi-government entity. This body does not have the full power and function of the government. At the same time, it enjoys them to the extent that distinguishes it from the private body. Bearing in mind that the public body may "entrust" or "direct" a private body to carry out the type of functions or conduct illustrated in subparagraph (iv).[375]

In conclusion, the suggested definition combines the three standards as "public body" includes any entity that fulfills two elements: i) governmental control, while the ownership and all the other elements mentioned by the Panel above (see Footnote 173 and174) are good evidence thereof; ii) enjoying either public fund, public policy, or public object through authority delegation. The ambit of this definition is neither narrow nor broad. It does not involve all the SOEs just because they are controlled by the government. It is also less flexible than AB's approach, which would empower the provisions of the ASCM.

3.1.3. The result is "benefit"

[372] Non-market Economy is "A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning". Polouektov Alexander, 'The Non-Market Economy" Issue in International Trade: in The Context of WTO Accessions' (Report UNCTAD/DITC/TNCD/MISC.20, 2002) 6.
[373] WTO, Protocol of Accession of the People's Republic of China' (Protocol WT/L/432, November 2001) Article 10.
[374] Vera Thorstensen, Daniel Ramos, Carolina Muller, and Fernanda Bertolaccini 'WTO – Market and Non-Market Economies: the hybrid case of China' (2013) 1 (2) Latin American Journal of International Trade Law, 765, 766.
[375] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 293.

Broadly, the spectrum of the ASCM includes financial government programs that result in conferring a benefit to a particular recipient/s. Thus, the existence of financial contributions by the government is not adequate by itself to comprise a subsidy. Then, the benefit in the account of the receiver is a major element in determining the existence of a subsidy measure.[376]

Importantly, the ASCM does illustrate explicitly neither the definition of "benefit" nor the method to calculate its amount. It merely provides for extensive guidelines for such a calculation through Article 14. Accordingly, there are two main requirements any methodology to calculate benefit shall meet. The primary, legal nature which means it should be created by a legal instrument of the investigating Member, such as legislation or regulation. The secondary, transparency, and clarity regarding the application.[377]

Moreover, Article 14 of the ASCM makes a distinction among four types of subsidies with regard to the existence of benefits. Initially, in the case of equity capital, the benefit is conferred only if the investment decision would not have been made in usual investment practice. Secondly, a governmental loan confers a benefit when the firm that receives the loan would have paid a higher interest on a comparable commercial loan. Thirdly, as for the loan guarantee, a benefit exists if the firm receiving the guarantee would have paid a greater amount on a comparable commercial loan without the government guarantee. Finally, the benefit is materialized regarding the provision of goods or services by the government if this provision is given for less adequate remuneration. In contrast to the purchase of goods by the government, adequate remuneration should be higher. Notedly, the remuneration is to be compared with ordinary market conditions of the goods or services concerned.[378]

However, the findings of Panels and Appellate Body along with the viewpoints of parties to WTO disputes are the center of attention to clear up the meaning and existence of the

[376] Article 1(b) of the ASCM.
[377] Article 14 of the ASCM
[378] Article 14 (a,b,c,d respectively) of the ASCM

term "benefit". As such, the optimal method to calculate its amount, is due to the scarcity of such explanation in the ASCM.

3.1.3.1. The Meaning and calculation of benefit

3.1.3.1.1. The meaning of benefit

The first landmark dispute concerning the meaning of the term "benefit" is the *Canada-Aircraft* dispute. This dispute was initiated by Brazil against several Canadian financial measures with the aim of facilitating the export and promoting the civil aircraft industry. For instance, benefits provided under the Canada-Québec Subsidiary Agreement on Industrial Development; and by the Government of Québec under the Société de Développement Industriel du Québec (SDI).[379]

However, Brazil, a Complainant, interpreted the word "benefit", according to Webster's Third New International Dictionary, as "advantages" or "something can aid or promote". Then, "advantage" means "more favorable or improved position or condition". Accordingly, the financial contribution by the government must help, support, or improve the receiver's conditions.[380]

On the contrary, Canada, a defendant, asserted that the standard meaning of the term "benefit" is an advantage, which does not differ explicitly between the benefit accorded from subsidy and the usual commercial contract.[381] Thus, Canada contested the Brazilian interpretation as "*the advantage given beyond commercial or market activity*".[382] Additionally, Canada added that in order for the term "benefit" to be consistent with the purpose and object of the ASCM, the "benefit" should include a) the net cost of the granting government,[383] and b) the above and beyond advantages that the market could provide.[384]

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[379] The benefit is a 49% interest in a civil aircraft manufacturer to another civil aircraft manufacturer on other than commercial terms. *Canada - Measures Affecting the Export of Civilian Aircraft*, [1997] Request for the Establishment of a Panel by Brazil 13 July 1998, WT/DS70/2, 2.
[380] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, paras. 5.40 - 9.98.
[381] Ibid para. 5.30.
[382] Ibid para. 5.31.
[383] Article 1 Annex IV of the ASCM states "*Any calculation of the amount of a subsidy for the purpose of paragraph 1(a) of Article 6 shall be done in terms of the cost to the granting government*". Besides, Article 6 explains the situations in which the serious prejudice, caused by actionable subsidy, might exist.
[384] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, para. 5.38.

Moreover, Canada added that a "benefit" can be either direct or indirect. The direct benefit intends to enhance straightly and particularly the receipt's financial level (person, firm, or industry). For example, direct payments to a producer of goods. The indirect benefit upgrades the financial situation of the firms by making changes to the whole economic environment in which those firms usually operate.[385]

In response, Brazil countered the net cost to the government approach by considering that Revenue Canada's Special Import Measures Act Handbook states that:

> It is also possible that a benefit would accrue to an exporter or an importer as a result of a government guarantee which would not necessarily result in a cost to the government. The benefit could be a lower interest rate or a loan at a commercial rate which the company would otherwise not get without government involvement.[386]

Finally, the Panel rejects the net cost to the government approach alluded to by Canada to define the term "benefit". The Panel's viewpoint is grounded in various reasons. For instance, the ordinary meaning of the term "benefit", which is referred to by Brazil and required by Article 31.1 of the Vienna Convention[387], is consistent with the meaning of Article 1 of the ASCM. Hence, the government financial contribution constitutes a subsidy, if the recipient receives advantages that would not have been provided in a normal market.[388] Besides, the concept of "benefit" should not be narrower to exclude the normal commercial activities by the government, because a normal governmental commercial contract, for example, does not provide more advantageous terms for equivalent transactions.[389]

Additionally, by considering the net cost to the government approach, every financial contribution that has no cost to the government, even though it gives advantages to a receipt, shall be excluded from the scope of the ASCM. This can be found in Article 1.1(a)(1)(iv) which introduces the situation where a government directs a private body to

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[385] Ibid para. 9.109.
[386] Ibid para. 5.47.
[387] "The ordinary meaning to be given to the terms of the treaty in their context" Article 31(1) United Nations. 1969. "Vienna Convention on the Law of Treaties." Treaty Series 1155 (May): 331.
[388] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, para. 9.112.
[389] Ibid para. 9.114.

make "financial contributions". In such a situation, the private body bears all the costs, and not the government. Thus, defining the "benefit" based on the cost to the government would have contradiction with the mentioned Article.[390] Then, it limits the scope of the ASCM instead of promoting its purpose and object.[391]

Lastly, the Panel disagreed with Canada to signify Annex IV.1 of the ASCM in defining the term "benefit". The Panel contended that the Annex at hand concerns the calculation of the amount of actionable subsidy, which is contained in Article 6 of the ASCM, not even the calculation of the value of the benefit. By way of explanation, the amount of subsidy can be calculated only after the existence of the subsidy. Therefore, positive evidence, on both "financial contribution" and "benefit", must be submitted before moving on to the next step, which is calculating the value of the subsidy. As a result, this Annex is irrelevant to the question of the meaning of the term "benefit".[392]

Moreover, the AB upheld the panel's finding and emphasized that "benefit" means "advantage", "gift" or "favorable or helpful factor or circumstances". Then, there should be a receipt, natural or legal person, who has received these advantages. Therefore, in determining whether or not the benefit has been conferred, the focal point should be the receipt, but not the granting authority.[393] In November 2007, the Chairman of the Negotiating Group on Rules[394] confirmed that "*A benefit is conferred when the terms of the financial contribution are more favourable than those otherwise commercially available to the recipient in the market, including, where applicable, as provided for in the guidelines in Article 14.1*".[395]

In short, the term "benefit" within the meaning of Article 1.1(b) of the ASCM shall be interpreted as every advantage that results from governmental financial contribution and

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[390] Ibid para. 9.115.
[391] Ibid para. 9.119.
[392] Ibid para. 9.116.
[393] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, paras. 153-154.
[394] WTO Members agreed at the Doha Ministerial Conference to launch negotiations in the "WTO Rules" area. The Negotiating Group on Rules covers anti-dumping; subsidies and countervailing measures, including fisheries subsidies; and regional trade agreements.
[395] Negotiating Group on Rules, 'Working Document from the Chairman' (Working paper TN/RL/W/232, 28 May 2008) B-3.

places the recipient[396] in a better economic situation than in the case of the absence of such contribution. This definition is the most verified by the Panel and the AB.[397] Consequently, every financial contribution by the government that does not improve the market conditions available to the recipient falls outside the spectrum of the ASCM.[398]

3.1.3.1.2. Benefit Calculation

As mentioned before, the ASCM does not set forth a unified methodology that is used to calculate the amount of benefit of subsidy. It leaves this issue at the Members' discretion. The initial point is the legality of the method of benefit calculation. Article 14 of the ASCM requires every Member to include its method within its legislation or implementing regulations, failing which the method is legally invalid. As a second step, the Member shall clarify sufficiently the way of application of such methodologies. That was Korea's claim against Japan in *the Japan-DRAM* dispute.[399] Korea asserted that the formulas and methodologies for calculating the benefit are not mentioned in the Japanese Guideline which regulates the imposition of countervailing measures. Korea went further and stated that even the word "benefit" is not highlighted in the mentioned Guideline.[400]

By the same token, it is notable that Article 14 of the ASCM adopts the market benchmark as a base of comparison to calculate the amount of benefit. That was emphasized by the Panel in *Canada- Aircraft* which stated that "*a financial contribution will only confer a "benefit", i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market*".[401] Thus, the recipient should have been made "better off" than it would otherwise have been.[402] Therefore, the financial governmental contribution does not confer a benefit, if it is consistent with the

[396] Either the direct recipient or the actual beneficiary. The meaning is clarified in the following section.
[397] DS257- *US- Softwood Lumber*, Panel Report, paras. 4.205- 4.206.
[398] Staff of IMF, OECD, World Bank, and WTO, *Subsidies, Trade, and International Cooperation* (IMF 2022) 33.
[399] For more information about the fact, see DS336- *Japan- DRAMs*, Panel Report, footnote 196 of this dissertation.
[400] DS336- *Japan- DRAMs*, Panel Report, para. 4.9.
[401] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, para. 9.112.
[402] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, para. 157.

ordinary market transaction. Besides, the language of the Panel's findings shows that there is only one market in which the comparison should be made.

However, the questions that arise here are what is the relevant market for conducing this comparison? What are the conditions/situations of the concerned market? Fortunately, the AB answered the first question in *Canada- Renewable energy* dispute.[403] Firstly. The AB pointed up the importance of determination of the relevant market for the purpose of benefit existence and calculation. It stated that "*The definition of the relevant market is central to, and a prerequisite for, a benefit analysis*".[404] Secondly, the relevant market shall not include the wholesale of the products or services in the market as a whole but shall be limited only to the competitive products or services in the market.[405] Furthermore, for determining the competitive market two main-factors, but not limited to, must be taken into consideration. Firstly, demand-side sustainability: if the two products are deemed maintainable by the consumers. Secondly, supply-side sustainability: is the possibility of the supplier shifting its production from one to another product in a short period of time.[406] Thus, the AB in the dispute at hand concluded that supply-side factors propose that windpower and solar PV producers of electricity differ from other electricity producers regarding cost structures and operating costs and characteristics. Accordingly, the relevant competitive market cannot include electricity producers other than windpower and solar PV producers due to the absent of competition with the others.[407]

As for the second question, according to the US, the market should be commercially perfect. In other words, the government's intervention must not distort that market.[408] While the Panel, previously in *the US – Softwood Lumber III*, denied such condition and

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[403] In this dispute, Japan claimed that Canada breached its obligation under the ASCM and provided a prohibited subsidy contingent upon the use of domestic over imported products. The challenging product is certain wind and solar photovoltaic ("PV") electricity generation projects. Those mentioned projects were supplied through the FIT and micro FIT Contracts, granted under the FIT Program established by the Canadian Province of Ontario. *Canada - Certain Measures Affecting the Renewable Energy Generation Sector (Renewable Energy Sector),* [2010] WTO Panel Report 19 December 2012, WT/DS412/R; WT/DS426/R, paras. 3.1- 2.1.

[404] *Canada - Certain Measures Affecting the Renewable Energy Generation Sector (Renewable Energy Sector),* [2010] WTO Appellate Body 6 May 2013, WT/DS412/AB/R; WT/DS426/AB/R, para. 5.169.

[405] Ibid para. 5.178.

[406] Ibid para. 5.171.

[407] Ibid para. 5.174.

[408] DS257- *US- Softwood Lumber* IV, Panel Report, para. 7.38.

stated that "*the market does not need to be those of a hypothetical undistorted or perfectly competitive market*".[409] Anyhow, Article 14 of the ASCM does not designate any condition for the market at hand. Therefore, the AB in *the US- Carbon Steel* dived into a linguistic interpretation of Article 14 (d) "*The adequacy of remuneration shall be determined in relation to prevailing market conditions*…". Particularly, the concept "*prevailing market conditions*". The AB found that the term "*conditions*" means "*characteristic or qualities*". Plus, the market is "*the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices*". On top of that, the term "*prevailing*" refers to "*predominant*', or "*generally accepted*". Conjointly, the concept "*prevailing market conditions*" stands for "*generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices*".[410]

However, from the viewpoint of the author of this dissertation, AB's interpretation was sufficient concerning the meaning of the terminologies "condition" and "market", but not with regard to the term "prevailing". For more explanation, according to the Oxford dictionary the term "prevailing" means "*existing or most common at a particular time*". That means, for the case in question, the market must have the same characteristic that it had at a "*particular time*". As long as the market distortion is caused by the action of an external entity which is government intervention through financial support. Therefore, that "*particular time*" with regard to the market should be understood as the condition of the market before such intervention because at that time the market was in its ordinary situation where the forces of supply and demand interact to determine market prices without an interaction by any external element. Bearing in mind that the market should not be perfect as the US claimed, instead the investigating Member shall consider the real commercial situation of that market including any economic crisis.

For further discussion, Müller highlighted a flaw with the single market benchmark approach. She based her claim on the draft Article 14 of the ASCM which stipulated that "*no benefit was conferred unless the government discriminates among users or providers*

[409] DS257- *US- Softwood Lumber III*, Panel Report, para. 7.50.
[410] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Appellate Body report, para. 4.150.

of the good or service". Consequently, the market is not the only benchmark for the benefit calculation, but also the peer group of other users or providers of a particular product. [411]

The author of this dissertation agrees with Müller's viewpoint because "*A market is created whenever potential sellers of a product are brought into contact with potential buyers and a means of exchange*".[412] Then, according to the Draft Article, the discriminatory treatment appears only between either the "users" or the "providers". Thus, there is no business relationship (in the form of demand and supplier) between them in order to create a market. Additionally, it is understandable from the language of Article 14 that this single benchmark deals only with the four forms of subsidies in which they are set out. That means the other forms of subsidies provided for in Article 1 of the ASCM can have a different benchmark on a case-by-case basis. For instance, when the financial contribution is shaped in the form of tax forgiveness, using the law in order to encourage the establishment of new investments in a specific geographic area. In such a situation, the market benchmark becomes useless due to the absence of the relevant market. Thus, the benefit calculation benchmark should be based on the loss (net cost) of the government in its tax revenue.

Over and above that, the absence of the market for comparison purposes was emphasized by the AB in *the US- Lumber softwood* dispute. The AB found that the Canadian market was distorted and gave insufficient ground for calculating the amount of the benefit because the Canadian government was the predominant supplier of the goods (lumbers-trees). Thus, the prices of private suppliers for those goods were influenced by the prevailing price strategy of the government. Accordingly, the comparison with the government price does not represent adequate remuneration,[413] and the investigating authority shall use a price other than the distorted price in the market.[414] One of the best alternative benchmarks is the third-country benchmark that is stipulated in Article 15 of the Subsidies Code (to be discussed below).

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[411] Sophia Müller, *The Use of Alternative Benchmarks in Anti-Subsidy Law: A Study on the WTO, the EU and China* (Springer, 2018) 28.
[412] DS426- *Canada - Renewable Energy Sector*, Appellate Body Report, para. 5.169.
[413] DS257- *US- Softwood Lumber*, Appellate Body Report, paras. 100- 101.
[414] Ibid para. 101.

3.1.3.2. Who is the Recipient of the benefit?

In order for a subsidy to exist the governmental financial contribution shall confer a benefit according to Article 1 of the ASCM. Carefully examining this Article in conjunction with Article 14 of the ASCM "*any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1*". It can be understood that if the financial contribution is provided directly or indirectly by a government, then the determination of whether the benefit is conferred is based on the account of the recipient. On the contrary, the case laws show that on some occasions the beneficiary of financial contribution is an entity other than the direct recipient.

Moreover, in November 2007, the Chairman of the Negotiating Group on Rules highlighted this issue and stated that

> Where a subsidy is granted in respect of an input used to produce the product under consideration, and the producer of the product under consideration is unrelated to the producer of the input, no benefit from the subsidy in respect of the input shall be attributed to the product under consideration unless a determination has been made that the producer of the product under consideration obtained the input on terms more favorable than otherwise would have been commercially available to that producer in the market.[415]

Unfortunately, Article 14 does not address the case when the recipient and beneficiary are different entities. Therefore, analyzing the WTO disputes is a necessity for clarifying the issue at hand.

It is noted that the recipient of financial contribution is not necessarily to be the only beneficiary. That was observed in the *US-Softwood lumber IV*.[416] In this dispute, the US raised the question that does the lumber input provided from lumber producers, who have already obtained subsidy under the Canadian Stumpage program, to another lumber producer constitutes a subsidy? In other words, does the benefit that pass-through the upstream producer (direct recipient) to another upstream producer (indirect

[415] Negotiating Group on Rules (n 395) B-6.
[416] For more information about the fact, see DS257- *US- Softwood Lumber*, Panel Report, in footnote 256 of this dissertation.

recipient/beneficiary) constitute a subsidy?[417] In answering this question, both the AB and the Panel emphasized that "*the existence of any subsidy may never be presumed*", but pass-through analysis must be conducted, then positive evidence on "financial contribution" and "benefit" must be submitted.[418] The Panel concluded that subsidy, in the dispute at hand, can pass-through only if the "*logs rather than lumber are sold by a harvester/sawmill, then some portion of any subsidy that it receives under a stumpage program is attributable to its production of logs*".[419] As a general rule, there are two conditions for a pass-through approach: a) The sold product has already been manufactured by the recipient of subsidy. b) Some amount of subsidy has contributed to the product's manufacturing process.

Additionally, the other issue was highlighted firstly in the *US- Hot-Rolled lead* dispute which concerns hot-rolled lead and bismuth carbon steel products originating in the UK. The USDOC detected a subsidy rate of 12.69 % on imports from United Engineering Steels Limited (UES).[420] As a brief of the facts, the UES was a joint-venture equally owned by British Steel Public Limited Company (British Steel plc) and Guest, Keen, and Nettlefolds (GKN), both of which were privately-owned companies. In 1988, British Steel plc was privatized to arm's length transaction and for fair market value and consistent with commercial considerations.[421] The challenged subsidy had the form of equity infusions provided by the British Government only to British Steel plc (which means to the state-owned enterprise) before being privatized.[422] This dispute raised the question of whether the benefit of financial contribution to an undertaking resumes to exist after the privatization of that undertaking.[423]

The US contended that the pre-existing subsidy provided to British Steel plc (as a SOC) has transferred to the GKN (as a Private-Owned Enterprise) by way of changing the

[417] DS257- *US- Softwood Lumber IV*, Panel Report, para. 4.132.
[418] Ibid paras. 4.132- 6.6.
[419] Ibid para. 7.97.
[420] *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Bismuth Carbon Steel Products),* [1998] WTO Panel Report 23 December 1999, WT/DS138/R/Corr.2. para, 2.2.
[421] Ibid para. 2.3.
[422] Ibid para. 2.5.
[423] Ibid para. 4.5.

ownership.[424] The US founded its claim on the fact that the ASCM does not require a new benefit determination in the case of changing the ownership of the company.[425] However, The EU, a third party, denied the existence of the benefit as the US claimed, because the private-owned enterprise has purchased productive assets at fair market value, but not at more favorable terms than those available to another competitor in the market. Thus, the private-owned enterprise did not receive any special benefit (advantages) within the meaning of the ASCM.[426]

The AB upheld the panel's conclusion.[427] According to the provisions[428] of the ASCM, the goal of countervailing measures is to offset (countervailable) subsidies. Thus, the subsidy, firstly, should be proved to exist (including both financial contribution and benefit), and then the countervailing duties can be levied.[429] Additionally, the Panel agreed with the EU's argument and stated that "*the existence or non-existence of "benefit" rests on whether the potential recipient or beneficiary, which "logically" must be a legal or natural person, or group of persons, has received a 'financial contribution' on terms more favourable than those available to the potential recipient or beneficiary in the market*".[430] Moreover, in the case where the recipient of financial support is other than the beneficiary, then the benefit shall not pass through the recipient (for example upstream) unless the producer of the final product (downstream) itself received the input at terms advantageous to the market.[431] In the dispute at hand, the benefit based on the favorable treatment is not meant to exist. Accordingly, the US should have clearly distinguished between BSC, UES, and BSplc/BSES, because changing ownership led to the creation of a new company. Then, the US should have examined the continued existence of "benefit" already deemed to have been conferred from the dissolved company to the newly established one.[432]

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[424] Ibid para. 6.29.
[425] Ibid para. 6.41.
[426] Ibid para. 6.36.
[427] *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom (Bismuth Carbon Steel Products),* [1998] WTO Appellate Body Report 10 May 2000, WT/DS138/AB/R, para. 75.
[428] Articles 19.1- 19.4, and 21.1 of the ASCM.
[429] DS138- *US- Bismuth Carbon Steel Products),* Panel Report, para. 6.57.
[430] Ibid para. 6.66.
[431] Sophia Müller, (n 411) 217.
[432] DS138- *US- Bismuth Carbon Steel Products),* Panel Report, para. 6.70.

3.1.3.3. Alternative benchmark for the calculation of the amount of subsidy in terms of the benefit to the recipient

As stated earlier, Article 14 of the ASCM adopts the market benchmark for calculating the amount of benefit based on which the amount of subsidy shall be decided. However, this Article does include only four forms of subsidies, but not all forms as stipulated in Article 1 of the ASCM. That means the market benchmark, most likely, is not sufficient for the determination of the amount of benefit either in unregulated cases or in the case of the absence of the prevailing market. Therefore, alternative benchmarks are required.

Article 15 of the Subsidies Code 1979 provides for two alternative approaches. Firstly, the third-country market approach allows the investigating authority to use either the price at which the like product in a third country is sold or a constructed value[433] of the like product in a third country.[434] The author of this dissertation emphasizes the importance of this approach as it is mentioned in the Code. According to this approach, the Code does not give the investigation authority full discretion in selecting the third country, then it does not lead to an inaccurate and insufficient calculation of the amount of benefit. In contrast, the Code requires the investigating authority, while calculating the benefit, to take into consideration the "actual" trade level of the third country's market to be as equal as the subsidizing Member's market.[435]

Secondly, the importing-country market approach allows the investigating authority to compare the price of the alleged subsidized product with the price of the like product in its market to determine the amount of benefit. Successfully, regarding this approach, Article 15 of the Code obliges the investigating authority to make all necessary adjustments to its market's price to reflect reasonable profits.[436] Moreover, for sufficient implementation of these two approaches, this Article requires the investigation authority to base the

[433] Constructed value permits the creation of the price of the product from scratch by taking into consideration cost of production plus a reasonable amount for administration, selling and any other costs and for profits. Footnote 33 of the Subsidies Code.
[434] Article 15(2) of the Subsidies Code.
[435] Article 15(4) of the Subsidies Code.
[436] Article 15(3) of the Subsidies Code.

calculation on two main-factors a) prices at the same level of trade, and b) as nearly as possible at the same time the operations are made.[437]

Additionally, the European Regulation on protection against subsidized imports from countries not members of the European Union adopts, in addition to the previous approaches, the world-market approach. This approach allows the investigating authority to refer to the price of the like product in the world market which is available to the recipient.[438] The world market price is constructed based on data collected either from the biggest supplier countries or regions, or from the biggest global suppliers in general.[439] The author of this dissertation describes this approach as not reflecting the real price of the alleged subsidized products. It ignores the different trade levels of suppliers by selecting the biggest supplier of a product. This opinion is justified according to the "Penn Effect", majority of products are cheaper in poor (low-income) countries than in rich ones. Even equivalent products tend to cost more in high-income countries.[440] Thus, if the subsidized product is produced in low-income countries, while the biggest supplier of that product belongs to high-income countries, then definitely the cost of the product would be higher than the actual cost of the examined product. Therefore, it is notable that the world market approach, unlike the third-country and importing-country market approaches, does not take into account the importance of the trade level as a principal factor in determining the price of a product.

According to the case law, the Panel in the *US-anti-dumping and countervailing duties (China)* adopted the approach of constructed value provided for in Article 15 of the Code, because there is nothing in Article 14(b) of the ASCM limits the geographical market or prohibits any particular approach to constructing a proxy. The Panel stated that "*if no appropriate commercial loan benchmark can be identified, then the authority can construct*

[437] Article 15(4) of the Subsidies Code.
[438] Article 6(d)(ii) of the European Union, Regulation on Protection against Subsidised Imports from Countries not Members of the European Union, 8 June 2016, Official Journal of the European Communities L 176/55.
[439] Sophia Müller, (n 411) 40.
[440] Andrea Ricci, *Value and Unequal Exchange in International Trade: The Geography of Global Capitalist Exploitation* (Routledge, 2021) 138.

a benchmark loan proxy".[441] Additionally, the AB upheld the Panel's finding[442] and highlighted that Article 14(b) does prevent neither the use of a benchmark of commercial loans that are not actually available in the market where the firm is located, nor loans in other markets or constructed proxies.[443] At the same time, when an investigating authority resorts to a loan benchmark in another currency or to a proxy, it shall ensure that such benchmark is adjusted so that it approximates the "comparable commercial loan".[444]

On the other hand, on some occasions the commercial benchmark is not needed for the calculation of the amount of benefit, instead, theoretical reasoning is fully adequate. For instance, the case of tax exemption resulting in government revenue constitutes a financial contribution under Article 1.1(a)(1)(ii) of the ASCM. The USDOC in *Corrosion- Resistant Carbon steel flat products from the Republic of Korea* determined that the amount of this benefit is equal to the amount of tax exemption that would have otherwise been paid in the absence of this exemption.[445]

3.1.4. When the granting base is "specificity"

According to Article 1 of the ASCM, the existence of subsidy demands three fundamental elements to be combined: a) a government or any public body, b) provides financial aid, and c) that results in benefiting either the direct recipient or actual beneficiary. A subsidy, as a general rule, is not prohibited, then it is not challenged under anti-subsidy provisions, unless a constitutive element is fulfilled which is "specificity". Thus, only the "*specific subsidy*" can be disputed and subject to countervailing measures.[446] Further elaboration, when a "subsidy" is granted based on already selected recipients among other competitors within the market, it then distorts the exceptional allocation of resources and, consequently,

[441] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 10.119.
[442] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, [2008] WTO Appellate Body Report 11 March 2011, WT/DS379/AB/R. para. 490.
[443] Ibid para. 480.
[444] Ibid para. 489.
[445] Marc Benitah (n 33) para. 2.1.2.2.3.
[446] Article 1(2) of the ASCM.

the market.[447] Therefore, it should be said that specificity is an essential requirement for the application of the WTO subsidy disciplines, but not for subsidy being.

Moreover, Article 2 of the ASCM brings out some general principles according to which the subsidy is deemed to be specific to a certain enterprise or industry or group of enterprises or industries. At the head of the line, specificity shall be proved only by positive evidence.[448] The Panel defined the term "positive" as "*an affirmative, objective and verifiable character, and that it must be credible*". Then, it explained the meaning of the term "positive evidence" as "*the quality of the evidence that authorities may rely upon in making a determination*".[449]

In contrast, there is an irrefutable presumption on the specificity of both export-contingent subsidies and subsidies contingent upon the use of domestic products over imported products (classified as prohibited subsidies under Article 3 of the ASCM).[450] Thus, the investigating authority has no obligation to submit any evidence on the specificity of these two kinds of subsidies. That is justified on the base that "specificity" is required to prove the distortion effect of subsidy and this category is assumed to have a definite harmful effect on the market because it entails the deformation of the system of comparative advantages[451].[452]

Additionally, the subsidy is not specific if it is provided based on objective criteria or conditions. As a point of clarification, objective criteria or conditions should be a) automatic and neutral which do not prefer certain enterprise over others; b) "*economic in nature and horizontal in application, such as number of employees or size of enterprise*";[453]

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[447] Marc Benitah (n 30) 273. And Peter C. Mavroidis, *Trade in Goods* (Oxford University Press, 2012) 549.
[448] Article 2 (2.4) of the ASCM.
[449] *United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, [2003] WTO Panel Report 21 February 2005, WT/DS296/R, para. 7.215.
[450] Article 2(2.3) of the ASCM. The following chapter contains a deep discussion about the categories of subsides.
[451] The theory of comparative advantage is introduced by David Ricardo in 1815 and suggests that every country should produce or export the goods and services that enable it to enjoy more advantages over other countries. OECD, *Globalisation, Comparative Advantage and the Changing Dynamics of Trade* (Publishing, 2011) 11.
[452] Pieter M. Alexander 'The Specificity Test Under US Countervailing Duty Law' (1989) 10 (3) Michigan Journal of International Law, 807, 809.
[453] Footnote 2 of the ASCM.

c) provided for explicitly in any legal instrument. This publicity is required to ensure a high level of adherence by the granting authority.[454] However, the EC in the *US-Large Civil Aircraft (LAC)*[455] argued that the Department of Commerce (DOC) Advanced Technology Program (ATP) is specific because access to this program is limited, by law, only to those companies that perform research into high risk, high pay-off, emerging and enabling technologies. According to the EC's specificity approach, a subsidy program is specific whenever it stipulates conditions on eligibility, regardless of how generic those conditions are as long as they are "*applicable across multiple sectors of the economy such as a capacity to do research and development*".[456] Unfortunately, the AB refused the mentioned approach and emphasized that objective criteria should be examined within a certain industry but not within the whole economy.[457]

Furthermore, the subsidy is specific when it addresses "*an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises")*".[458] Due to the absence of the definition of the term "industry" in the ASCM, the Panel along with the parties in *US-Softwood Lumber IV* agreed that the term "certain industry" includes every producer that produces similar types of products, but not necessarily specific goods or end products. In other words, consideration must be given to the type (category) of products they produce; Thus, the enterprises, in this sense, are competitors. For instance, if the producers, who have a diversity of steel products, belong to a group of steel

[454] Article 2(2.1.b) of the ASCM.
[455] A summary on the fact, the EC asked the establishment of the Panel to find that the US provided both prohibited and actionable subsidies to its Large civil Aircraft industry, then breached its obligation under the ASCM. The US financial contribution had various forms such as HB 2294 tax incentives provided by the state of Washington that provides LCA-related: "*(1) business and occupation ("B&O") tax rate reductions; (2) B&O tax credits;… and (5) property tax exemptions as a total amount of $3,456.7*". The Department of Commerce (DOC) Advanced Technology Program (ATP) funds Research and development (R&D) related to high risk, high pay-off, emerging and enabling technologies applicable to LCA in the amount of $4.6. *United States - Measures Affecting Trade in Large Civil Aircraft* (Second Complaint) [2012] WTO Panel Report 31 March 2011, WT/DS353/R, para. 2.1, and pp 11-12.
[456] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Panel Report, para. 5.90.
[457] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, para. 1350.c (B).
[458] Article 2(1) of the ASCM.

industries, then the subsidy would be specific although the output products are not similar.[459]

One essential issue should be discussed in this regard as long as the Agreement is silent about it. On some occasions, as proved before, the recipient of the subsidy and the beneficiary are not the same entity. In such cases, the question can arise whether the specificity is deemed to exist with respect to recipient or beneficiary. However, the AB interpretation of the term "benefit" in *Canada – Aircraft* is meaningful "*A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient*".[460] Thus, beneficiaries must be taken into account to prove and sum up the benefit but not relevant to the specificity.

According to the opinion of the author of this dissertation, specificity should refer to the recipient regardless of the beneficiary for two interrelated reasons; Initially, specificity, in this regard, is equal to discrimination. Thus, discriminatory treatment exists when the government treats the recipients differently but not the beneficiaries, because the latter cannot be determined clearly at the issuing time and they are, more likely, unaware of such subsidies. Then, the determination of specificity will be difficult to establish. Secondly, the intention of the government has crucial weight in this regard, because it sets the requirements and criteria for the eligibility to obtain a subsidy that must be fulfilled by the direct recipient while the beneficiaries, either direct or indirect, are not given any consideration in this process.

Over and above, a subsidy is specific when the granting authority limits its availability to certain enterprises situated within a designated geographical area.[461] In this kind of subsidy, the specificity criterion, based on which the eligibility of enterprises or industries arises, is the location of the recipient that is why it is called a "regional subsidy". Thus, it is worth noting that a regional subsidy exists even if it is provided to all enterprises in a fixed region

[459] DS257- *US- Softwood Lumber VI*, Panel Report, para. 7.120.
[460] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, para. 154.
[461] Article 2(2) of the ASCM.

as long as the enterprises located outside that region are not entitled to such subsidy.[462] Besides, the concept of "designated geographical region" should be understood as any geographical limitation that draws the borders of land adjusted by the granting authority, regardless of any administrative or economic demarcation.[463]

The EC, as a third Party, in *the US- Large Civil Aircraft* pointed out, that in order for the regional subsidy to be specific, the granting authority must not be the local regional authority of the designated region, but instead a higher governmental level. In other words, when a subsidy is offered by a regional government to all enterprises within its jurisdiction in that region, then it is non-specific. While the same subsidy offered by the central government would be classified as specific as long as the central government has wider jurisdiction and limits the access of that subsidy to certain enterprises based in a specific region. The EC supported its argument by referring to the *Dunkel Draft*[464] case which states that "*A subsidy which is available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority*". The Current Article 2.2 of the ASCM by omitting the part "*irrespective of the nature of the granting authority*" denies the fact that sub-regional authority and higher authorities are equal with regard to specificity that is based on geographic region.[465] Unfortunately, neither the Panel nor the AB had any discussion about this issue.

Furthermore, one can debate that the EC' argument is accurate. Bearing in mind the second part of the mentioned Article which stipulates that "*It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement*". Obviously, this provision provides for an exemption. It gives the competent authorities at all levels the

[462] The Panel, like the US, contested the EC' interpretation of the Article 2.2 as specificity must include both geographical region and subset of enterprises within that region. DS316- *European Communities- Measures Affecting Trade in Large Civil Aircraft*, Panel Report, para. 7.1223.
[463] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, paras. 9.140- 9.144.
[464] Group of Negotiations on Goods (GATT), 'Draft Text on Subsidies and Countervailing Measures' (Draft Agreement MTN/GNG/NGIO/23, 7 November 1990) Article 2(d) < https://docs.wto.org/gattdocs/q/UR/GNGNG10/23.PDF > accessed 02 February 2021.
[465] *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, [2008] Third Party Written Submission by the European Communities, WT/DS379. para. 46.

right to modify the general tax rates without considering these measures as a specific subsidy. That means both regional authority and central authority are entitled to enjoy this exemption within their jurisdiction. Thus, the regional authority has the right to adjust the general tax rate applicable to its region and its action will not be deemed as a specific subsidy, only if all enterprises and industries concerned can enjoy the tax modification measure.[466]

Remarkably, specificity does not exist if governmental financial aid confers a benefit to all enterprises and industries within the whole state;[467] then subsidy, other than the prohibited category, escapes from the WTO subsidy disciplines. Therefore, pursuant to Article 2 of the ASCM, the investigating authority shall establish evidence of the existence of specificity either in-law (*de jure*) or in-fact (*de facto*).

3.1.4.1. De jure specific

According to Article 2.1(a), subsidy is specific if it is explicitly limited to certain enterprises by means of law such as the legislation pursuant to which the granting authority operates. Deeply, the meaning of the term "explicit" in the words of AB is "*express, unambiguous, or clear from the content of the relevant instrument, and not merely "implied" or "suggested*".[468] Besides, limiting access to the subsidy can be embodied in various ways, either by including both financial contribution and benefit or by confining just one of them.[469] Accordingly, the subsidy is *de jure* specific when the granting authority limits the accessibility to financial contribution or benefit or both of them through any legal instrument, for example, laws, regulations, or other official documents. Thus, the effect of limitation is provided for and derived from the law.

The Appellate Body's finding in *the US-Large Civil Aircraft (2ed complaint)* gives an insight look at the issue at hand. Based on the AB's guideline, before scrutinizing whether

[466] Dominic Coppens (n 36) 113.
[467] *United States - Subsidies on Upland Cotton,* [2002] WTO Panel Report 8 September 2004, WT/DS267/R, para. 7.1142.
[468] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report, para. 372.
[469] Ibid para. 378.

the subsidy is available only to specific enterprises,[470] the starting point shall be identifying the subsidy itself by examining the legal framework through which the subsidy is designed.

On some occasions, one legal instrument might stipulate various subsidy programs. On other occasions, the same subsidy program might be stipulated in different legal instruments.[471] In such cases, determining whether several subsidies constitute part of the same subsidy program requires a careful inspection of any links and commonalities among them, such as the overarching purpose behind the subsidies. Bearing in mind that the vague policy of promoting economic growth is not a sufficient factor to confirm such a purpose.[472] Accordingly, the AB upheld the Panel's finding that the business and occupation (B&O) tax reductions for commercial aircraft and component manufacturers were *de jure* specific and did not share any commonalities with other tax rates for other enterprises due to different imposition dates and not aiming at the same goal.[473]

Moreover, the question of whether the subsidy program is provided by one granting authority or more does not have any impact on the specificity test. While the specificity test shall include not only "*the particular recipients identified in the complaint, but focuses also on all enterprises or industries eligible to receive that same subsidy*".[474] In practice, the AB, like the Panel, disagreed with China's argument and concluded that the loans granted by State-Owned Commercial Banks were *de jure* specific because this subsidy was provided to certain industries, like the radial tire industry, that was classified as "encouraged industries".[475] For further details, the implementing regulation of the 11th Five-Year Plan[476] classifies a wide range of Chinese industries, but not every industry as it was explicitly declared therein, into three categories "encouraged", "restricted", and "eliminated" projects. On the other hand, there are some activities, automatically called

[470] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, para. 756.
[471] Ibid para. 750.
[472] Ibid para. 751.
[473] Ibid paras. 747- 856.
[474] Ibid para. 753.
[475] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report, para. 385.
[476] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 9.56.

"permitted", that do not fall under any of these three categories, although they are in conformity with the relevant laws and regulations.[477] Thus, the *de jure* specificity exists on the base that this classification was not based on objective criteria. Besides, if the implementing regulation does not contain any information about the "permitted" projects, then they are excluded and not eligible to receive this subsidy.[478] Accordingly, the implementing regulation is limited to "encouraged projects", but not the "permitted", to enjoy the subsidy program. Hence, subsidy is considered specified through the text of law, which is the implementing regulation in this case.

3.1.4.2. De facto specific

Whenever the investigating state fails to put forward positive evidence on *de jure* specificity, it does not lose its claim on the challenged subsidy. Instead, it can rely on the actions and practices of the state as they are implemented in the market without being regulated by any legal instrument. That is known as *de facto* specificity.[479] Moreover, Article 2.1(c) of the ASCM lays down some factors that can make subsidies in-fact specific. For instance, when only certain enterprises take the full benefit of a subsidy program, then the amount of subsidy afforded to certain enterprises is greater than they should receive,[480] and "*the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy*".[481] In examining the last factor, special consideration shall be given to the reasons based on which the granting authority accepts or rejects to grant a subsidy.[482]

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[477] DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Panel Report, para. 9.70.
[478] Ibid para. 9.71.
[479] The Appellate Body decided that in order to make reference to *de facto* specificity, the investigating state is not obliged to exhaust either *de jure* specificity or objective criteria requirement stipulated in Article 2(1)(a) and (b) respectively. DS379- *US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Appellate Body Report, para. 401.
[480] Appellate Body suggested that for "disproportionately" test "the panel should determine whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)". DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, para. 897.
[481] Article 2(1)(c) of the ASCM.
[482] Footnote 3 of the ASCM.

It is noteworthy that these factors can be submitted individually or jointly in order to prove the *de facto* specificity.[483] Additionally, through the assessment process, attention shall be paid to the purpose of economic activities within the jurisdiction of the granting authority, a line with the duration through which the subsidy program has been in operation.[484]

In practice, the US, the respondent in the dispute on certain hot-rolled carbon steel flat products imported from India which is the complainant, opined that when an investigating authority examines whether a subsidy program is used by "a limited number of certain enterprises," it needs to address whether these "certain enterprises" form a distinct and separate sector within the entire economy. If yes, then *de facto* specificity is materialized.[485] Hence, it requested the panel to confirm its finding that the National Mineral Development Corporation's (NMDC) provision of high-grade iron ore is *de facto* specific "*because the actual recipient of the subsidy is limited to industries that use iron ore, including the steel industry, and is thus limited in number*".[486] On the contrary, India argued that "*a program is specific to 'certain enterprises' under Articles 2.1(a) and (b) can only be reached in the context of a 'comparative set', whereby an investigating authority can determine that the subsidy only benefits 'certain enterprises' over this 'comparative set".* To put it clearly, a "comparative set" of "similarly-situated" entities refers to a group of entities that possess common characteristics or circumstances, enabling fair and relevant comparisons to be conducted among them.[487]

In short, the Panel, like the AB thereafter,[488] concluded, against India's argument, that specificity shall not "*be established on the basis of discrimination in favour of "certain enterprises" against a broader category of other, similarly situated entities*".[489] Instead, if a law or fact restricts access to a subsidy to steel producers, the requirement of specificity

[483] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, para. 878.
[484] Article 2(1)(c) of the ASCM.
[485] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Panel Report, para. 7.104.
[486] Ibid. para. 7.91.
[487] Ibid para. 7.120.
[488] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Appellate Body report, para. 5.1.e.
[489] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Panel Report, para. 7.126.

can still be met according to Article 2. Especially, Article 2 does not focus on the identity or nature of the entities that are excluded. Besides, it does not consider whether the excluded entities are producers of aluminum, refrigerators, or farmers. It also does not concern itself with whether the excluded entities are similar or in a similar situation to the steel producers who do have access to the subsidy.[490] However, the US failed "*to take account of all the mandatory factors in its determination of de facto specificity regarding NMDC*". In particular, the duration of the subsidy program at hand,[491] also the economic diversification of India.[492]

3.2. The definition of State aid in EU law

At the European level, the promotion and safeguarding of fair competition among members have been the crucial goal since 1957 the first creation of the European Economic Community by signing the treaty of Rome till date.[493] Therefore, regulating State aid constitutes a fundamental part of the European competition policy which also includes the prohibition of cartels, monopolies, and others.[494] It is worth noting that the State aid control regulates the actions of the Member States of the EU that might distort the competition within the internal market. In this sense, companies are just a tool either to receive a benefit or to suffer a competitive disadvantage.[495]

However, the "State Aid" is a legal concept defined by Article 107 (1) of the TEFU as

> any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Member States, be incompatible with the internal market.

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[490] Ibid para. 7.122.
[491] Ibid para. 7.138.
[492] Ibid para. 7.137.
[493] August Reinisch, *Essentials of EU Law* (Cambridge University Press, 2012) 1.
[494] Pier Luigi Parcu, Giorgio Monti, and Marco Botta (eds), *Economic Analysis in EU Competition Policy: Recent Trends at the National and EU Level* (Edward Elgar Publishing, 2021) 24.
[495] Justus Haucap and Ulrich Schwalbe, 'Economic principles of State aid control' (Discussion Paper No 17, 2011) 14. <https://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/017_Haucap_Schwalbe.pdf > accessed 05 October 2022.

The first notable issue in this provision is the general ban on state aid. Unlike the "subsidy" under the WTO, State aid is generally prohibited and subject to pre-acceptance by the European Commission[496] which is the responsible power for the enforcement of the EU law.[497] Furthermore, State aid is an objective concept. That means the Commission is required to evaluate separately every state act concerning its specific features and characteristics without adhering to its previous assessments that were decided in different cases.[498] In other words, the challenged State aid measures shall be resolved case-by-case basis. Thus, it is fair to say that the concept "measures of equivalent effect", which includes any practice that has the same effect,[499] can be applied with regard to the prohibitions of customs duties on imports and exports and quantities restrictions,[500] but not in the area of state aid.

In order for a measure to be classified as State aid within the context of Article 107(1) TFEU, the following five elements must be fulfilled:

- The subject is "aid in any form".
- The doner is "Member State or through State resource".
- The result is "enjoying an economic advantage".
- The granting base is "favoring one or more undertakings or the production of certain goods – selectivity".
- The effect is "distorting or has the potential to distort competition and affecting trade between EU countries".

Those five cumulative elements are discussed briefly in this section.

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[496] Falk Schöning and Clemens Ziegler, 'what is state aid?' in Leigh Hancher, Adrien de Hauteclocque, and Francesco Maria Salerno (eds), *State aid and the Energy Sector* (Bloomsbury Publishing, 2018) the first part of the introduction.
[497] Article 17(1) of the TEFU.
[498] European Union, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 19 July 2016, Official Journal of the European Communities C 262/01, para. 1(4).
[499] Mattias Derlen and Johan Lindholm 'Article 28 E.C. and Rules on Use: A Step towards a Workable Doctrine on Measures Having Equivalent Effect to Quantitative Restrictions (2010) 16 (2) Columbia Journal of European Law, 191, 1.
[500] Articles 30- 34- 35 of the TFEU.

3.2.1. The subject is "aid in any form"

Article 107 TFEU, like other Articles,[501] employs the term "aid" as a generic term that involves, on one hand, direct and indirect financial measures and, on the other hand, non-fiscal measures that result in economic advantages in favour of an undertaking. For instance, the aid includes the direct transfer of funds, such as loans for lower than market interest, and indirect fiscal support like exemption from paying public debts. At the same time, the aid also covers the supply of goods and services on preferential terms.[502] It is notable that the preferential terms do not trigger the application of State aid rules if they are justified based on a commercial reason such as the preferential tariffs based on overcapacity.[503] This wide scope of aid can be justified on the base that the TFEU differs among state intervention measures according to their effects, but not to their causes or aims.[504]

That was emphasized in the judgment of the Court of First Instance in Case T-613/97 as:

> The aim of that provision is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products. The concept of aid therefore covers not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect. The supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as subsidies.[505]

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[501] Article 92 of the European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957. Article 87 of the European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5. Hussein Kassim and Bruce Lyons ' The New Political Economy of EU State aid Policy' (2013) 13 Journal of Industry, Competition and Trade, 1, Table 1, 6.

[502] This example might seem like the Article 1 of the ASCM "a government provides goods or services other than general infrastructure, or purchases goods". However, the government intervention under the ASCM is limited to the pricing of the goods or services. On contrast, the state intervention under the TEFU might takes divorce forms such as pricing, quantity, payment methos and any other terms within the contract.

[503] Falk Schöning and Clemens Ziegler (n 496) footnote 106.

[504] *Ministère de l'Économie, des Finances et de l'Industrie v. GEMO SA* [2003] Case C-126/01. para. 34.

[505] *Union française de l'express (UFEX), DHL International SA, Federal express international (France) SNC and CRIE SA v Commission of the European Communities* [2006] Case T-613/97, para. 158.

In short, the extent of the term "aid" in the above-mentioned sense is more extensive than the WTO subsidy that encompasses various, but limited, forms of financial contribution.

3.2.2. The donor is "Member State or through State resource"

The aid must be granted directly or indirectly to an undertaking by a Member State or through State resources. In this regard, a distinction shall be made between these two granting sources.

3.2.2.1. Measure is attributed to a Member State

Obviously, like the WTO subsidy, only measures that are imputable/attributed to a state can be considered as state aid. Thus, the spectrum of "state" shall include every public body regardless of its level (whether central, federal, regional, or local),[506] as long as it enjoys public authority. Accordingly, having public authority is the crucial factor for determining the existence of the state measure. As a general rule, every measure conducted through public authority is imputable to the state.[507]

On the contrary, imputability is not certain without positive evidence of the existence of public authority when the measure is adopted by a public body.[508] Thus, the daily business decision adopted by a public body is not necessarily subject to the State aid rules. Moreover, the measure can be attributed to the state even if it is carried out by a private body, only if the public authority appointed that private body to confer an advantage.

Therefore, the Court of Justice and the Advocate General have highlighted some facts that indicate the existence of immutability:[509]

- The challenged measure could not have been adopted without considering the requirements of the public authorities or directives issued by governmental bodies;

[506] Falk Schöning and Clemens Ziegler (n 496) footnote119.
[507] *Compagnie nationale Air France v Commission of the European Communities* [1996] Case T-358/94, para. 62.
[508] *French Republic v Commission of the European Communities* [2002] Case C-482/99, para. 52.
[509] Ibid paras. 55- 56. See also Opinion of Mr Advocate General Jacobs delivered on 13 December 2001, *French Republic v Commission of the European Communities* [2001] C-482/99, paras. 65- 68

- The link between the public undertaking and the State. For instance, how the public undertaking has been established, its legal status whether it is subject to public law or ordinary company law);
- The integration of the public undertaking into the structures of the public administration;
- The nature of the public undertaking's activities;
- The extent to which the undertaking is controlled/managed by the public authority.

On the other hand, when a Member State implements EU legislation without any discretion and enacts measures that provide an economic advantage to a specific undertaking, the credit for such advantage is attributed not to the Member State itself, but rather to the EU. Then, Article 107 would not be applicable.[510] It is worth noting that the measure can be imputable to two or more Member States if they all participate in conducting the same measure.[511]

By way of comparison with the WTO subsidy law, the Appellate Body, as discussed earlier in this chapter, has adopted the "public authority" approach for determining whether the measure is conducted by the state, then it might constitute a "subsidy" or "state aid". The AB, unlike the opinion of the author of this dissertation, stated that the public body is "*an entity that Possesses, exercises, or is vested with government authority*".[512]

3.2.2.2. Measure is granted through State resource

The term "state resource" involves not only the public sector resources[513] but also the private body resources in two situations a) when the resource is under public control, then it is available to the national authorities, even if it is not owned by it,[514] b) if it is not under

[510] Commission Decision of 26 February 2010 on State aid C 9/09 (ex NN 49/08, NN 50/08 and NN 45/08) implemented by the Kingdom of Belgium, the French Republic and the Grand Duchy of Luxembourg for Dexia SA (notified under document C (2010) 1180) (OJ L 274, 19.10.2010, p. 54) para. 106.
[511] Ibid paras. 125- 128.
[512] For further information, see section 3.1.2.1.3. of this dissertation.
[513] *Compagnie nationale Air France v Commission of the European Communities* [1996] Case T-358/94, para. 56.
[514] *Essent Netwerk Noord BV supported by Nederlands Elektriciteit Administratiekantoor BV v Aluminium Delfzijl BV, and in the indemnification proceedings Aluminium Delfzijl BV v Staat der Nederlanden and in the indemnification proceedings Essent Netwerk Noord BV v Nederlands Elektriciteit Administratiekantoor BV and Saranne BV* [2008] Case C-206/06, para. 70.

the public authority control, then the distribution of the resource is managed and apportioned according to the provisions of public rules.[515] Additionally, the State aid rules might apply whenever the aid is funded wholly or partially through a state resource.[516] Notably, in the case when the aid is partially funded by the state resource, both the degree of the state intervention in the measure and financing method have a crucial weight in determining whether the aid is sourced by the public authority.[517]

Moreover, Resources coming from the Union, for example, the European Investment Bank, are deemed as State resources, only if the national authorities have discretion as to the use of these resources, particularly, the selection of beneficiaries.[518]

However, the state resource, in this regard, equals to the WTO subsidy provisions on the foregoing of government revenue. In other words, the aid that causes a reduction in ordinary State income, like exemption from the obligation to pay taxes or fines or providing exceptional rights on natural resource without adequate remuneration, or create additional burden on the State budget, like granting a loan guarantee, is sufficient to be treated as State aid when the other elements are met.

It should be pointed out that, as a difference between the ASCM and the European State aid law, the mentioned examples are classified under the ASCM as foregoing government revenue, government-provided goods or services other than general infrastructure, and indirect transfer of funds, respectively. Thus, it would be fair to say that the ASCM is much more comprehensible in presenting the forms that the subsidy/aid can take. Moreover, the contextual comparison shows a dissimilarity between "subsidy" and "State aid". It can be said that the sphere of subsidy is more extensive than state aid. While the latter must cause a cost to the government, the term "financial contribution" is mainly understood as the action of transfer of funds without referring to the source and origin of this fund. In this sense, the private fund can constitute a subsidy according to the fourth item of Article

[515] *Italian Republic v Commission of the European Communities* [1974] Case 173/73, para. 16.
[516] *Steinike & Weinlig v Federal Republic of Germany* [1977] Case 78/76, para. 22.
[517] *French Republic v European Commission* [2012] Joined Cases T-139/09, T-243/09 and T-328/09, paras 63- 64.
[518] Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU (n 491) para. 60.

1.1(a)(1) of the ASCM only if the government entrusts or directs the private body with no need to have control over or manage the distribution of its financial resource, as mentioned above, to make the cost to the government, then establish a state aid.[519]

It is worth mentioning that various scholars, like James, Anders, and Klara, argue that the scope of the WTO subsidy is wider (more comprehensive) than the European state aid. That is understandable because the latter limits the existence of the aid to situations that entail a cost to the government, and excludes the financial support provided by the private actors, which are directed or entrusted by the government, from being challenged as a Atate aid.[520]

3.2.3. The result is "enjoying an economic advantage"

The third element for State aid to exist is the economic benefit obtained by the recipient of the aid. Like the WTO subsidy, state intervention shall result in placing the specific undertakings in a better economic or financial position than they would have been under normal market conditions. As such, the economic advantage covers any monetary benefit that would have not been confirmed without the state intervention that has modified the normal market conditions.[521] Undoubtedly, economic advantage contains positive economic improvement, like a direct grant (loans), and negative economic improvement, such as tax reduction.[522] On the other hand, some profits do reach the level of economic advantages within the meaning of Article 107(1) TFEU. For instance, reimbursement of illegally imposed taxes, and compensation of an expropriation.[523]

For this assessment, a comparison must be conducted between the financial situation of the (recipient) undertaking before and after the state measure has occurred.[524] The benchmark for this comparison is the conditions of other undertakings that carry out their businesses

[519] Luca Rubini (n 37) 145.
[520] James Flett, Anders C. Jessen, and Klara Talaber-Ritz, *The Relationship between WTO Subsidies Law and EC State aid Law* (Kluwer Law International 2008) 441.
[521] *Syndicat français de l'Express international (SFEI) and others v La Poste and others* [1996] Case C39/94, para. 60.
[522] *Banco de Crédito Industrial SA, now Banco Exterior de España SA v Ayuntamiento de Valencia* [1994] Case C-387/92, para. 13
[523] *Nuova Terni Industrie Chimiche SpA v European Commission* [2010] Case T-64/08, paras. 59- 63.
[524] *Italy v Commission*, (n 515) para. 13.

in the same field of industry and under the same situation, but not with the previous conditions of the undertaking concerned.[525] In other words, the comparison shall be done in view of "*the terms under which comparable transactions carried out by comparable private operators have taken place in comparable situations*".[526] For that purpose, some facts should be taken into account such as the kind of operator and transaction, the market or markets concerned, and the time of transaction. Again, the WTO AB has followed the same approach to a certain point.[527]

Unlike the WTO dispute settlement body, the Union courts have established "the Market Economy Operator (MEO)" test. This test introduces and assesses the cases in which the public body can carry out economic transactions, as a private body, without conferring advantages to a certain undertaking, then it does not constitute aid within the meaning of Article 107(1) TFEU.[528] The MEO test assesses whether the public body's actions were carried out under normal market conditions, without granting preferential treatment or advantages to specific undertakings (companies). According to this test, any Member State that declares that it acted as an economic market operator shall provide positive evidence to emphasize that

> The decision to carry out the transaction was taken on the basis of economic evaluations comparable to those which, in similar circumstances, a rational market economy operator (with characteristics similar to those of the public body concerned) would have had carried out to determine the profitability or economic advantages of the transaction.[529]

However, this test is to be implemented only when the action of the public body is not derived from the application of the public authorities.

3.2.4. The granting base is "favoring one or more undertakings or the production of certain goods "selectivity"

[525] Falk Schöning and Clemens Ziegler (n 496) footnote 52.
[526] Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU (n 491) para. 98.
[527] See section "calculation of the benefit" of this dissertation.
[528] *Kingdom of Belgium v Commission of the European Communities* [1990] Case C-142/87, para. 29.
[529] *European Commission v Électricité de France (EDF)* [2012] Case C-124/10 P, paras. 82- 85.

As discussed earlier in this chapter under the WTO subsidy system, specificity is a mandatory factor for the prohibition of the subsidy, but not for the subsidy existence. Unlike the European State aid law which considers the "selection" as an integral part of the existence of the state aid. The reason behind such variation is the general prohibition of State aid under Article 107 TFEU. In other words, the formula is the selectivity of the recipient means prohibition of the measure (state aid). Every State aid is banned. Then, every State aid shall be provided on a selective basis.

Selectivity means exclusive undertaking/s or good/s receive the economic advantages of the state measure on a discriminatory base. That base refers to specific criteria that favor some competitors over others within the market. Like the WTO subsidy law, selectivity can be established either *de jure* (includes the eligibility requirements that are directly provided for in a legal instrument such as a certain size or certain sector);[530] or *de facto* (involves conditions or barriers levied by Member States limiting the benefit of the measure to certain undertakings, for example applying a tax reduction only to investments exceeding a certain threshold).[531]

Additionally, selectivity appears in three forms to certain undertakings, to certain industries (goods), or certain regions (regional selectivity).[532] Regional selectivity has been introduced in the case law, particularly, regarding the tax measures. Accordingly, the state authority at any level (central, regional, and local) can present a lower level of taxation within a defined geographic area, over which it has competence, without considering its action as regional selective.[533]

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[530] *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos Soc. coop. arl (C-78/08), Adige Carni Soc. coop. arl, in liquidation v Agenzia delle Entrate and Ministero dell'Economia e delle Finanze (C-79/08) and Ministero delle Finanze v Michele Franchetto (C-80/08)* [2011] Joined Cases C-78/08 to C-80/08, para. 52.
[531] *Ramondin SA and Ramondín Cápsulas SA v European Commission* [2002] Joined Cases T-92/00 and T-103/00, para. 39.
[532] *Portuguese Republic v Commission of the European Communities* [2006] Case C-88/03, para. 57.
[533] Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU (n 491) paras. 143-144.

However, the criteria based on which the benefited undertakings are selected must be objective in order not to be subject to the State aid rules. In this regard, no significant dissimilarity compared to the ASCM.[534]

3.2.5. The effect is "distorting or has the potential to distort competition and affecting trade between EU countries"

Generally, distorting the competition and affecting the trade between EU countries are two independent elements. However, the usual practice of the Commission is to assess those elements conjunctively.[535] The Court of the First Instance pointed up that this assessment shall be conducted with the sense of prediction of a future effect. That is to say, it is not mandatory to prove that the competition is actually distorted, or the trade among Members is absolutely affected. Instead, the mere threat/intimidation to have that distortion effect is sufficient to establish the fulfillment of these elements.[536]

Comprehensively, the competition is distorted or threatens to be distorted when a state strengthens the competitive position of an undertaking over its competitors by granting it an economic advantage.[537] Moreover, upgrading the competitive position of the recipient does not necessarily require the improvement of its market shares, but only maintaining its stronger position is adequate for that purpose.[538]

However, a possible distortion of competition is not found to exist if four cumulative conditions are met:

(a) Service is subject to a legal monopoly (established in compliance with EU law);
(b) The legal monopoly shall exclude any possible competition to become the exclusive provider of the service in question;
(c) The service is out of the competition; and

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[534] *Confederación Española de Transporte de Mercancías (CETM) v Commission of the European Communities* [2000] Case T-55/99, para. 40.
[535] Falk Schöning and Clemens Ziegler (489) footnote 195.
[536] *Italian Republic v Commission of the European Communities* [2009] Case T-211/05, para. 152.
[537] *Alzetta Mauro and others v Commission of the European Communities* [2000] Joined Cases T-298/97, T-312/97 etc., paras. 141- 147.
[538] *Wolfgang Heiser against the Innsbruck tax office* [2005] Case C-172/03, para. 55.

(d) If the service provider is active in another (geographical or product) market that is open to competition.[539]

On the subject of affecting trade between EU Members, this element reflects the essential goal of the Commission in protecting the internal market. Achieving this goal requires the Members not to enhance the economic position of an undertaking that carries out an effective cross-border business within the Union. The Union courts have decided that such enhancement is capable of affecting the trade within the Union, then renders the aid measure subject to State aid rules.[540]

From a different viewpoint, the trade among Members can be affected even if the undertaking runs its business domestically without exceeding the national borders. That is because the domestic market would be full of the products of the beneficiary (undertaking which received the aid); thus, entering this market would become harder for the other operators in another member state.[541]

It is so important to note that some aid measures do not reach the level of distortion contained in Article 107 TFEU, due to the minor amount of the aid that causes immaterial distortion of the competition. However, this modest aid is not regulated in Article 107 TFEU, but it was invented by the Commission in the early 2000s and known as *de minimis* rule.[542] The current de minimis regulation stipulates that public support does not constitute State aid if some requirements are met. For instance, the support is granted to a single undertaking, the maximum amount of which is EUR 200,000 in three fiscal years.[543]

In brief, the definition of subsidy under the ASCM does not contain any requirement regarding the trade distortion effect. On one hand, this distortion effect is obligatory to be

[539] Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU (n 491) para. 98.
[540] For example, *Eventech Ltd v The Parking Adjudicator* [2015] Case C-518/13, para. 66; and *Regione Friuli Venezia Giulia v Commission of the European Communities* [2001] Case T-288/97, para. 41.
[541] *Eventech Ltd v The Parking Adjudicator* [2015] Case C-518/13, para. 67.
[542] Falk Schöning and Clemens Ziegler (496) footnote 214.
[543] Article 3 of European Union, Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid Text with EEA relevance, 18 December 2013, Official Journal of the European Communities L 352, 24.

proved only regarding one kind of subsidy which is "actionable subsidy"[544]. On the other hand, with reference to another kind of subsidy which is "prohibited subsidies", there is an irrefutable presumption that the distortion of trade is definite and absolute. Again, the distortion effect, like the specificity, is a requirement for prohibiting the subsidy measure, but not for its presence. Moreover, while the *de minimis* aid is excluded from the jurisdiction of the State aid rules, a similar subsidy will ever be challenged under the ASCM. If a subsidy, even if it falls within the de minimis threshold, is found to be inconsistent with the provisions of the ASCM, it can still be challenged by other WTO members through dispute settlement mechanisms and it is not automatically exempted from scrutiny under the ASCM.

3.3. Conclusion

For decades, the world trading system has been facing complexities and contradictions concerning the question of subsidy. The international economic regulation under the GATT was not capable of dealing with the exceptional tensions caused by numerous states' conflicts. One of the most significant disputes is the Automobile Industry War between Japan and the US which has raised the voice for establishing new rules to protect international trade.

The definition of the term "subsidy" within Article 1 of the ASCM was the center of attention in this chapter. This definition consists of three main elements that are liable for creating the subsidy "financial contribution", "government or any public body", and "enjoying a benefit". Besides, there is an accumulative element that renders the subsidy prohibited and countervailable which is "specificity". After a critical analysis and a comparison between the "subsidy" and the "European State aid ", it is fair to conclude that the comprehensive explanation of the forms of the "financial contribution" is a remarkable achievement for the WTO subsidy agreement. While the general illegality of the State aid is more effective and makes the European rules stricter than the WTO provisions. Moreover, it is notable that the different aims and functions of the two legal systems have

[544] The actionable subsidy is regulated under Part III of the ASCM, and to be discussed in the following chapter.

a crucial role in formulating the relevant provisions. The protection of competition and securing the internal market are the essential aims of the EU.[545] While the liberalization of trade through the reduction of tariffs and other trade barriers is the final goal of the WTO.[546]

In contrast, several loopholes and gaps were highlighted in line with some arguments that might assess improving the sufficiency of the ASCM. For instance, the AB has partially succeeded in defining the "public body". By way of explanation, the AB by adding the conjunction "or" to the definition, means that every element is adequate, on its own, to demonstrate the existence of the public body. The author's counter opinion is the Agreement intends to create a new body that stands in between the government and private body, named as a semi-government entity. This body does not have the full power and function of the government. At the same time, it enjoys them to the extent that distinguishes it from the private body.

Additionally, using the market as a benchmark for determining the existence and amount of benefit is not applicable in all cases. Other alternative benchmarks should be referred to. For instance, Article 15 of the Subsidies Code 1979 provides two alternative approaches: the third-country market approach and the importing-country market approach, which considers the prices of like products in a third country or the importing country's market to determine the benefit amount. Also, the European Regulation on protection against subsidized imports includes the world-market approach, which refers to the price of the like product in the world market. However, this approach may overlook the trade levels and not reflect the actual cost of the subsidized product. In conclusion, case law supports the use of constructed value and proxies as long as there is no limitation on the geographical market mentioned in Article 14 of the ASCM. Theoretical reasoning can also be employed in certain cases, such as tax exemptions, to determine the amount of benefit.

Furthermore, an example of the unregulated issue under the WTO system is that if the beneficiary can be an entity other than the direct recipient of the subsidy, then which entity shall be specified by the government measure? However, the author of this dissertation

[545] Article 26(2) of the TFEU.
[546] The Preamble of the Marrakesh Agreement (n 23).

argues that in terms of specificity, it should pertain to the recipient irrespective of the beneficiary, for two interconnected reasons. One of these reasons, to be mentioned here, is that considering specificity based on the recipient is a means to avoid discrimination. Therefore, discriminatory treatment occurs when the government treats the recipients differently rather than the beneficiaries, as the latter may not be readily identifiable at the time of issuance and are likely unaware of such subsidies.

Chapter 4: In-depth analysis of subsidies: categories and remedial approaches

> *The granting of subsidy is not, in and of itself, prohibited under the SCM agreement… The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement*. (The Appellate Body emphasized.)[547]

Part I of the ASCM, including Articles 1 and 2 as examined in the previous chapter, lays out the meaning of the terms "subsidy" and "specificity". It, then, constitutes the first and fundamental step to validate the WTO subsidy disciplines. Besides, parts II, III, and IV of the ASCM classify the subsidies into three main categories. The trade distortion effect, not the purpose, is the ground for such classification.[548] These categories originated from the US proposals presented during the Tokyo Round.[549] Nowadays, they have their final structure and are described, metaphorically speaking, as "Traffic Light Subsidies".

Moreover, the traffic light subsidies consist of Red, Green, and Amber subsidies. By way of explanation, the "Red Subsidy" is the prohibited group, due to their direct trade-distorting effect. This category involves two kinds of subsidies: subsidies contingent upon export performance (export subsidy) and upon the use of domestic over imported goods (import substitution subsidies). In contrast, the "Green Subsidy" represents the non-actionable group, and includes three types of subsidies, namely subsidies for research activities, for disadvantaged regions, and for the adaptation of existing facilities to environmental requirements. In the middle, there is the "Amber Subsidy" which stands for the actionable group and covers every other subsidy as far as it is specific and causes trade adverse effects. Each group contains different disciplines along with remedial provisions and is to be explored thoroughly in the present chapter. Hence, the question examined in this chapter is *Are the remedial measures presented by the ASCM sufficient and adequate to counteract and indemnify the adverse effects of the different categories of subsidies?* Furthermore, some recommendations are suggested to empower the effect of the remedies to promote fair competition among Members.

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[547] *Canada - Measures Affecting the Export of Civilian Aircraft*, [1997] WTO Appellate Body Report Article 21.5 DSU 21 July 2000, WT/DS70/AB/RW, para, 47.
[548] Timothy Meyer 'Free Trade, Fair Trade, and Selective Enforcement' (2018) 118 (2) Columbia Law Review, 491, 538.
[549] Dominic Coppens (n 36) 29.

Additionally, this chapter briefly[550] discusses the general outlines of the concessions for developing countries. The ASCM classifies the developing nations, according to their economic development levels, as least-developed countries, other developing countries, and Members in the process of transformation from a centrally-planned into a market, free-enterprise economy. These concessions and other special provisions are contained mainly in Articles 27 and 29 of the ASCM. They vary among the developing nations from different perspectives such as the length of time periods for implementing the ASCM and various commitments or measures to increase trading opportunities for developing countries. These provisions are known as "Special and Differential Treatment" (S&D) provisions.

Finally, this chapter describes the European State aid law. It classifies State aid into three categories Prohibited, Semi-Permitted, and Absolute-Permitted Categories. Further, it discusses briefly the remedial procedure in case of illegal aid. Moreover, the EU recognizes the possible challenges and distortions that might emerge due to subsidies from third countries, then introduced new regulation to tackle this concern known as Foreign Subsidies Regulation. Thus, this section aims to highlight the commonalities and differences between the WTO subsidy and European state aid. Accordingly, it underlines the loopholes and drawbacks and then attempts to evolve the ASCM provisions by suggesting some alternatives and modifications derived from the European State aid framework.

4.1. Categories of subsidies in the context of the ASCM

Unlike European state aid, the ASCM does not forbid generally the Members from subsidizing their private economic actors and industries. Instead, it distinguishes among the public subsidies based on their impact on cross-border trade. The ASCM, therefore, as already mentioned above, systemizes the subsidies in three distinct categories as follows: prohibited subsidies, actionable subsidies, and non-actionable subsidies. This segment analyses these categories in order.

[550] Shortly because the majority of the provisions and periods mentioned therein are terminated and not applicable anymore.

4.1.1. Prohibited subsidies

To commence with the prohibited subsidies as the absolute illegal and trade-distorting category. As stated earlier, the negative impact of trade measures on international trade is the essential criterion for the categorization of subsidies. In other words, the more hazardous the impact on trade, the more prohibited the subsidy is. Thus, Article 3 Paragraph 1 of the ASCM strictly bans two kinds of subsidies as:

- Subsidies contingent, in-law or in-fact, upon export performance.
- Subsidies contingent upon the use of domestic over imported goods.

With regard to the category under consideration, the Member states are not required to prove, by positive evidence, the adverse effect of the challenged subsidy, but rather they have only to establish that the challenged subsidy falls within the scope of the prohibited category. The reason behind the *per se* prohibited nature of this category is that it hypothetically has an adverse effect on the interest of other Members. That can be understood from the language of Article 3.2 of the ASCM which states "*A Member shall neither grant nor maintain subsidies referred to in paragraph 1*". Additionally, Article 4.1 of the ASCM allows Members, when they have evidence only of the existence of prohibited subsidies, to enter immediately into consultation with the granting Member. Unlike Article 7.1 of the ASCM on actionable subsidies, it requests positive evidence of the adverse effects of the challenged subsidy in order to launch the consultation.

Moreover, the Appellate Body in *the US-Tax Incentives* dispute emphasized that

> Only subsidies contingent upon export performance within the meaning of Article 3.1(a) (commonly referred to as export subsidies), or contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) (commonly referred to as import substitution subsidies), are prohibited per se under Article 3 of the SCM Agreement. In any event, subsidies, if specific, are disciplined under Part III of the SCM Agreement, but a

> complaining Member must demonstrate the existence of adverse effects under Article 5 of that Agreement.[551]

This *Prima facie* proof is comprehensible because, as discussed in the second chapter, the prohibition of export subsidies was first introduced in the 1960s under Article XVI of the GATT. Then, various adjustments have been made till entering the ASCM into force when almost the majority of the WTO Members "believed" in the harmful effects of export subsidies on the goods sector either in the importing country or in a third country.[552] Likewise, subparagraph 4 of Article III of the GATT bans any measure that is in favor of domestic over imported goods. Thus, it forms the base of the second prohibition (import substitution subsidies).

Notably, the general ban on both export and import substitution subsidies is the fundamental distinction between prohibited and actionable subsidies. Besides, part III of the ASCM requires proof of adverse effects only with regard to the actionable subsidies as referred to in Article 1 of the ASCM, excluding any application to the prohibited or non-actionable subsidies. Consequently, if the complaining Member failed to prove the adverse effect of one of the alleged prohibited subsidies due to the lack of evidence, then this scenario would bear no influence on the final decision. This highlights the importance of precise classification of subsidies.

However, it is crucial to mention that the prohibition stipulated in Article 3 did not have an instant implementation on all Members. For instance, the developed countries had three years of the ASCM entered into force to comply with the provisions of part II,[553] while the countries in transition had a period of seven years to bring their measures into conformity with the mentioned provisions.[554]

4.1.1.1. Subsidies contingent upon export performance (export subsidy)

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[551] *United States - Conditional Tax Incentives for Large Civil Aircraft*, [2014] WTO Appellate Body Report 4 September 2017, WT/DS487/AB/R, para. 5.6.
[552] Jan Jakub Michalek (n 68) 26.
[553] Article 28(1)(b) of the ASCM.
[554] Countries in transition means Members in the process of transformation from a centrally-planned into a market. Article 29 of the ASCM.

Although some economists believe in the global benefits that can be obtained through export subsidies in specific circumstances, almost all the WTO Members agree that export subsidy is one of the unfair trade practices that distort international trade unquestionably.[555] Thus, some scholars argue that the exchange rate supported by the government is not considered, by itself, contingent on exports as long as it applies across the border and includes not only the investors (exporters) but also a wide range of beneficiaries like tourists.[556] However, what does the "export subsidy" stand for? Or how can it be defined? These are the first questions that come to someone's mind after reading the term "export subsidy". Especially, after knowing that according to the ASCM, it is not sufficient for the export subsidy to exist the mere fact that the subsidy is granted to the undertaking that carries out the export transactions, but other conditions should be met.[557] Hence, to answer this question, an insight look should be given to subparagraph 1 of Article 3 of the ASCM that outlines the term "export subsidy".

The term "export subsidy" means "*subsidies contingent, in-law or in-fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I*".[558] Here, several points must be discussed. To begin with the terms "in-law" and "in-fact" have already been analyzed but with regard to the "specificity" test. On the one hand, the export subsidy exists in-law, when the governmental financial contribution is granted for the purpose of exportation by means of law, such as regulations, legislation, etc. Thus, the wording of the legislation, for example, establishing the measure in question, demonstrates expressly the existence of the export condition.[559] For instance, the term contained in the Canadian Motor Vehicles Tariff Order 1998 serves as an excellent illustration of export contingency in-law "*the only way to import any motor vehicles duty-free is to export, and the amount of import duty exemption allowed is directly dependent*

[555] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1997) 279.
[556] Dominic Coppens (n 36) 584.
[557] Footnote 4 of the ASCM.
[558] Article 3(1) of the ASCM.
[559] *Canada - Certain Measures Affecting the Automotive Industry*, [1998] WTO Appellate Body Report 31 May 2000, WT/DS139/AB/R; WT/DS142/AB/R, para. 100.

upon the amount of exports achieved."[560] Thus, the relationship between import duty exemption and export performance is relative.

Furthermore, the AB highlighted that the legal instrument doesn't need to contain an *expressis verbis* on export performance in order for the contingency in-law to exist. Instead, the contingency can also be acquired through the interpretation of the words that are used in the measure.[561] Here, the best example is *the US- FSC* dispute in which the taxpayers could benefit from the tax exemption provided for in the Extraterritorial Income Exclusion Act (the "ETI Act") when the income from certain types of transaction involves "qualifying foreign trade property" (QFTP). The ETI Act defines the QFTP as the property that must be "*held primarily for sale, lease, or rental, in the ordinary course of trade or business for direct use, consumption, or disposition* ***outside*** *the United States* …". That means the property, which is produced within the US, shall be exported in order to be eligible for the tax exemption (fiscal subsidy). In other words, using the phrase "*use… outside the United States*" necessarily implies the exportation of the property from the United States (the place of production) to the place of use.[562]

On the other hand, the export subsidy can also appear without being introduced in a legal instrument, through the practice and the actual facts of the measure. One should demonstrate that boosting the export transactions or export earnings is the essential goal behind the governmental financial contribution.[563] Moreover, the AB in *the EC-Large Civil Aircraft* has evolved the "*de facto*" test as "*the granting of the subsidy geared to induce the promotion of future export performance by the recipient* ". By way of explanation, a comparison must be done between the anticipated export sales of the subsidized product that resulted from granting the subsidy and the situation in the absence of the granted subsidy. Hence, the test is positive if the comparison shows that by granting the subsidy the recipient has been motivated to increase its exports in a way that does not reflect the conditions of supply and demand in the ordinary domestic and export markets.

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[560] Ibid para. 104.
[561] Ibid para. 100.
[562] *United States - Tax Treatment for "Foreign Sales Corporations"* [1997] WTO Appellate Body Report Article 21.5 DSU 14 January 2002, WT/DS108/AB/RW, para. 116.
[563] Footnote 4 of the ASCM.

Accordingly, the trivial promotion in export sales does not indicate necessarily the existence of an export subsidy because this promotion can occur under normal market conditions. In the words of Lester, the *de facto* export contingency exists when the subsidy motivates the producers to export their products instead of selling them domestically. Then, the export sales become higher than and favoured over the domestic sales.[564] Arguably, a scholar like Steger called for a more consistent and unified interpretation of the *de facto* export contingency, as opposed to relying on case-by-case assessments.[565] However, the author of this dissertation stands on the side of the test developed by the BSB. Stated differently, the determination of the *de facto* contingency should be on a case-by-case basis as long as it is derived from the actual facts that are unlimited and unpredictable and cannot be covered by a fixed term. Therefore, while applying this test the panel should examine objectively every circumstance surrounding the subsidy measure that might help to understand the measure's design, structure, and modalities of operation.[566]

Furthermore, as it is clear from the language of subparagraph 1 of Article 3 of the ASCM, the exportation purpose, or as the black-text calls "*contingency upon export performance*", is not required to be incarnated solely in an individualistic action. It can, however, be combined with other requirements in the same action. Moreover, numerous forms of export subsidies can be found in Annex I of the ASCM.[567] Two significant matters must be pointed out concerning this Annex. Fundamentally, Annex I is not an exhaustive list which means the twelve items listed therein are just examples of export subsidies. That can be understood clearly from the language of Article 3.1 states "*including those illustrated in Annex I*". The dictionary meaning of the term "illustrate" is to serve as an "example of". Accordingly, the existence of an export subsidy is not limited to this Annex but rather includes any other measure that falls within the meaning of Articles 1 and 3.1 cooperatively.[568]

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[564] Simon Lester 'The problem of subsidies as a means of protectionism: Lessons from the WTO EC - AIRCRAFT case' (2011) 12 Melbourne Journal of International Law, 345, 358.
[565] Debra Steger 'The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?' (2010) 4 Journal of World Trade 44, 779, 785.
[566] DS316- *EC - Measures Affecting Trade in Large Civil Aircraft*, Appellate Body Report, paras. 1045- 1051.
[567] This list was originated by the GATT working party in 1960, then enclosed to the Subsidies Code 1979. Sophia Müller (n 411) 20.
[568] Mel Annand, Donald F. Buckingham, and William A. Kerr, 'Export Subsidies and the World Trade Organization' (Research paper No 1, 2001) 60.

Another pertinent point, when every export subsidy is a prohibited subsidy. Plus, every item listed in Annex I has been deemed an export subsidy. Deductively, every item at hand is a prohibited export subsidy. This outcome indicates that the challenged subsidy is prohibited merely when it falls within the scope of Annex I without any need to establish that it constitutes an export subsidy according to Article 3.1. Additionally, the Panel in *Korea- Commercial Vessel* emphasized that "*Given the per se nature of the items set forth in the Illustrative List, no further separate analysis of the program under Articles 1 and 3 would be necessary*".[569]

However, the author of this dissertation partially argues the above Panel's finding on the base that the complaining Member may bypass Article 3.1 of the ASCM if the measure in question is included in the illustrative list, but it cannot disregard Article 1 of the ASCM under any circumstances. That is because only the measure that fulfills the requirements of Article 1 can be subject to the WTO subsidy disciplines, then it can be prohibited under Article 3.1.[570] Therefore, Article 1 is the first step for validating and implementing the other provisions contained in the ASCM regardless of, as the panel claimed, "*the historical context of the Illustrative List, in the sense that it was first drafted before the definition of "subsidy" set forth in the SCM Agreement was introduced*".[571]

Moreover, while studying Annex I, footnote 5 of the ASCM must be paid great attention because of the exemption of the prohibition of export subsidy, or as it was named by the EC "safe heaven".[572] Footnote 5 states that "*Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement*". In simple words, if any item of Annex I is explicitly deemed not to be classified, for certain reasons, as an export subsidy, then it will never be prohibited neither under Article 3 nor any other provisions of the ASCM.

Undoubtedly, Item K of Annex I can sufficiently explain the meaning of footnote 5. On one side of the coin, Item K considers the export credits at rates lower than those that

[569] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.204.
[570] Dominic Coppens (n 36) 118. In this regard, the opinion of the author of this dissertation is originally published in ELTE LJ 2023/2.
[571] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, footnote 126.
[572] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Panel Report, para. 7.11.

usually should be paid as an export subsidy. On the other side of the coin, the second paragraph of item K denies this classification when the grant of the export credits is organized under and confirmed with an international agreement, such as The Arrangement on Officially Supported Export Credits concluded by the OECD. Thus, the EC, as a third party, in the *Canada-Civil Aircraft* dispute declared that in order to avoid the ban on export credits, every export credit activity must be in conformity with the OECD Guidelines.[573] Additionally, the EC asserted that the broad interpretation of the exemption is not warranted, thus it should be interpreted narrowly.[574]

Due to the absence of a clear interpretation of the meaning of "*contingency upon export performance*" in the ASCM, the next phase is inquiring about this interpretation through the WTO dispute settlement body's case law which clarifies the term "contingent" adequately and comprehensively.

Initially, the Panel in *Australia-Automotive Leather* relied on the New Shorter Oxford English Dictionary to explain the ordinary meaning of the term "contingent" as "*dependent for its existence on something else*", "*conditional; dependent on, upon*".[575] Afterward, the Panel referred to footnote 4 of the ASCM, which is an integral part of Article 3.1(a), that interprets and replaces the term "contingent" with "tied to". Additionally, the Panel and the AB agreed in a previous dispute,[576] to simplify the term "tied to" as "restrain or constrain to or from an action; limit or restrict as to behavior". Thus, the meaning of the term "contingency", "conditionality" or "tied to" is equivalent to an undeniable connection between the grant of a subsidy and export performance.[577]

[573] Ibid paras. 7.11-7.15.
[574] Ibid para. 7.21.
[575] *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather,* [1998] WTO Panel Report 25 May 1999, WT/DS126/R, para. 9.55.
[576] DS70- *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, para. 171.
[577] DS126- *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather,* Panel Report, para. 9.55.

In practice, the Panel decided that the loan[578] granted by the Australian government to Howe[579] does not constitute a subsidy contingent upon export performance due to the absence of a specific connection between the grant of subsidy and the export performance. The panel asserted that neither the design of the loan payment nor the repayment provisions, nor any other terms in the loan contract would tie the loan to the export performance. In contrast, the US, complainant, argued that the export is the only way for Howe in order to maintain its production and sales levels to be able to remain in business and pay off the loan. That means "*if Howe does not export, the Australian government will not be repaid*".[580] This argument was rejected by the Panel because Howe had full discretion to choose the source of funds, whether exportation or domestic sales, that will be used to repay the loan. Besides, export performance was not a term (provision) contained in the loan contract. Plus, there was no evidence to proof the fact that at the time of singing the loan contract, the Australian government expected that mainly export sales would generate the funds to repay the loan. Therefore, this potential export earning was insufficient to conclude that the loan was contingent in-fact upon anticipated exportation or export earnings.[581]

Consequently, the definition of the term export subsidy formed by the DSB, is very broad and the legal tests on the existence of export subsidy hardly comply with the policies and programs of the WTO Members. This argument was established by scholars Annand, Buckingham, and Kerr who contended that the decisions of the DSB were not built on appropriate and solid economic principles. Instead, they were more literal definitions. The DSB did not take into consideration the economic realities of the international trade. Therefore, those scholars raised the question that considering the wide scope of the export

[578] The loan contract provides for a fifteen-year loan of $A25 million by the Government of Australia to Howe/ALH. Howe/ALH is exempted from paying any interest for the first five years. Unlike the other ten-year period, Howe is required to pay interest on the loan based on the rate for Australian Commonwealth Bonds.
[579] This dispute concerns financial assistance in the form of loan provided by the government of Australia to Howe, a wholly-owned subsidiary of Australian Leather Upholstery Pty. Ltd., which is owned by Australian Leather Holdings, Limited ("ALH"), part of which is owned by Schaffer Corporation, Ltd. Howe is the only dedicated producer and exporter of automotive leather in Australia. DS126- *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather,* Panel Report, para. 2.1.
[580] Ibid para. 9.74.
[581] Ibid para. 9.75.

subsidy, would Members be willing to acknowledge that their national marketing schemes could potentially be deemed illegal under the new international legal standard?[582]

4.1.1.2. Subsidies contingent upon the use of domestic over imported goods (import substitution subsidy)

To continue with the second prohibited type of subsidy which is called "import substitution subsidy". This subsidy is regulated under Article 3.1(b) of the ASCM as follows: "*subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods*". A brief elaboration of the terminologies "use" and "goods" is needed. In the first place, the AB in the *US-Hot-Rolled Carbon Steel (India)* dispute defined the term "use" as "*the action of using or employing something*".[583] Subsequently, the AB in the *US-Tax Incentive* dispute added that the term "use" may include, based on circumstances, various practices, for example, consuming a good in the process of manufacturing or incorporating a component into a separate good, or serving as a tool in the production of a good.[584] Additionally, the AB in the latter dispute highlighted that the term "goods" in this provision can be used as a synonym for "products"[585] that are potentially tradeable but are not confined to those goods that are actually traded.[586]

After the first reading of Article 3.1(b), it can be understood that favoring/preferring domestic over imported commodities is the essential reason behind this prohibition. On one hand, this prohibition comports with the GATT National Treatment principle which requires the members not to give imported goods less favorable treatment than the domestic goods with regards to all laws, regulations, and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[587] On the other hand, the prohibition of import substitution subsidy contradicts the exemption of the National

[582] Mel Annand, Donald F. Buckingham, and William A. Kerr (n 568) 150.
[583] DS436- *US - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* Appellate Body report, para. 4.374.
[584] DS487- *US - Conditional Tax Incentives for Large Civil Aircraft,* Appellate Body Report, para. 5.8.
[585] The AB, previously, found out that the terms "goods" and "products" might have different interpretation depend on the context in which they are used. For more information, see the dispute 268 DS257- *US-Softwood Lumber from Canada* which is discussed in the third chapter of this dissertation.
[586] DS487- *US - Conditional Tax Incentives for Large Civil Aircraft,* Appellate Body Report, para. 5.9.
[587] Article III (4) of the GATT.

Treatment principle that is stipulated in Article 3.8(b) of the GATT. This exemption allows the exclusive grant of subsidies to domestic producers with respect to internal taxes and charges and the purchase for the government of domestic products.[588] However, the AB in the *US-Tax Incentives* pointed out that "*even if the granting of a subsidy is exempt from the GATT national treatment obligation…, it may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement*".[589] Thus, the AB made the "contingency" test as the cut-off point between these two Articles. The AB stated that subsidy would be "contingent" upon the use of domestic over imported goods "*if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy*".[590] Accordingly, in order for a subsidy to be prohibited under Article 3.1(b) of the ASCM the favorable treatment must be a condition for receiving the subsidy but not a mere result of the government measure, otherwise, it would enjoy the exemption of the National Treatment obligation.

However, the phrasing of Article 3.1(b) does not mention whether the contingency should exist in-law or in-fact as Article 3.1(a) does. Thus, the language dissimilarity between these two provisions raises the question of what does the contingency include in the case of import substitution subsidy? Peter and Michael opine that the *de jure* contingency is certainly included in this provision.[591] That was also the opinion of the Panel in the *Canada – auto* dispute, which added that the drafter of the ASCM did not mention the phrase "in-law and in-fact" in order to only effectuate the "in-law" contingency. The Panel's opinion was established based on the AB's finding that "the omission must have some meaning".[592]

Controversially, the AB reversed the Panel's finding and asserted that although the omission must have some meaning, it is not necessary to be negative and it may differ from one case to another depending on the context and the object and purpose of the

[588] Article III(8)(b) of the GATT "The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products".
[589] DS487- *US - Conditional Tax Incentives for Large Civil Aircraft,* Appellate Body Report, para. 5.16.
[590] Ibid para. 5.7.
[591] Rüdiger Wolfrum, Peter-Tobias Stoll, and Michael Köbele (n 249) 485.
[592] *Canada - Certain Measures Affecting the Automotive Industry*, [1998] WTO Panel Report 11 February 2000, WT/DS139/R; WT/DS142/R, paras. 10.220- 10.222.

agreement.[593] Regarding the context, the AB contended that Articles 3.1(a) of the ASCM and III.4 of the GATT 1994 are relevant contexts under which the interpretation of omission must be done. The two Articles in question cover both *de jure* and *de facto* inconsistency. Then, it would be inappropriate if a similar provision in the ASCM applied only to situations involving *de jure* inconsistency.[594] Accordingly, limiting the effect of Article 3.1(b) only to contingency "in-law" would render it inconsistence with the object and purpose of the ASCM because it would make circumvention of obligations by Members too easy.[595] For these reasons, the AB decided that Article 3.1(b) extends to subsidies contingent in-law and in-fact upon the use of domestic over imported goods.[596]

4.1.1.3. Remedies of the prohibited subsidies

Generally, any dispute violates the WTO law and any obligation contained therein is subject to the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[597] This document establishes the Dispute Settlement Body, which consists of a panel and an Appellate Body, that adopts decisions and recommendations in a given dispute and observes their implementation. The decision of the DSB is binding on the Member States.[598] Furthermore, arbitration is an alternative approach to resolving disputes instead of the DSB, only in the case of mutual consent of the parties.[599] However, a party can refer to the arbitration if the decisions and recommendations of the DSB or the time frame fixed by which have not been fulfilled or respected.[600]

Additionally, some special or additional rules and procedures on the settlement of disputes contained in various WTO Agreements shall be taken into consideration due to the doctrine

[593] DS139/142- *Canada - Certain Measures Affecting the Automotive Industry,* Appellate Body Report, paras. 137- 138.
[594] Ibid para. 140.
[595] Ibid para. 142.
[596] Ibid para. 143.
[597] Art 1(1) of the *Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226. [hereinafter DSU]
[598] Zoltan Vig, International Economic and Financial Organizations, in Z. Fejes, M. Sulyok, and A. Szalai (eds), *Interstate Relations* (Iurisperitus Kiadó, 2019) 140.
[599] Article 25 of the DSU.
[600] Article 21(3)(3) of the DSU.

of *lex specialis*.[601] Head of the list, the Agreement on Subsidies and Countervailing Measures contains Articles 4.2 through 4.12 on remedies of prohibited subsidies.[602] Besides, part V of the ASCM includes common provisions between prohibited and actionable subsidies.[603] From the establishment of the WTO till 2021, a total of 130 disputes on subsidies have been commenced, some of which have been proceeded under the Articles in question.[604]

The Member officially commences an investigation into the existence and the amount of the alleged subsidy based on a written application submitted by or on behalf of the domestic industry.[605] The term "domestic industry" means either "*the domestic producers as a whole of the like products*" or the domestic producers who produce a major proportion of the total domestic production of those products,[606] and are called "main producers". Exceptionally, the term "domestic industry" might not refer to the main producers but instead to the rest of the producers only if a) the main producers control directly or indirectly the importers or exporters of those products or vise-verse; b) there is a third party that controls all of them (main producers, exporters, and importers); c) together they directly or indirectly control a third person, if there is evidence that the producer concerned has acted differently from non-related producers.[607]

The application for investigation must indicate sufficient evidence on the existence of subsidy and its amount, if possible, the injury suffered by the domestic industry, and the cause-effect relationship between the alleged subsidy and injury.[608] However, it is worth noting that an investigation can be launched without such an application only if the

[601] This doctrine states that if two laws govern the same factual situation, the applicable law should be the law governing a specific subject matter (lex specialis), instead of the law governing only general matters. Federico Ortino, and Ernst-Ulrich Petersmann (eds) (n 260) 332.
[602] Appendix 2 of the DSU.
[603] Footnote 35 of the ASCM states that "The provisions of Part II or III may be invoked in parallel with the provisions of Part V".
[604] WTO Official Website, 'Dispute settlement activity - some figures', Chart 3 < https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm > accessed 24 August 2022.
[605] Article 11(1) of the ASCM.
[606] Article 16(1) of the ASCM. Bearing in mind that the production (collective output) is major if it constitutes more than 50% of the total production of the like product. Article 11(4) of the ASCM.
[607] Footnote 48 of the ASCM.
[608] Article 11(2) of the ASCM.

authorities are capable of providing the above-mentioned evidence.[609] The authorities shall, after a comprehensive examination of the accuracy and adequacy of the evidence,[610] accept or reject this application. Only in the case of acceptance, the initiation of an investigation can be publicly announced by the authorities.[611] Nonetheless, the investigation shall be immediately terminated either if the authorities conclude that the evidence is not sufficient, the subsidy is *de minimis* or the volume of injury is negligible.[612] In any event, the investigation cannot continue for more than 18 months after its commencement.[613]

The investigation authorities, after accepting the application, shall invite the Member, whose products are alleged to be subsidized, for consultation.[614] The Member concerned is required to cooperate in conducting the investigation by giving access to non-confidential evidence, including the non-confidential summary of confidential data being used for initiating or conducting the investigation.[615]

Additionally, according to the dispute settlement procedures contained in Article 4 of the ASCM, disputes are initiated when a WTO Member dispatches a formal request for consultation. This request should state available evidence regarding the existence and nature of the prohibited subsidy, to another member whose measure is challenged.[616] Through this consultation, the Members shall discuss, without delay, the disputed matters with the aim of reaching a mutually agreed solution.[617] Usually, if the parties to the dispute do not agree otherwise, the mutually agreed solution shall be attained within 30 days. If not, any party may request the establishment of a panel to start the litigation procedure before the WTO DSB.[618]

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[609] Article 11(6) of the ASCM.
[610] Article 11(3) of the ASCM.
[611] Article 11(5) of the ASCM. Furthermore, the investigation authorities shall notify and give a public notice about the initiation of investigation to every interested member. the public notice shall include some essential information, for example, the name of the exporting country or countries and the product involved, the date of initiation of the investigation, description of alleged subsidy etc. Article 22 of the ASCM.
[612] *de minimis* means the subsidy is less than 1% ad valorem. Article 11(9) of the ASCM. To be discussed deeply later in this chapter.
[613] Article 11(11) of the ASCM.
[614] Article 13(1) of the ASCM.
[615] Article 13(4) of the ASCM.
[616] Article 4(2) of the ASCM.
[617] Article 4(3) of the ASCM.
[618] Article 4(4) of the ASCM.

Moreover, the panel shall examine the evidence at hand and shall permit the parties to submit any other arguments and evidence that can demonstrate their claims whether or not the measure in question is a prohibited subsidy. To achieve that goal, the panel may request the Committee on Subsidy and Countervailing Measures[619] to establish a Permanent Group of Experts (PGE)[620] which is comprised of five independent members who have thorough knowledge in the field of subsidies and trade relations.[621] This group should advice the panel about the existence and nature of the alleged prohibited subsidy and deliver its binding final report within the time-period fixed by the panel.[622] It is worth noting that this group shall not be asked about its opinion with regard to the actionable subsidies, but only regarding the prohibited subsidies.[623] Afterward, the panel shall submit its final report to the parties. Then, the report shall be circulated to all Members within 90 days of the date of the establishment of the panel's terms of reference.[624] Subsequently, the DSB shall adopt the panel's report within 30 days of the date of circulation to all Members.

However, the panel's report might not be adopted by the DSB in two situations: a) the DSB decides by consensus not to do so, or b) one of the parties to the dispute decides to appeal it.[625] In the latter case, the Appellate Body is required to render its decision within 30 days from the date when a party to the dispute formally announces its intention to appeal. It should be mentioned that this time period can be extended upon a written request from Appellate Body to DSB which expresses the reasons for the delay along with the estimated time for submitting the report. Under no circumstances should the proceedings exceed 60 days.[626]

The remedies for the prohibited subsidies are classified as follows:

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[619] This committee is established by the ASCM and consists of representatives from each of the Members. The Committee shall elect its own A Chairman shall be appointed by those Members. The Committee shall meet regularly than twice a year and in some circumstances upon a request of any Member. Article 24(1) of the ASCM.
[620] Article 24(3) of the ASCM.
[621] Article 24(2) of the ASCM.
[622] Article 4(5) of the ASCM.
[623] Article 24(4) of the ASCM.
[624] Article 4(6) of the ASCM.
[625] Article 4(8) of the ASCM.
[626] Article 4(9) of the ASCM.

4.1.1.3.1. Withdrawal of the subsidy

Whenever the panel finds that the challenged measure constitutes a prohibited subsidy, it should rule that the subsidy must be withdrawn by the subsidizing Member within a specific time-period.[627] That is exactly what happened in the *Brazil-Aircraft* dispute, when the Appellate Body upheld the original Panel's recommendation which asserted that some of Brazil's measures constituted prohibited export subsidies, and then must be withdrawn. [628] Therefore, Brazil, as a defendant, modified the measures at hand in order to be consistent with Article 3.1(a) of the ASCM. In return, Canada, as complainant, argued that Brazil's modification to its export subsidy program remained prohibited export subsidies, and did not bring it into compliance with the mentioned provision.[629]

However, the meaning of the terminology "withdrawal" has been controversial due to the silence of the ASCM. Thus, several questions were raised in this regard by Peter Stoll and Michael Koebele, and left open,[630] such as what does the withdrawal cover? Is the mere modification of the export subsidy sufficient to render the measure compatible with the ASCM? In other words, shall the withdrawal include both the retrospective (existing) and the prospective (future) measure?

In the course of examining the meaning of "withdrawal" of a subsidy, the Appellate Body opined that the ordinary meaning of "withdraw" is *"remove" or "take away" and as "to take away what has been enjoyed; to take from*." This definition suggests that the "withdrawal" of a subsidy means the "removal" or "taking away" of that subsidy. Thus, the continuance payments under an export subsidy measure are prohibited and are not consistent with the obligation to "withdraw" prohibited subsidies. Hence, the modification of the measure through decreasing the portion of the export subsidy is not adequate for meeting the meaning of the term "withdraw" under Article 4.7 of the ASCM.[631] According to this

[627] Article 4(7) of the ASCM.
[628] *Brazil - Export Financing Program for Aircraft*, [1999] WTO Appellate Body Report Article 21.5 DSU 21 July 2000, WT/DS46/AB/RW, para 82.
[629] Ibid para. 20.
[630] Rüdiger Wolfrum, Peter-Tobias Stoll, and Michael Köbele (n 249) 494.
[631] DS46- *Brazil - Export Financing Program for Aircraft,* Appellate Body Report, para. 45.

interpretation, it is understood that no future payment can be made under the prohibited program.

Regarding the previously conferred benefit, which resulted from granting a prohibited subsidy, should the amount of subsidy, which was already disbursed, be given back or not? The Panel examined this question in the *Australia-Leather exports* dispute. The Panel asserted that "*In our view, if the term "withdraw the subsidy' can properly be understood to encompass repayment of any portion of a prohibited subsidy, "retroactive effect' exists*".[632] The author of this dissertation agrees with the Panel's finding for two major reasons:

Firstly, the aim of this remedy is to remove the adverse effects caused by the prohibited subsidy. Thus, this goal will not be achieved only by terminating the effect of the measure in the future, but also by repaying the full amount of the financial contribution that constituted the measure due to which the adverse effects first occurred. Moreover, Singh relies on the AB's statement and emphasizes that the adverse effects could be caused by subsidies granted before entering the ASCM into force as long as the Member has been maintaining the subsidy program after the enforcement of the ASCM.[633] Then, the interpretation of "withdraw the subsidy" which encompasses repayment is consistent with the objective and purpose of the ASCM. Particularly, in the case of the one-time subsidy contingent in-fact either on the export performance or on the use of domestic over imported goods, where the remedy of withdrawal of subsidy will be meaningless if the effect of which was limited to the future event and ignored the past event.[634]

Secondly, if the subsidizing Member did not withdraw the prohibited subsidy, the complaining Member is probably permitted to take appropriate countermeasures (to be discussed later) to offset the adverse effect that occurred in the past, not in the future. Then, it is appropriate for the first remedy (withdrawal) to have either the same or greater effect but not lower than the second remedy (countermeasures). However, this opinion is justified

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[632] *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, [1998] WTO Panel Report Article 21.5 DSU 21 January 2000, WT/DS126/RW, para. 6.22.
[633] Gurwinder Singh (n 25) 122- 123.
[634] DS126- *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report Article 21.5 DSU, para. 6.38.

based on part III of the ASCM on "actionable subsidies". According to Article 7 of the ASCM when the challenged subsidy has caused adverse effects to the interests of the complaining Member, the subsidizing Member shall "*take appropriate steps to remove the adverse effects or shall withdraw the subsidy*".[635] If not, the complaining Member may impose a countervailing measure.[636] It is obvious that the subsidizing Member has been given the opportunity to choose an appropriate method to remove the adverse effects, and withdrawal of the subsidy is a definite alternative to these methods that promise the same purpose. Thus, the repayment of the granted subsidy would certainly accomplish the mission of withdrawing the subsidy by a subsidizing Member, accordingly, removing the adverse effect on trade.

4.1.1.3.2. Take "appropriate countermeasures"

If the time-period specified in the report of the DSB is terminated without withdrawing the prohibited subsidy by the defending Member, the complaining Member might be permitted (authorized) to adopt an appropriate countermeasure unless the DSB decides by consensus to reject the request.[637] According to the DSU, the countermeasure, informally known as "retaliation', means the right of the complaining Member "*to suspend the application to the Member concerned of concessions or other obligations under the covered agreements*".[638] The purpose of the countermeasure can be either to enforce the recommendation and rulings of the BSD or to rebalance mutual trade benefits.[639]

Unfortunately, this countermeasure strategy generally is criticized as a remedy for non-compliance from various perspectives. By way of illustration, the retaliation through establishing new trade barriers contradicts the idea of liberalization emphasized by the WTO, due to the economic harmful effect, especially at the price of the products, on both the targeted Member and the Member imposing these measures.[640] Moreover, these

[635] Article 7(8) of the ASCM.
[636] Article 7(9) of the ASCM,
[637] Article 4(10) of the ASCM.
[638] Article 22(2) of the DSU.
[639] WTO Official Website, 'The process - Stages in a typical WTO dispute settlement case', <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm> accessed 24 August 2022.
[640] Ibid.

measures are, more likely, insufficient to achieve the above-mentioned goals. For instance, banning a developed country from accessing the market of a small country, whose economy highly relies on and was adversely affected by a prohibited export subsidy provided by the former, can have worse economic consequences than the subsidy itself.[641] This argument was emphasized by Panagariya who examined the policy of interventions on behalf of export interests and concluded that every country, in particular, which has a small economy, attempts to retaliate against export subsidies with similar export subsidies or tariffs will only hurt itself.[642] Even though, 403 countervailing measures have been enforced by 25 WTO reporting Members between the years 1995 and 2022. Unsurprisingly, the US has topped up the list with 212 countervailing measures during the examined period.[643]

Furthermore, the essential question in this regard is when should the countermeasure be considered "appropriate" for the purpose of Article 4? The starting point in answering this question is the footnotes 9 and 10 of the ASCM that refer to the term "appropriate" as "*this expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited*". By the same token, the Arbitrators in *the US- upload cotton* defines the "appropriate countermeasure" as

> Countermeasures, in order to be "appropriate', should bear some relationship to the extent to which the complaining Member has suffered from the trade-distorting impact of the illegal subsidy. Countermeasures are in essence trade-restrictive measures to be taken in response to a Member's application of a trade-distorting measure that has been determined to nullify or impair the benefits accruing to another Member.[644]

Indeed, this explanation is consistent with the general principles set out in the DSU which provides that the level of the concessions shall be equal to the level of nullification and impairment caused by the illegal measure.[645]

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[641] Tsai-yu Lin 'Remedies for Export Subsidies in the Context of Article 4 of the SCM Agreement: Rethinking Some Persistent Issues' (2008) 3 (1) Asian Journal of WTO & International Health Law and Policy, 21, 42.
[642] Arvind Panagariya, 'Evaluating the Case for Export Subsidies' (Policy research working paper 2279, 2000) 3. < https://ssrn.com/abstract=629126 > accessed 09 February 2023.
[643] WTO Official Website, 'Subsidies and countervailing measures'< https://www.wto.org/english/tratop_e/scm_e/scm_e.htm > accessed 10 February 2023.
[644] *United States - Subsidies on Upland Cotton*, [2002] WTO Decision of the Arbitrator Art 22.6 DSU 31 August 2009, WT/DS267/ARB/1, para 4.87.
[645] Article 22(4) of the DSU.

Moreover, the European Community in *the US-FSC* dispute requested authorization to suspend concessions based on the amount of subsidy allocated by the US which is approximately $4,043 million. In return, the US argued that the appropriate countermeasure should be fixed based on the effect of the subsidy on European trade, which is about $1100 million, but not based on the amount of subsidy.[646]

On this point, the panel indicated that such countermeasures are "aimed at inducing or securing compliance with the DSB's recommendation".[647] Besides, there is nothing in the context of the ASCM that suggests entitlement to manifestly punitive measures.[648] Therefore, the appropriate countermeasure should be determined based on the effect of the subsidy on European trade, regardless of the amount paid for conducting the illegal action.[649] By doing so, the trade benefit between the Members concerned has been balanced like in the case if the US had withdrawn the illegal subsidy from the beginning.

Concisely, the author of the dissertation supports the viewpoint that in order for a better implementation of the remedy of subsidy, it is not sufficient for the countermeasure only to meet the "appropriateness" or "not to be disproportionate" test. The "punitive countermeasure" should be introduced as a possible approach that creates greater pressure on defending Members to withdraw any prohibited subsidy within a dispute settlement mechanism. This approach can be justified on the basis that the *per se* nature of the prohibited subsidy requires stricter subsidy discipline than the actionable subsidy. Additionally, the countermeasure, in itself, is a sanction for non-compliance with the DSB's recommendation and is not a mere compensating measure like the countervailing duty (explained below).[650] Thus, how it is possible for a sanction measure not to include the meaning of punishment? Therefore, the "appropriateness" test should take into account not only the adverse effects caused by the export subsidy but also the fact the subsidizing Member is guilty of acting in breach of both the ASCM and the DSB recommendation. By

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[646] *United States - Tax Treatment for 'Foreign Sales Corporations*, [1997] WTO Decision of the Arbitrator Article 22(6) DSU 30 August 2002, WT/DS108/ARB, para 6.37.
[647] Ibid para. 5.52.
[648] Ibid para. 5.62.
[649] Ibid paras. 6.10- 6.28.
[650] 'The expected punishment of a CVD leads all countries to lessen their use of subsidies'. Brian Kelly 'The Pass-Through of Subsidies to Price' (2014) 48 (2) Journal of World Trade, 3.

adding the punitive flavor to this countermeasure, the willingness of the subsidizing Member to adhere to the DSB recommendation can be more certain, because they do not want to "pay more while they can pay less".

4.1.1.3.3. Apply provisional measures, such as "countervailing duties"

It is important to mention that both provisional measures and undertakings (below) are regulated under part V of the ASCM as common remedies for both prohibited (part II) and actionable (part III) subsidies. Therefore, the Members are allowed to apply the provisions of Part II or III parallelly with the provisions of part V. One exception can be pointed out in this regard, countervailing duty and countervailing measure cannot be invoked simultaneously due to their similar effect as a form of relief.[651]

Provisional measures are interim remedies that can be granted under special circumstances. Firstly, the investigation authorities have already initiated the investigation after giving proper public notice as explained before. Secondly, a preliminary affirmative determination has been made on the subsidy, injury, and causal link. Thirdly, such a measure aims to prevent injury from being caused during the investigation period.[652] Therefore, a provisional measure can be applied only after 60 days from the date of initiation of the investigation and for a period no longer than 4 months as a maximum.[653] Comprehensively, the countervailing duty is one of the various forms of provisional measures, which means "*special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise*".[654] The countervailing duty is guaranteed through cash deposits or bonds equal to the preliminary evaluation of the amount of the alleged subsidy.[655] The amount of subsidy, according to Article 14 of the ASCM, shall be determined in terms of the benefit to the recipient.[656] Likewise, the countervailing duty can be imposed, based on a decision made by the importing Member,[657]

[651] Footnote 35 of the ASCM.
[652] Article 17(1) of the ASCM.
[653] Articles 17(3) and 17(4) of the ASCM.
[654] Footnote 36 of the ASCM.
[655] Article 17(2) of the ASCM.
[656] See the calculation of benefit in the third chapter of this dissertation. Some alternatives methods are discussed.
[657] Article 19(2) of the ASCM.

when creatin requirements have been fulfilled: a) a final determination of the existence and amount of subsidy is made, b) it is shown beyond doubt that the subsidized imports have caused an injury to the domestic industry of the complaining Member, c) the subsidizing Member has refused to withdraw the subsidy.[658] Moreover, the amount of countervailing duty should be determined on case-by-case basis, and in a non-discriminatory manner.[659] Under any circumstances, the amount of which should be equal or less, but not more, than the amount of the subsidy and calculated in terms of subsidization per unit of the subsidized and exported product.[660] In any case, this amount shall not reach the amount of subsidy as long as such lesser duty is adequate to remove the injury caused.[661]

Generally, the provisional measure, including countervailing duty, shall apply only to products that enter for consumption after taking into consideration the periods discussed above.[662] Additionally, the provisions of the ASCM shall be applicable even if the products are imported indirectly, through an intermediate country, from the country of origin to an importing Member. In this case, all the transactions are to be regarded as having been made between the country of origin and the importing Member.[663]

On some occasions, the effect of the provisional measure can extend to a prior time or situation that existed in the past which is called the "retroactive effect". This exception is stipulated in Article 20 of the ASCM. Two conditions must be met in order for countervailing duties to be levied retroactively for the period for which provisional measures, if any, have been applied: 1) the final determination of injury or threat of injury is made, 2) the effect of the subsidized imports would, in the absence of the provisional measures, have led to a determination of injury.[664]

[658] Article 19(1) of the ASCM.
[659] Article 19(3) of the ASCM.
[660] Article 19(4) of the ASCM.
[661] Article 19(2) of the ASCM.
[662] Article 20(1) of the ASCM.
[663] Article 11(8) of the ASCM.
[664] Article 20(2) of the ASCM.

In practice, the Panel in the *US- Softwood lumber III* decided that the provisional measures, which were levied by the US based on a preliminary subsidy rate of 19.31%,[665] were inconsistent with the ASCM due to disregarding (neglecting) the time limit specified in the Article 17. In detail, the investigation was initiated on 23 April 2001, while the provisional measures were applied on imports entering from 19 May 2001 till 14 Dec 2001. Thus, the provisional measures were imposed directly after 25 days of the initiation of the investigation (less than 60 days) and were in force for a period of almost 7 months (more than 4 months).[666] Bearing in mind, the Panel emphasized that the period of 4 months refers to the period during which the affected imports enter for consumption rather than the period during which cash deposits or bonds are taken as the US argued. Because the US interpretation would make the application of provisional measure significantly last for more than 4 months.[667]

4.1.1.3.4. Undertakings as alternative to CVD

The implementation of the provisional measures, including the countervailing duties, should be suspended, or terminated[668] in either case: a) if the elimination or termination of the subsidy or any measure with similar effect has been undertaken by the government of the exporting Member, b) if only the exporter, not the government, undertakes to modify the price of its products to the extent which convinces the investigation authorities that the distortion effect of the subsidy is diminished. In any event, price increases shall be equal to or lower than the amount of subsidy as long as such a lower price is sufficient to cease the injury to the domestic industry.[669] These two types of undertakings cannot be brought into a discussion between the Members concerned unless a preliminary affirmative determination on both the existence of subsidy and the injury caused by which has been

[665] *United States - Preliminary Determinations with Respect to Certain Softwood Lumber III from Canada (Softwood Lumber III),* [2001] WTO Panel Report 27 September 2002, WT/DS236/R. para. 2.5.
[666] Ibid para. 7.101.
[667] Ibid para. 7.102.
[668] The provisional measures and the undertakings cannot be applied at the same time due to their similar mitigation effect on injury to the domestic industry. Footnote 49 of the ASCM.
[669] Article 18(1) of the ASCM.

made by the investigating authority. On top of that, only in the case of the second undertaking, the consent of the exporter must be obtained.[670]

The undertakings proposed by the exporting government, or the exports, are not necessarily implemented. Instead, they require the approval of the importing Member. However, the ASCM does not oblige the importing Member to accept the offered undertakings, but the rejection should be built upon solid ground. For instance, the number of actual or potential exporters is too great, or reasons relating to the general policy of the importing Member. Such rejection does not mean the end of the negotiation. The exporter must be given the opportunity to provide a counter argument that might roll the table around and change the rejection into an acceptance.

By the same token, in the *US-Offset Act (Byrd Amendment)*[671] dispute, Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand (complaining parties) requested the Panel to examine that the US' Offsets Act (Byrd Amendment) is not compatible with both Article 8.3 of Anti-dumping Agreement and Article 18.3 of the ASCM because it impedes the application of the standing requirements on undertakings as a remedy. The complaining parties argued that the Offset Act allows the domestic producers to stand in favor of and support the imposition of anti-dumping or anti-subsidy duties, as long as these duties will be disbursed to them, rather than accepting the undertakings offered by the Exporting Member or the Exporters. By doing so, this Act provides the domestic industry with great power in making a negative decision against the undertakings. In other words, this Act ceases the effect of one remedial measure provided for in the Anti-dumping agreement and the ASCM.[672] However, the Panel in this dispute emphasized that the decision of the investigating authority to accept or refuse the undertakings offered can be based on any reason because the ASCM does not

[670] Article 18(2) of the ASCM.
[671] The provisions of this Act allow Customs Border Protection to redistribute the collected anti-dumping and countervailing (AD/CV) duties to domestic producers injured by foreign dumping and subsidies. *United States - Continued Dumping and Subsidy Offset Act of 2000,* [2000] WTO Panel Report 16 September 2002, WT/DS217/R; WT/DS234/R. para 2.2.
[672] Ibid para. 3.3.

provide exclusive reasons, instead, only some examples are mentioned. Thus, the investigating authority has full discretion to decide on which fact the rejection is based.[673]

On the other hand, the exporting Member and the exports are permitted to request the investigation authority to wind up the investigation process in case of the acceptance of undertakings by the latter. Moreover, the undertakings shall automatically terminate in case of negative determination of subsidization or injury is made. Exempting the case in which the existence of undertaking is the essential reason behind such negative determination. Then, the undertaking, upon the request of the authority concerned, can remain in force for a reasonable period. On the contrary, the undertakings shall continue according to its terms and the provisions of ASCM in case of affirmative determination of subsidization and injury is made.[674]

During the course of enforcing the undertakings, the exporting government or the exporters concerned might be required, by the importing Member, to submit regularly a detailed report that confirms the fulfillment of their obligation under the undertakings. In the event of a violation of such obligation, the importing Member is allowed to take expeditious actions in the form of immediate application of provisional measures. Besides, definitive duties can be imposed on products entered for consumption not more than 90 days before the application of such provisional measures.[675]

Moreover, the ASCM provides for equal treatment regarding the duration and review of countervailing duty and undertaking.[676] The mentioned measures shall remain in force only to the extent necessary to compensate for the injury caused by the subsidy.[677] The measures in force must be reviewed by the investigating authority either intentionally or upon request by any interested party. The purpose behind this revision is to examine the need for the continued imposition of the measure. However, the termination of the measure is mandatory when the result of the review confirms that the measure is no longer

[673] Ibid para. 7.80.
[674] Article 18(4) of the ASCM.
[675] Article 18(6) of the ASCM.
[676] Article 21(5) of the ASCM.
[677] Article 21(1) of the ASCM.

warranted.[678] In any circumstances, the measure shall not remain in force longer than 5 years from its imposition.[679]

4.1.2. Actionable Subsidies

It is worth noting that the mere adoption of the prohibited category might impair the achievement of the WTO economic objectives, such as upgrading the standard of living, ensuring maximum employment, and increasing the production of goods. To avoid that undesirable end, attempts must be made to maintain the balance among market efficiency principles based on free competition and the WTO objectives.[680] Therefore, the ASCM creates the category of "actionable subsidies" and regulates its implementation under part III. Not to mention, regulating actionable subsidies strikes a balance between addressing trade-distorting practices and allowing governments to support domestic industries. It provides a framework to address harmful subsidies while allowing for justified flexibility.

"Actionable subsidy" can be defined as any subsidy that meets the criteria of Articles 1 and 2 of the ASCM, which is not prohibited under part II, and causes adverse effects to the interest of other Members.[681] Accordingly, the fundamental difference between the prohibited and actionable categories is the burden of proof of their adverse effects. In the case of the prohibited subsidy, there is an irrebuttable presumption of the existence of adverse effects. Thus, the complainant Member shall only prove that the challenged subsidy is a prohibited subsidy, but no requirement to submit positive evidence on its adverse effects.[682] In contrast, the complainant Member in the case of actionable subsidy, shall establish that the challenged subsidy has caused an adverse effect to its interest under Article 5 of the ASCM. Although the ASCM does not specify a particular purpose and object of the actionable subsidies, it can be understood that, as Stewart highlighted, this category aims to compromise between the possible useful aspects and the trade-demanding aspects of subsidy.[683] Therefore, the challenged subsidy might be a legal/lawful subsidy

[678] Article 21(2) of the ASCM.
[679] Article 21(3) of the ASCM.
[680] Gurwinder Singh (n 25) P 94.
[681] Article 5 of the ASCM.
[682] Read through the first section of this chapter.
[683] David P. Stewart, *The GATT Uruguay Round: Negotiation history 1986-1992* (Kluwer Law International, 1993) 500.

and not be subject to any remedial measure, if the complainant Member has failed to submit sufficient evidence of its adverse effect.

Moreover, part III of the ASCM uses the general expression "adverse effects". Someone can claim that this broad expression might include trade and environmental adverse effects. As Marc argued "*until now, all the philosophy of the SCM was based on trade related adverse effects (contingency on export performance, lost market shares, price undercutting, etc.)*", but not on environmental effects on which special set of rules have been created, like Annex VIII of the ASCM on Fisheries Subsidies.[684] Subsequently, the term "adverse effects" within the ASCM should be understood as referring to the trade aspects such as impacts on price, quantity, and market shares.

Furthermore, the adverse effects can be manifested in various forms. These forms contained in Article 5 of the ASCM are only examples and are not contained in an exclusive list. That is clear from the language of this Article through using the term "*i.e.*" before listing the forms.[685] The first form the adverse effect might take is causing injury to the domestic industry of another Member. Footnote 11 of the ASCM states that "*The term "injury to the domestic industry' is used here in the same sense as it is used in Part V*".[686] In practice, the US in *the EC-Large Civil Aircraft* dispute claimed that the EC provided aid to every major model of Airbus LCA family constituted a specific subsidy, then it caused injury to the US domestic industry in the field of LCA in the form of price depression and price suppression.[687] For further explanation, the injury can be demonstrated in two ways. Firstly, the European company Airbus experienced a substantial 18% increase in its market share in the Large Civil Aircraft (LCA) industry over a four-year period starting from 2001. Secondly, Airbus witnessed a 25% rise in its market share in the United States during the same timeframe. Essentially, if Airbus had not received the subsidy in question, its

[684] Benitah Marc, 'fisheries subsidies in the new draft SCM: at last a recognition of the concept of the environmentally harmful subsidies (EHS)' International Economic Law and policy blog <https://ielp.worldtradelaw.net/2007/12/fisheries-subsi.html > accessed 16 March 2023.
[685] Article 5 of the ASCM "*No Member should cause…adverse effects to the interests of other Members, i.e.:*".
[686] The meaning of domestic industry has been already discussed above regarding the countervailing measure in the case of prohibited subsidies.
[687] DS316- *European Communities- Measures Affecting Trade in Large Civil Aircraft*, Panel Report, para. 4.96.

American competitor Boeing would have been able to maintain its market share in the US LCA market, resulting in a 54% higher increase in its LCA sales in 2005 compared to the actual outcome.[688]

The second form of adverse effects is nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994. In other words, the subsidy is deemed to cause adverse effects, if it prevents any Member from enjoying any kind of benefits, in particular the concessions contained in Article II, accorded under the GATT.[689] From a practical perspective, Mexico in *the US-Offset Act* dispute relied on Article 5(b) of the ASCM to demonstrate that benefits that accrue to Mexico under Article II of the GATT 1994 are being nullified or impaired by the Act (the subsidy).[690] Mexico explains that the benefits are nullified or impaired because

> Mexico could not have reasonably anticipated the introduction of the Act, and the subsidies systematically upset the expected competitive relationship between Mexican and like the United States products in cases where anti-dumping and countervailing duties apply. In addition to the expected tariffs under GATT Article II and duties under GATT Articles II:2(b), VI:2 and VI:3, the competitive relationship between the imported and like domestic products is established and, thereby, upset by the subsidies. The nullification or impairment is direct and systematic and it reflects the explicit objective of the Act - to enhance the remedial effect of United States' anti-dumping and countervailing duty laws.[691]

In the dispute at hand, the panel concluded that a link should exist between the challenged subsidy and the benefit that is nullified or impaired. Further elaboration, three steps must be fulfilled in order to activate Article 5(b): First, the subsidy shall be granted or maintained. Second, the existence of a benefit accruing under the GATT 1994. Third, a causal link demonstrates that nullification or impairment of this benefit has been caused by this subsidy. Accordingly, the Panel held that Mexico failed to prove the existence of

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[688] Ibid para. 4.406.
[689] Article 5(b) of the ASCM.
[690] Argument of Mexico "in cases where anti-dumping and countervailing duties are in place against imports of Mexican products, Mexico can legitimately expect that the competitive relationship between Mexican and like United States products will be defined by a tariff, at most, equal to the United States' tariff binding under Article II:1 plus permissible anti-dumping and/or countervailing duties as contemplated under Article II:2(b) and no more." DS217/234- *United States - Continued Dumping and Subsidy Offset Act of 2000,* Panel Report, para. 4.208.
[691] Ibid paras. 4.209- 4.210.

nullification or impairment because the unpredictability relied on by Mexico can easily result from any subsidy program that does not determine explicitly and in advance the amount of subsidy to domestic producers. Additionally, Mexico examined the subsidy program itself but not its application, so there was no way of knowing whether the offset payments would systematically offset or counteract tariff concessions.[692]

4.1.2.1. Serious prejudice

The third form of adverse effects is known as "serious prejudice to the interest of another Member". Footnote 13 of the ASCM makes reference to paragraph 1 of Article XVI of the GATT 1994 to emphasize the similarity in language between the two Articles in employing the expression "serious prejudice". Unfortunately, the purpose of this reference has not been reached because the mentioned paragraph does not define the expression "serious prejudice". It merely indicates that serious prejudice and the threat to cause serious prejudice shall have the same effect.[693] Furthermore, this reference does not introduce any new information since the footnote already states within its text that the concept of "serious prejudice" encompasses the notion of a potential threat of serious prejudice.

On closer inspection, Article 6 of the ASCM gives a comprehensive analysis of serious prejudice through its current seven paragraphs, because paragraph 1 had provisional validation for five years after the ASCM entered into force according to Article 31 of the ASCM. Additionally, paragraph 2 is terminated subsequently as long as it shows the way of the implementation of paragraph 1. Hence, commencing the discussion directly with paragraph 3 which stipulates four forms though which serious prejudice may arise. The first two forms are:

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[692] Ibid paras. from 7.106- 7.133.

[693] Paragraph 1 of Article XVI of the GATT "If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization."

> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
>
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;[694]

In order for panels to determine the existence of these two situations, an examination of the "displacement" and "impediment" shall be conducted. Regarding the expression of "displacement", the AB in the *EC and certain Member states – Large Civil Aircraft* Dispute defined the term "displacement" as "*substitution effect between the subsidized products and the like products of the complaining Member*". In other words, "displacement" is an economic mechanism in which the export of subsidized products replaces the exports of like products from the complaining Member or from a third country.[695] To that end, those groups of products shall have a competitive relationship in the market. Moreover, the AB decided that the terms "replace" and "impede" are not interchangeable.[696] Therefore, the expression "impedance" should indicate the situation when the imports or exports of the complaining Member have been impeded or hindered by the subsidizing products. Definitely, that requests a hypothetical comparison between the situation of the actual market in which the subsidized products exist and what would the situation be in the case of the absence of the subsidy.[697] In the context of this comparison, Article 6 (4) of the ASCM requires the complaining Member to demonstrate that the relative shares of the market have been changed in any of the following forms

> (a) there is an increase in the market share of the subsidized product; (b) the market share of the subsidized product remains constant in circumstances in which, in the absence of the subsidy, it would have declined; (c) the

[694] Article 6(3) of the ASCM.
[695] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, para. 1160.
[696] Ibid para. 1071.
[697] Ibid para. 1071.

market share of the subsidized product declines, but at a slower rate than would have been the case in the absence of the subsidy.[698]

Exceptionally, Article 6 (7) abandons the effect of "displacement or impediment" as serious prejudice under any of the following circumstances:

> (a) prohibition or restriction on exports of the like product from the complaining Member or on imports from the complaining Member into the third country market concerned;
>
> (b) decision by an importing government operating a monopoly of trade or state trading in the product concerned to shift, for non-commercial reasons, imports from the complaining Member to another country or countries;
>
> (c) natural disasters, strikes, transport disruptions or other force majeure substantially affecting production, qualities, quantities or prices of the product available for export from the complaining Member;
>
> (d) existence of arrangements limiting exports from the complaining Member;
>
> (e) voluntary decrease in the availability for export of the product concerned from the complaining Member (including, inter alia, a situation where firms in the complaining Member have been autonomously reallocating exports of this product to new markets);
>
> (f) failure to conform to standards and other regulatory requirements in the importing country.

The third form is the effect of the subsidy on the price of the products. Concerning this form, serious prejudice can be materialized in four kinds: as significant price undercutting, significant price suppression, price depression, or lost sales. Bearing in mind that the comparison between the subsidized products and the price of the like products shall be made in the same market in which these two sets of products have their competitive relationship. The AB in the *US-subsidy in upland* cotton explained the term significant as "important, notable or consequential". Furthermore, the Panel in the same dispute opined that the degree of significance may vary from case to case. Besides, the level of numeric significance along with other circumstances, such as

[698] Article 6(4) of the ASCM.

the nature of the product and the market, may enter into such an assessment, as appropriate in a given case.

Moreover, the fourth form, as explicitly outlined in Article 6(3)(d), deems that a subsidy results in serious prejudice when it causes the subsidizing Member's world market share in a specific subsidized primary product or commodity to surpass its average share over the preceding three-year period. Furthermore, this increase in market share must persist consistently throughout the period in which the subsidies have been granted.[699]

Some scholars, like Mark,[700] raised the question of whether the four forms outlined in Article 6 are sufficient to establish the existence of serious prejudice, or if additional factors, such as the significance of the affected industry, should also be considered. The Panel in *the Korea-commercial vessels* dispute emphasized that the four forms stipulated in Article 6(3) are indeed adequate to constitute serious prejudice within the meaning of Article 5(c).[701] The Panel based its opinion on several factors. For instance, the explicit wording of Article 6(3) indicates that only four situations mentioned therein constitute serious prejudice by stating that "*Serious prejudice in the sense of paragraph (c) of Article 5 may arise…*".[702] Besides, the use of the word "may" is a general reference to other requirements mentioned in Article 6(7), such as the situation of *force majeure* like natural disasters. Moreover, Article 27.8 of the ASCM highlights that in the case of developing Members, positive evidence shall be submitted to demonstrate the serious prejudice in accordance with the provisions of paragraphs 3 through 8 of Article 6. This further supports the Panel's perspective that these provisions explicitly identify these situations as constituting serious prejudice.[703] Moreover, in *the US-large civil aircraft* (2ed compliant) dispute, most Members rejected the judicial economic factor argued by the EU, which claimed

[699] Article 6(3)(d) of the ASCM.
[700] Marc Benitah (n 33) chapter 5.
[701] DS273- *Korea - Measures Affecting Trade in Commercial Vessels*, Panel report, para. 7.581.
[702] Ibid para. 7.582.
[703] Ibid para. 7.584.

that the US breach of the bilateral Civil Aircrafts Agreement[704] was deemed as serious prejudice. This denial of the Members was based on the fact that strict adherence to the criteria outlined in the ASCM, such as the four forms specified in Article 6(3), ensures a more objective and consistent approach to assessing serious prejudice. In contrast, by incorporating additional economic factors, the scope of serious prejudice may become broader and less defined, making it more challenging to establish clear boundaries for the application of remedies as outlined in Article 7 of the ASCM.[705]

4.1.2.2. Remedies of the actionable subsidies

Due to some similarities regarding remedial procedure between prohibited and actionable categories and to avoid repetition, this subparagraph analyzes only special remedies concerning the actionable subsidies contained in Article 7 of the ASCM. Hence, the other remedies provided for in Part V of the ASCM, including Provisional Measures and Undertakings, are common provisions and can be read thoroughly in the section on prohibited subsidies.

The journey of dispute settlement starts when the complaining Member invites the subsidizing Member for consultation. This invitation shall explicitly present the existence and nature of the challenged subsidy together with evidence of adverse effects as explained in the previous section, including but not limited to the injury to the domestic industry.[706] Because the aim of this consultation is to reach a compromise solution on the disputed subsidy, the invited Member shall respond to this request promptly without any procrastination.[707] Unless the parties to the consultation agree otherwise,[708] the length of the consultation lasts for 60 days. In case no mutually agreed solution has been reached by

[704] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Panel Report, para. 4.269.
[705] Ibid para. 7.1593.
[706] Article 7(2) of the ASCM.
[707] Article 7(3) of the ASCM.
[708] All periods included in Article 7 can be extended based on mutual agreement. Footnote 20 of the ASCM.

the end of this period, any mentioned party may refer the conflict to the DSB in order for the Panel to be established.[709]

The Panel shall examine the dispute at hand and shall deliver its final report to all WTO Members, including the Parties to the dispute, within 120 days of the date on which the Panel was established.[710] The Panel's report is subject to the adoption of the DSB within a period of 30 days. It is important to mention that the parties to the dispute have the right to appeal the panel's decision within this period.[711] Besides, the DSB shall arrange a special meeting for this purpose, if a meeting is not scheduled in this period.[712]

Moreover, the decision of the Appellate Body shall be circulated to the Members within 60 days starting from the day on which the notification on appeal has been formally delivered to the DSB. However, the period of 60 days can be extended to 90 days as a maximum upon a written request from the AB to the DSB. This request shall state the reason behind the extension and the estimated issuing date. Within 20 days of the issuance of the AB's decision, the DSB shall either adopt this decision, then it becomes final and binding at the parties, or reject it by consensus.[713]

Two scenarios can be seen, the report of the Panel or the AB might be either: negative, denying the existence of the challenged subsidy, or positive, determining that the subsidy has caused adverse effects on the interests of the complaining Member. In the latter scenario, the recommendation of the report is that the subsidizing Member shall take appropriate steps to remove the adverse effects or withdraw the subsidy. The major difference between the two remedies is that the former has future effects, while the latter has an effect on the past and the future.[714] This is comprehensively discussed with regard to the remedies of the prohibited subsidies.

[709] Article 7(4) of the ASCM. See also: Vig Z, Les organisations internationales économiques et financières, in Zs. Fejes, M. Sulyok, and A. Szalai (eds), Les relations interétatiques (Iurisperitus Kiadó, 2019). 155.
[710] Article 7(5) of the ASCM.
[711] Article 7(6) of the ASCM.
[712] Footnote 21 of the ASCM.
[713] Article 7(7) of the ASCM.
[714] Article 7(8) of the ASCM.

If the recommendations of the DSB have not been adhered to by the subsidizing Member, then the DSB shall authorize the complaining Member to take countermeasures (as explained before) equal to the degree and nature of the adverse effects.[715] Moreover, the arbitrator, upon a request of the party to the dispute under Article 22.6 of the DSU, shall examine whether or not the countermeasure is consistent with the degree and nature of the adverse effects.[716]

4.1.3. Non-actionable subsidies

As the name of this category suggests certain subsidies are immune from being subject to countervailing duties and being challenged before the WTO dispute settlement body, only if strict criteria are fulfilled. Article 8 of the ASCM classifies the non-actionable subsidies into two groups. Firstly, every subsidy that is not specific according to Article 2 of the ASCM.[717] Secondly, specific subsidies are designated for three types of purposes as research and development (R&D), environmental protection, and disadvantaged regions.[718] In addition, Article 9 of the ASCM provides a remedy that is available if a non-actionable subsidy causes serious adverse effects to the industry of another WTO member. However, the provisions of this category were applied temporarily for only the first five years after the ASCM entered into force. To resume the application of these provisions, the consent of all Members of the Subsidies Committee is required.[719] Therefore, nowadays no subsidy programs exist within the non-actionable category, as long as the mentioned Committee has not agreed to extend their application. Thus, this section briefly discusses the criteria and conditions under which three types of non-actionable subsidies are materialized. Moreover, it raises the question of whether the Committee should re-effectuate the non-actionable category. However, this dissertation discusses shortly these subsidies without diving deeply into details.

[715] Article 7(9) of the ASCM.
[716] Article 7(10) of the ASCM.
[717] Article 8(1)(a) of the ASCM. Read third chapter for a deep discussion about the "specificity" under Article 2 of the ASCM.
[718] Article 8(2) of the ASCM.
[719] Article 31 of the ASCM.

4.1.3.1. Types of non-actionable subsidies from "purpose" perspective

Article 8.2 delineates three objectives that serve as the basis for classifying three categories of subsidies as non-actionable. Uncompromising criteria and conditions are provided for each type as follows:

Firstly, "Research Subsidy" includes government assistance for research activities conducted by firms, or by higher education or research establishments when they have contractual relationships with firms.[720] In this regard, the Panel in *the US-Large Civil Aircraft (2nd complaint)* rejected the European Communities' argument that Article 8.2(a) expressly provides that "*government support of R&D on a contract basis is a "subsidy", and therefore by definition qualifies as a financial contribution*". The Panel emphasized that "*The problem with the European Communities' argument is that there does not appear to be anything in Article 8.2(a) to suggest that governmental purchases of R&D services from firms fall within the scope of the SCM Agreement*."[721]

Hence, two kinds of research activities can be distinguished in this regard; a) Industrial activity consists of the discovery of new knowledge that may be useful in developing new products, processes, or services, or sufficient enhancement of existing products, processes, or services.[722] In this case, government assistance might cover no more than 75% of its total eligible cost.[723] b) Pre-competitive development activity means "*the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, ... which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives...*".[724] Here, government assistance might cover less than 50% of its eligible cost.[725] Bearing in mind that the ASCM excludes civil

[720] Article 8(2)(a) of the ASCM.
[721] DS353- *US- Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Panel Report, paras. 7.957- 7.958.
[722] Footnote 28 of the ASCM.
[723] Article 8(2)(a) of the ASCM.
[724] Footnote 29 of the ASCM.
[725] Article 8(2)(a) of the ASCM.

aircraft products from this category. That means government assistance that finances the civil aircraft research activity shall be either prohibited or actionable subsidy.[726]

Moreover, the government financial support shall fund only: (i) the cost of personnel employed exclusively in the research activity; (ii) the cost of instruments, equipment, land, and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity; (iii) cost of consultancy used exclusively for the research activity; (iv) additional overhead cost incurred directly as a result of the research activity; and (v) other running costs (such as those of materials, supplies, and the like), incurred directly as a result of the research activity.

Secondly, government financial support to "Disadvantaged Regions" is non-actionable if: a) the regional subsidy program is an integral part of the general regional development policy of a Member and has a sufficient influence on the development of a region; b) The targeted region is not specific according to Article 2 of the ASCM. That means the subsidy program shall be publicly accessible and available to all industries within eligible regions; c) The targeted regions shall be clearly designated, contiguous geographical areas, and are not created solely as a conduit for aid.

Additionally, the determination of disadvantaged regions shall be based on neutral and objective criteria that are provided for in any legal instrument and capable of verification. The region's difficulties arise out of more than temporary circumstances. Besides, subsidy programs must not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy.[727] Therefore, the eligibility criteria shall include a measurement of economic development (based on either income or per capita GDP of not more than 85% of the country average or unemployment of at least 110% of the country average, as measured over a three-year period).[728]

[726] Footnote 24 of the ASCM.
[727] Footnote 32 of the ASCM.
[728] Article 8(2)(b) of the ASCM.

Thirdly, "Environmental Adaptation Subsidy" is considered non-actionable only if: a) encourages adaptation of facilities in operation for at least two years[729] to new environmental requirements that are imposed by means of law; b) The new requirements must result in greater constraints and financial burdens on firms and be directly linked to and proportionate to a firm's planned reduction of nuisances and pollution; c) The subsidy program shall be a one-time non-recurring measure; d) It shall cover no more than 20% of the cost of adaptation. This cost should neither include the cost of replacing and operating the assisted investment nor manufacturing cost savings, which must be fully borne by the firm.[730]

Additionally, when a Member decides to commence any of the mentioned subsidy programs, the first obligatory step is notifying the subsidy Committee about the program before its implementation. This notification shall be sufficiently capable of demonstrating that the desired subsidy program fulfills all the requirements and criteria in force. Notwithstanding, the Committee, the Secretariat,[731] or any interested Member has the right to ask for additional information, but not confidential information,[732] and yearly updates concerning the program at hand.[733] Moreover, the approval of the Committee for the examined program shall be given, without any delay, only if the program meets the requirements and criteria set out in Article 8 of the ASCM. However, the determination of the Committee is not final, instead, it is subject to binding arbitration upon the request of any interested Member. The decision of the arbitration body shall be issued to the Members within 120 days from the date when the matter was referred to the arbitration body.[734]

Although the subsidy provided under this category has been approved by the Committee, a Member may request consultations with the Member granting or maintaining the subsidy in the course of its implementation. This right for consultation is confirmed only to the Member which can demonstrate that the serious adverse effects to its domestic industry

[729] Footnote 33 of the ASCM.
[730] Article 8(2)(c) of the ASCM.
[731] Article 8(4) of the ASCM.
[732] Footnote 34 of the ASCM.
[733] Article 8(3) of the ASCM.
[734] Article 8(5) of the ASCM.

have resulted from the implementation of this program.[735] A prompt acceptance of the consultation by the Member granting or maintaining the subsidy program is mandatory in order to clarify the situation and reach a mutual solution within 60 days of the request.[736] Otherwise, the requesting Member may refer the issue to the Committee.[737] In this case, the Committee shall immediately review the facts, evaluate the evidence provided, and give its final decision within 120 days of receiving the matter. Finally, if the decision of the Committee is confirmative, which proves the adverse effect, it may recommend to the subsidizing Member to modify this program in such a way as to remove these effects. In the event, that six months has been passed without following the recommendations, the Committee shall authorize the requesting Member to take appropriate countermeasures corresponding to the nature and degree of the effects determined to exist.[738]

4.1.3.2. Was the re-adoption of the non-actionable subsidies provision necessary?

As stated before, the "green light" subsidies provision had only a 5-year validity commencing from the date of entry into force of the ASCM. The extension of its application is subject to the consent of the Committee.[739] In January 2000, this safe harbor was not renewed by the WTO Members, leading to its automatic expiration.[740] Indeed, the termination of the non-actionable subsidy is unlikely to have a negative impact neither on the implementation of the ASCM nor on the balance of cross-border trade. That can be deduced, initially, from the zero notification on pure non-actionable subsidy program[741] under Article 8 of the ASCM during its validating period.[742] Besides, the developing countries were the only Members that notified some of their subsidy programs as non-

[735] Article 9(1) of the ASCM.
[736] Article 9(2) of the ASCM.
[737] Article 9(3) of the ACSM.
[738] Article 9(4) of the ASCM.
[739] Article 31 of the ASCM.
[740] WTO, Article 31 of The Agreement on Subsidies and Countervailing Measures' (Analytical Index, 2021) 1. <https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art31_oth.pdf > accessed 06 October 2023.
[741] Pure non-actionable subsidy in this regard means that the subsidizing member has relied only on Article 8 to justify such subsidy.
[742] WTO, 'World Trade Report 2006: Exploring the links between subsidies, trade and the WTO' (Report, 2006) 200. <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf > accessed 06 October 2023.

actionable where it was not needed due to the special treatment, they have under the ASCM.[743]

Moreover, the WTO is required, like any other financial institution, to contribute to addressing climate change-related issues.[744] As Nicholas Stren opines climate change is a serious universal threat and urgent actions are demanded at the global level. Otherwise, if no action is taken, then the estimated reduction in global GDP varies from 5 to 20%.[745] Therefore, the ASCM should balance between the right of WTO Members to provide Environmental Subsidies and their trade adverse effect on other Members. Some scholars, like Robert Howse, criticize the small amount of the environmental subsidy allowed under Article 8 of the ASCM, by limiting it to 20% of the cost of adoption excluding the manufacturing cost.[746] Additionally, Howse claims that Article 8 does not clearly determine the purpose of the environmental subsidy program to be non-actionable, and "benefit" and "specificity" are neither consistent with the WTO principles nor have actual foundations in the structure of international economic law. Instead, he suggests that the eligible environmental subsidies should be determined based on the policies listed in the Kyoto Protocol and the purposes should be justified according to Article 2.1(a) of this protocol.[747] However, the main drawback of this suggestion is that the number of countries that have accepted the Doha Amendment of this Protocol is 144, while 164 countries are WTO Members.[748] Thus, if the ASCM refers to this protocol in case of environmental subsidy,

[743] WTO Official Website, 'Notifications under the Agreement on Subsidies and Countervailing Measures' <https://www.wto.org/english/tratop_e/scm_e/notif_e.htm > accessed 06 October 2023.
[744] Nicholas Herbert Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007) 551.
[745] Ibid 187.
[746] Robert Howse 'Climate Mitigation Subsidies and the WTO Legal Framework' (2010) International Institute for Sustainable Development, 1, 19.
[747] Ibid 20.
[748] In short, the Kyoto Protocol operationalizes the United Nations Framework Convention on Climate Change by committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets. As of 28 October 2020, 147 Parties deposited their instrument of acceptance, therefore the threshold of 144 instruments of acceptance for entry into force of the Doha Amendment was achieved. The amendment entered into force on 31 December 2020. United Nation Official Website, 'What is the Kyoto Protocol?' <https://unfccc.int/kyoto_protocol > accessed 07 October 2023.

the non-party to the Protocol would either be forced to implement this protocol or their measures to be considered as subsidies.[749]

Arguably, the author of this dissertation asserts that the re-adoption of the provision of environmental subsidy provision is redundant as a means for environmental protection. That is because the Members, instead, can rely on Article XX exception of the GATT 1994. It is understandable that the *lex specialis* rules (in this case, the ASCM provisions) prevail over the *lex generalis* rules (the GATT). That means in the case of the absence of the former, the latter definitely applies. Therefore, under Article XX at hand, the Members are permitted to adopt any measures that are necessary to protect human, animal, or plant life or health,[750] and relating to the conservation of exhaustible natural resources.[751] On one hand, the Members can justify their environmental subsidies, in case of serious environmental problems, based on these exemptions. Bearing in mind, the subsidizing Member does not have full discretion, but some strict requirements must be met as follows: a) they are not implemented in means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, b) they do not constitute a disguised restriction on international trade.[752]

On the other hand, from the perspective of the Member on which the environmental subsidy has an adverse effect, Article XX does not prioritize the environmental purpose over the protection of international trade. The preamble of Article XX is clear that the application of the measure, not the measure itself, shall not restrict the flow of international trade.[753] Thus, if the Member could prove that the environmental measure is considered a subsidy under the ASCM, then this subsidy shall be either prohibited or actionable. Thus, the WTO DSB will decide on a case-by-case basis in order to harmonize between the necessity of the adopted measure and the mitigation of trade adverse effects according to the prevailing situation. Moreover, the small amount of non-actionable environmental subsidy stipulated

[749] Anita M. Halvorssen ' UNFCCC, the KYOTO Protocol, and the WTO –Brewing Conflicts or Are They Mutually Supportive?' (2008) 36 (3/4) Denver Journal of International Law & Policy, 369, 377.
[750] Article XX (b) of the GATT.
[751] If such measures are made effective in conjunction with restrictions on domestic production or consumption. Article XX (g) of the GATT.
[752] Article XX of the GATT.
[753] "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries…" Article XX of the GATT.

in Article 8(c)(ii) of the ASCM can be replaced by the *de minimis* rule. In order to strengthen the effectiveness of this rule, the ASCM might learn from the European State aid law (as it is discussed later in this chapter).

4.2. Special and differential treatment of developing country members

The ASCM gives the developing country Members several concessions and special treatment regarding each category of subsidies. The reason behind such differential treatment is the argument that although the subsidy might have a distortion effect on the competition in the market, it also has a crucial role in the economic development of developing and least-developed countries.[754] Based on the economic development needs, Article 27(2) distinguishes between two groups of developing countries as: (a) Least-developed countries designated as such by the United Nations which are Members of the WTO (hereinafter called group 1),[755] (b) Other developing country Members when the (GDP) per capita[756] has reached $1,000 per annum (hereinafter called group 2).[757] Additionally, Article 29 excludes Members in the process of transformation from a centrally-planned into a market, free-enterprise economy from the implementation of some general provisions (hereinafter called group 3). Thus, the concessions and special treatment are discussed briefly in three major paragraphs.

Firstly, the prohibited subsidies, as explained earlier, are divided into two types. Regarding the export eubsidy, while group 1 is fully exempted from the application of export subsidy provisions, group 2 is permitted a period of eight years not to apply those provisions starting from the date of entry into force of the WTO Agreement.[758] It means that this period was over in 2003. However, the extension of this period can be consulted with the Subsidies Committee upon a request from the Member not later than one year before the expiry of this period. In this case, the committee, before justifying the extension, shall examine all

[754] Article 7(1) of the ASCM.
[755] Annex VII(a) of the ASCM.
[756] Moreover, Gross national product (GNP) per capita is the dollar value of a country's final output of goods and services in a year, divided by its population.
[757] Annex VII(b) of the ASCM. This group includes 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.
[758] Article 27(2) of the ASCM.

the relevant economic, financial, and development needs of the developing country Member in question. Under any circumstances, group 2 in order to enjoy the exemption shall a) not increase the level of its export subsidies, and b) eliminate them as early as possible when the use of such export subsidies is inconsistent with its development needs.[759] In the *Brazil-Aircraft* dispute, the Panel held that if these conditions were not met, then the Article 3.1(a) prohibition would apply.[760]

Although the ASCM takes into account the development needs of developing countries, it does not prioritize it over one of its essential goals which is the protection of competition. That is clear from the text of Article 27.5 which requires the Members of groups 1 and 2 which have reached export competitiveness in any given product to phase out its export subsidies for such product(s) over a period of eight years or two years respectively. Furthermore, the export competitiveness in a product is deemed to exist if exports of that product have reached a share of at least 3.25% in world trade of that product for two consecutive calendar years.[761] It is worth mentioning that if the export subsidies met the requirements as explained above, then Article 4 on remedies shall be replaced by Article 7 of the ASCM.[762]

Additionally, the prohibition of the import substitution subsidies shall not apply to group 1 for a period of eight years (till 2003), and to group 2 for a period of five years (till 2000), from the date of entry into force of the WTO Agreement.[763] Moreover, concerning group 3, the two types of prohibited subsidies shall be phased out or brought into conformity with Article 3 within a period of seven years (till 2002) from the date of entry into force of the WTO Agreement. As a result, Article 4 on remedies shall not apply for the same period.[764] Additionally, this subsidy program shall be notified to the Committee within two years (till 1997) from the entry into force of the WTO Agreement.[765] Taking into consideration the

[759] Article 27(4) of the ASCM.
[760] DS46- *Brazil - Export Financing Program for Aircraft,* panel Report, para. 8.1(c).
[761] Article 27(6) of the ASCM.
[762] Article 27(7) of the ASCM.
[763] Article 27(3) pf the ASCM.
[764] Article 29(2) of the ASCM.
[765] Article 29(3) of the ASCM.

possibility of extension of this period when the Committee determines that this extension is necessary for the process of transformation.[766]

Secondly, with regard to actionable subsidies, Article 27.8 rejects the irrebuttable presumption of serious prejudice, which is contained in Article 6(1) of the ASCM, to be applied to groups 1 and 2. Instead, it emphasizes that serious prejudice shall be demonstrated by positive evidence according to paragraphs 3 through 8 of Article 6. Currently, this Article has lost its importance due to the termination of Article 6(1) in 2000 as stated earlier. Besides, Article 29 of the ASCM does not provide any differential treatment for the interest of group 3. Therefore, it can be said that the three groups have no important concessions regarding the category in question.

Thirdly, the subsidy is to be considered *de minimis* when the investigating authorities concerned determine that:

- The overall level of subsidies granted upon the product in question does not exceed 2% of its value calculated on a per unit basis; or
- The volume of the subsidized imports represents less than 4% of the total imports of the like product in the importing Member.[767]

In such case, the countervailing duty investigation of the product originating from a Member of group 1 shall be terminated. On the other hand, for group 2 the overall level of subsidy shall be 3 instead of 2 in order for the subsidy to be considered as *de minimis*.

4.3. The categories and remedies of European State aid

Unlike the ASCM, the European State aid law follows the pre-approval approach regarding all new aid measures. Thus, every state is required to notify its aid schedule/plan and not to put it into force until receiving permission from the European Commission.[768] Nevertheless, Article 109 TFEU allows the European Council, upon a proposal from the Commission and after consulting the European Parliament, to exempt certain aid measures

[766] Article 29(4) of the ASCM.
[767] Article 17(10) of the ASCM.
[768] Article 108(3) TEFU.

from the general rule. This exemption can be achieved by making the pre-approval phase absolute/unquestionable only when the measure meets certain requirements. These requirements should be articulated in special regulations issued for that aim. For the purpose of this research, the European State aid measures can be classified into three categories. The classification is based on the level of the Commission's discretion in providing the permission as follows: a) prohibited category, b) semi-permitted Category, and c) absolute-permitted Category.

The First category is the "prohibited category". As a general rule, it includes every State aid measure that fulfills the five elements indicated in Article 107.1 TFEU as explained in the third chapter of this dissertation. This category deems every State aid illegal and incompatible with the internal market, whether or not it is intended for exportation or favoring the domestic industry as the ASCM does. Thus, it can be argued that the TFEU adopts a more secure approach compared to the ASCM because the former considers every aid prohibited and needs to be examined and approved by the Commission before entering into force. While the subsidy, in the case of the latter, is considered prohibited or actionable after it is implemented, and sufficient evidence has been submitted by the complainant member. As a result, the adverse effect of European State aid is more preventable than the WTO Subsidies.

"semi-permitted category" is the second category that might consider some aids, due to various reasons, such as well-functioning and equitable economy, legal and compatible with the internal market. As the exclusive authority responsible for examining aid measures, the Commission is required to balance between the necessity and the proportionality of the aid measure in achieving a community objective and the distortion of competition. To that end, the Commission has issued several regulations, notices, and guidelines that explain the occasions in which permission might be obtained based on Article 107(3) TFEU.

Article 107(3) contains a series of grounds on which aids may be considered compatible with the common market. For instance, promotion of the economic development of areas where the standard of living is abnormally low or where there is serious

underemployment.[769] Besides, developing the application of important projects of common European interest, or compensating for a serious disturbance in the economy of a Member State.[770] Further, promoting culture and heritage conservation,[771] or promoting certain economic activities or areas, when the common interest of the Union is not adversely affected.[772]

In this regard, the most current case on the possibility of limiting State aid to undertakings that are closely linked with the national economy is the case of Ryanair against the Kingdom of Sweden. It was brought before the European Court of Justice on May 1, 2020.[773] This case is important because, firstly, it shows how the European Commission acted to regulate State aid for the purposes of counter-acting the impact of covid-19. Secondly, it interprets the appropriateness and proportionality of aid granted on the basis of Article 107(3)(b) TEFU.

In this case, four different pleas were claimed by Ryanair. One significant aspect to be addressed in this section is the Commission's failure to adequately assess the positive impacts of aid in relation to its potential negative effects on trade.[774] The General Court rejected this argument and asserted that Sweden fulfilled the conditions laid down in Article 107.3(b) TFEU. Sweden was indeed experiencing a serious disturbance in its economy. Furthermore, the granted aids adopted to address this disturbance are deemed necessary, appropriate, and proportionate for that purpose. In such cases, these measures are presumed to be implemented in the best interests of the European Union. The General Court added that the Commission under Article 107.3(b) is not required to weigh the beneficial effects

[769] Article 107(3)(a) TFEU.
[770] Article 107(3)(b) TFEU.
[771] Article 107(3)(d) TFEU.
[772] Article 107(3)(c) TFEU.
[773] On 3 April 2020, the Kingdom of Sweden notified the European Commission of an aid measure in the form of a loan guarantee scheme for all airlines which hold the Swedish licence and which are important to secure connectivity in Sweden. The aim of the State aid scheme is to provide the airlines with sufficient liquidity to ensure that the disruptions caused by the Covid-19 pandemic do not undermine their viability and to preserve the continuity of economic activity during and after the current crisis. The maximum amount of the loan guarantees will be 5 billion kronor (SEK). On 11 April 2020, the Commission adopted Decision C (2020) 2366 final on State aid SA.56812 (2020/N) – Sweden – COVID-19: it assessed the compatibility of the Sweden aid with the internal market in the light of its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. *Ryanair DAC v European Commission* [2021] Case T-238/20.
[774] Ibid para. 66.

of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. On the contrary, this obligation arises in the case of Article 107.3(c) TFEU.[775]

For more explanation, the General Court compared paragraphs (b) and (c) of Article 107.3 TFEU. Paragraph (b) reads as follows: "*the following may be considered to be compatible with the internal market: […] aid to […] remedy a serious disturbance in the economy of a Member State*". This paragraph emphasizes that the interest of the internal market, encompassing the entire EU, is served when aid is provided by a Member State such as Sweden, with the aim of helping it overcome significant challenges or even existential threats that could have severe implications for its economy. In such cases, ensuring the stability and resilience of the Member State's economy becomes paramount, aligning with the broader interests of the internal market.

On the contrary, paragraph (c) concerns "*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*'. The latter provision includes a requirement to demonstrate that there is no adverse impact on trading conditions that go against the common interest, this condition that is absent in paragraph (b). This difference in wording highlights that paragraph (c) places an additional emphasis on proving that the aid measure will not negatively affect trading conditions in a manner that contradicts the overall interests of the European Union.[776] Finally, the Court also highlighted that the obligation to conduct a "balancing test" does not appear in the temporary framework like in the case of the Covid-19 crisis.[777]

The third category is the "absolute-permitted category" in which the Commission has no description to reject the aid measure as long as the Members are not required to obtain permission from the Commission. In other words, the Members are allowed to skip the pre-

[775] Ibid para. 68.
[776] Ibid paras. 67- 69.
[777] Ibid para. 70.

approval phase. This category includes the aids covered by General Block Exemption Regulation (GBER) and *de minimis* Regulation.[778]

4.3.1. The General Block Exemption Regulation (GBER)

In 2014, the European Commission issued the GBER which declares certain categories of state aids compatible with the internal market in the application of Articles 107 and 108 TFEU. The aim of this regulation is to enable the Member States to grant more financial support to private undertakings without being requested to obtain pre-approval from the Commission as long as certain criteria are met. This regulation has been modified three times. The recent applicable version was issued in August 2021.[779]

Some of the categories of aids covered by this Regulation as stipulated in Article 1 of the GBER are listed briefly. On the one hand, some categories are common between the European State aid law and the WTO ASCM. These categories are outlined mainly in paragraph 2 of Article 107 TFEU. For instance, regional aid, aid for environmental protection, and research aid. As discussed earlier, those three types find their identical in the provisions of ASCM and are considered non-actionable subsidies. However, these provisons are now considered invalid or no longer permissible due to their temporary validation, as explained earlier. On the other hand, the GBER goes much further and lays out a wider range of exempted aids that include, but are not limited to, aid to make good the damage caused by certain natural disasters, aid for local infrastructure, aid for regional airports, aid for ports, and aid involved in financial products supported by the Invest EU Fund, etc.[780]

Moreover, it is worth noting that although those aids are exempted from the general rule, they are also restricted with various strict conditions. On top of the list, this regulation determines a very clear threshold at which the aid is considered covered by this Regulation.

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[778] European Commission Official Website, 'State aid Regulations' <https://competition-policy.ec.europa.eu/state-aid/legislation/regulations_en#de-minimis-regulation> accessed 14 June 2023.
[779] Kelyn Bacon, *European Union Law of State aid* (Oxford University Press, 2017) 101- 102.
[780] Article 1 of the European Union, Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, 17 June 2014, Official Journal of the European Communities L 187. [hereinafter the GBER].

In contrast, if the amount of the aid exceeds these fixed thresholds, then an individual notification to the Commission and its detailed assessment are necessary before the aid is granted. For example, for regional investment aid with eligible costs of EUR 100 million, or for investment aid to SMEs: EUR 7,5 million per undertaking per investment project.[781] Undoubtedly, if the WTO Member would like to reactivate the provisions of non-actionable subsidies, such an explicit approach in determining the amount of permitted subsidy, instead of the percentage-based system, would leave little room for misunderstanding and confusion. By setting clear monetary limits for eligible costs, the criteria for determining the amount of permitted subsidy become more straightforward. This approach eliminates the need for calculations based on percentages, which can sometimes lead to ambiguity or interpretation differences. Additionally, the aid must be transparent "*which it is possible to calculate precisely the gross grant equivalent of the aid ex-ante without any need to undertake a risk assessment*". Some aids shall be considered transparent, such as aid comprised of grants and interest rate subsidies.[782]

Further, the aid shall have an incentive effect. It means that the aid must serve as a motivating factor in the decision-making process of the beneficiary. In other words, the aid should play a crucial role in influencing the beneficiary's decision to undertake a specific project or activity. To demonstrate the incentive effect, the beneficiary is typically required to submit a written application for aid before commencing any work on the project or activity.[783] Moreover, aid intensity and eligible costs shall be calculated before any deduction of tax or other charges. Thus, the eligible costs shall be supported by documentary evidence which shall be clear, specific, and contemporary.[784] Finally, regarding publication and information, the Member State concerned shall ensure the publication on a comprehensive State aid website, at the national or regional level.[785]

Additionally, the Member shall submit to the Commission a brief description of each aid full under this Regulation within 20 working days following the entry into force of the

[781] Article 4 of the GBER.
[782] Article 5 of the GBER.
[783] Article 6 of the GBER.
[784] Article 7 of the GBER.
[785] Article 9 of the GBER.

measure along with an annual report on the implementation of the regulation.[786] In any case, the Commission has the full right to withdraw the benefit of the block exemption if an EU country does not fulfill the common and specific rules of the Regulation.[787]

Although, this Regulation presents some exceptions to the general rule, it also points out some exceptions to the exceptions. In the same talk, this Regulation does not apply to specific aids and sectors, then they are subject to the general rule and shall go through the ordinary phase by obtaining prior approval from the Commission. For example, aid to export-related activities, aid contingent upon the use of domestic goods over imported goods, aid to facilitate the closure of uncompetitive coal mines, and aid to undertakings in difficulty[788].[789] Similarly, the ASCM provides strict provisions regarding these kinds of subsidies.

From a practical standpoint, one of the most recent cases was raised by Ryanair against the French Republic on 8th May 2020,[790] based on the Commission's Decision C (2020) 2097. This decision confirms the compatibility of the French aid to make good the damage caused by Covid-19 (as exceptional occurrences) with the internal market and more particularly in the light of Article 107(2)(b) TFEU.

[786] Article 11 of the GBER.
[787] Article 10 of the GBER.
[788] Para 18 of the GBER "undertaking in difficulty' means an undertaking in respect of which at least one of the following circumstances occurs: (a) In the case of a limited liability company, where more than half of its subscribed share capital has disappeared as a result of accumulated losses. Or (b) In the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses. Or (c) Where the undertaking is subject to collective insolvency proceedings. (d) Where the undertaking has received rescue aid and has not yet reimbursed the loan or terminated the guarantee. (e) In the case of an undertaking that is not an SME, where, for the past two years: (1) the undertaking's book debt to equity ratio has been greater than 7,5 and (2) the undertaking's EBITDA interest coverage ratio has been below 1,0."
[789] Article 2 of the GBER.
[790] On 24 March 2020, the French Republic notified the European Commission of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020. The beneficiary of this scheme is airlines holding an operating licence issued in France. The aim of this scheme is to maintain sufficient liquidity for the mentioned airlines until the restrictions or prohibitions on movement are lifted and normal commercial activity resumed. Bearing in mind, the precise amount of the taxes is determined by reference to the number of passengers carried and the number of flights operated from a French airport. *Ryanair DAC v European Commission* [2021] Case T-259/20, paras. 1- 7.

The French aid, like the Swedish aid discussed before, is available only to airlines licensed in France. Unlike the Swedish aid, the French aid aims to compensate airlines for losses they had incurred as a result of travel restrictions due to Covid-19. For this reason, it was based on Article 107(2)(b), instead of Article 107(3)(b). Thus, the General Court, before examining the four pleas submitted by Ryanair[791], emphasized that the French aid fulfilled all the conditions required in Article 107.2(b), and then the Commission did not err in adopting its decision.

The Court referred to the case law, and asserted that the Commission is obligated to declare such aid incompatible with the internal market and has no discretionary power in this matter, if the criteria in Article at hand are satisfied.[792] Additionally, essential requirements must be met as a) only economic damage caused by natural disasters or exceptional occurrences may be compensated for under that provision; b) there must be a direct link between the damage caused by the exceptional occurrence and the state aid; and c) precise assessment as possible must be made of the damage suffered;[793] d) the compensation shall not exceed what is necessary to make good the damage suffered by the beneficiary.[794]

Furthermore, the Court stressed that it is unarguable that the extremely restrictive measures, in particular the lockdown and the freedom to come and go, in France as well as within the European Union, aim only to limit the spread of the pandemic (COVID-19). Hence, it constitutes an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.[795] The airlines operating in France have faced serious economic damages with air transport when the percentage of passenger transport dropped almost to zero on French territory. Moreover, the causal link has been established based on the fact that the economic damage suffered by the airlines operating in France would not have occurred in the case of the absence of the pandemic and the restrictive measures taken by the French authorities.

[791] "The first plea alleges, in essence, infringement of the principles of non-discrimination on grounds of nationality and the free provision of services, the second plea alleges a manifest error of assessment in the appraisal of the proportionality of the aid scheme at issue in the light of the damage caused by the Covid-19 crisis, the third plea alleges infringement of the procedural rights under Article 108(2) TFEU, and the fourth plea alleges infringement of the duty to state reasons". Ibid para. 21.
[792] Ibid para. 23. See also *Olympiaki Aeroporia Ypiresies v European Commission* [2008] T-268/06, para. 51.
[793] Case T-259/20, para. 24.
[794] Ibid para. 25.
[795] Ibid para. 26.

Therefore, there is an unbroken causal link between the exceptional occurrence and the damage that occurred to the airlines (beneficiary).[796] Finally, the estimated amount of French aid, EUR 29.9 million, was given to compensate for this economic damage.[797] This amount falls under the eligible cost threshold.

4.3.2. De Minimis Rule

According to Article 109(4) TFEU, the Commission adopted regulation No 1407/2013 which introduces but does not generate,[798] new provisions on *de minimis* aid to be considered as a standing-alone category.[799] This category, like the GBER, constitutes an exemption from the general rule on obtaining prior approval from the Commission because it is deemed not to meet all the criteria in Article 107(1) of TFEU. Thus, the *de minimis* aid means every aid granted to a single undertaking over a given period of time that does not exceed a certain fixed amount.[800] In other words, a single undertaking can be granted, by a member state, the maximum aid of EUR 200 000 over any period of three fiscal years. Moreover, the ceiling of the *de minimis* aid regarding road freight transport for hire or reward shall not exceed EUR 100 000 over the same period.[801] For an accurate calculation of the three years, *de minimis* aid shall be considered granted "*at the moment the legal right to receive the aid is conferred on the undertaking under the applicable national legal regime irrespective of the date of payment of the de minimis aid to the undertaking*".[802] In this scene, due to the trivial amount of the aid, it is deemed compatible with the internal market, then it cannot have any distortion effect on the competition.[803]

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[796] Ibid paras. 26- 27.
[797] Ibid para. 50.
[798] Previously, the Commission has issued several notice and regulations on the *de minimis* rule for State aid. Such as, the notice European Union, Regulation on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, 12 January 2001, Official Journal of the European Communities L 10. And European Union, Regulation on the application of Articles 87 and 88 of the Treaty to de minimis aid, 15 December 2006, Official Journal of the European Communities L 379.
[799] European Union, Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, 18 December 2013, Official Journal of the European Communities L 352. [hereinafter de minimis Regulation].
[800] Preamble para. 1 of de minimis Regulation
[801] Article 3(2) of de minimis Regulation.
[802] Article 3(4) of de minimis Regulation.
[803] Preamble para. 3 of de minimis Regulation.

Furthermore, for the aid to be classified as *de minimis* it is not enough to meet the threshold mentioned above, but it also shall be transparent. This means that aid requires any form of risk assessment in order to determine its monetary value is not covered by the *de minimis* rules, regardless of how small the amount of assistance is.[804] Therefore, there is an irrebuttable presumption that aid provided in the form of grants or interest rate subsidies is considered transparent *de minimis* aid. Unlike some other forms of aid on which evidence shall be submitted to prove the transparency. For instance, the loan aid is considered transparent aid if either the beneficiary is not subject to collective insolvency proceedings, the loan is secured by collateral covering at least 50 % of the loan, or the gross grant equivalent has been calculated on the basis of the reference rate applicable at the time of the grant. Besides, the aid in the form of capital injection is deemed transparent only if the total amount of the public injection is less than the de minimis ceiling.[805]

However, like the GBER, the implementation of the *de minimis* rule is not extensive, some sectors are exempted from its scope, such as the fishery and aquaculture sector, the agricultural products (either primary or manufactured), export-related activities, and aid contingent upon the use of domestic over imported goods.[806]

By comparing the *de minimis* rule in both European and the WTO regimes, it is notable that, on one hand, the former sets forth a more comprehensive framework to regulate the issue at hand. It considers it as a separate category where the amount of support is quantified, and the limits are defined primarily. Thus, both the Member state and the Commission can determine the existence of *de minimis* aid without investigation. In contrast, the WTO ASCM explains the *de minimis* subsidy in one phrase of Article 11(9) stating that "*the amount of the subsidy shall be considered to be de minimis if the subsidy is less than 1 percent ad valorem*". It means that subsidy is *de minimis* when the amount of which does not exceed 1% of the total estimated value of the goods or transaction concerned. Thus, it is changeable based on the purpose and consequences of the measure. Certainly, the unpredictability of this rule requires the WTO bodies to commence

[804] Article 4(1) of de minimis Regulation.
[805] Article 4 of de minimis Regulation.
[806] Article 1 of de minimis Regulation.

investigation on a case-by-case basis. Accordingly, in order to effectuate the *de minimis* rule at the WTO level, this research suggests that ASCM should follow the EU approach and set a fixed threshold for different types of subsidies which are neither too high, nor ridiculously low. Moreover, like the European State aid law, the *de minimis* subsidy should constitute a special category to be more constructive and predictable. That is emphasized by the AB in *the US – Carbon Steel* dispute as follows

> There is nothing in Article 11(9) to suggest that its de minimis standard was intended to create a special category of "non-injurious" subsidization, or that it reflects a concept that subsidization at less than a de minimis threshold can never cause injury. For us, the de minimis standard in Article 11(9) does no more than lay down an agreed rule that if de minimis subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases.[807]

Bearing in mind that, considering the *de minimis* subsidy as a standing-alone category should include some exceptions in particular with regard to the prohibited category or any other products that require special regulations like agriculture and fishery. In the case of prohibited subsidies, for example, there is an irrebuttable presumption on the adverse effect of subsidies regardless of their amount if it is sufficient to cause an injury. The AB added that "*It is unlikely that very low levels of subsidization could be demonstrated to cause "material" injury. Yet such a possibility is not, per se, precluded by the Agreement itself, as injury is not defined in the SCM Agreement in relation to any specific level of subsidization*".[808]

4.3.3. Remedies for illegal State aid

As discussed earlier, illegal State aid is every aid that meets the criteria of EU State aid as provided for in Article 107(1) TFEU and aids that are neither approved by the Commission nor covered by the exemptions (the GBER and *the de minimis*). Thus, the consequences of granting illegal State aid can be severe at both EU and national levels. Whereas, the

[807] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany,* [2000] WTO Appellate Body Report 28 November 2002, WT/DS213/AB/R, para. 83.
[808] Ibid paras. 80-81.

European Court of Justice has established legal precedents stating that all legal acts underlying the incompatible grant of aid are considered null and void from the beginning. Consequently, acts related to the aid, such as grant notices or guarantee declarations, are deemed invalid and must be reversed. This legal consequence is automatic and does not require additional legal action.[809]

Furthermore, the Commission has the competence to commence a formal State aid investigation whenever it gets suspicious about any aid measure either by itself through the press of publicly conducted decision or through a complaint submitted by the competitors of the recipient of the aid.[810] Moreover, competitors of the aid recipient can submit their request for investigation before a regional court or an administrative court which shall examine the matter. If the national court finds the challenged measure can constitute incompatible state aid. It, then, shall forward the case to the Commission the initiate the official investigation.[811] Obviously, this option, the right of the individual to raise the case, is not available under the ASCM, instead only the Member States have the right to bring the issue before the DSB.

During the investigation, the Member States concerned shall be given the opportunity to submit their comments and additional supporting information in the procedure. Over this period and till issuing the final decision, the Commission may order the Member state a) to suspend the unlawful aid (suspension injunction) or b) to provisionally recover any unlawful aid (recovery injunction) only if there are neither doubts about the aid character of the challenged measure, nor an urgency to act, nor a serious risk of substantial and irreparable damage to a competitor.[812] If the Member state did not comply with the injunction decisions, the Commission may refer the matter to the European Court of Justice as long as the failure to comply constitutes an infringement of the TFEU.[813]

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[809] Vesna Tomljenović, Nada Bodiroga-Vukobrat, Vlatka Butorac Malnar, and Ivana Kunda, *EU Competition and State aid Rules: Public and Private Enforcement* (Springer, 2017) 235.
[810] Article 15 of European Union, Regulation laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), 13 July 2015, Official Journal of the European Communities L 248. [hereinaftere Regulation on application of Article 108 of TFEU, OJ L 248].
[811] Vesna Tomljenovic, Nada Bodiroga, and Vlatka Butorac Malnar (801) 53.
[812] Article 13 of Regulation on application of Article 108 of TFEU, OJ L 248.
[813] Article 14 of Regulation on application of Article 108 of TFEU, OJ L 248.

At the end of the investigation, if the Commission finds that the challenged aid is illegal, then the Commission shall decide, based on the infringement and distortion effects of the aid, either to abolish it (recovery decision) or modify it (if it is misused) within a specific period of time to become compatible with the law and internal market.[814] Where a recovery decision is taken, the Member State concerned shall take all necessary measures to recover the aid from the beneficiary with respect to the general principles of the Union Law. Moreover, the aid to be recovered shall start on the day on which the unlawful aid is awarded to the beneficiary and include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. Further, recovery shall be implemented without delay and in accordance with the procedures under the national law of the Member State concerned.[815]

Accordingly, the recovery order is retroactive which means it covers the ten years preceding the decision of the EC.[816] As stated in the Law Dictionary, "*recovery, in its most extensive sense, is the restoration of a former right".*[817] In this regard, it is fair to say that both terminologies "recover the aid" and "withdraw the subsidy" give the meaning of prospective effect. However, using the terminology "recover the aid" is more accurate and sufficient to emphasize that the compensation has a retrospective effect, thus it shall cover the previous period of time. Evidently, the ECJ has consistently held that the recovery of unlawful State aid that is issued for the purpose of re-establishing the previously existing situation cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid.[818]

4.4. EU foreign subsidies regulation

The EU warmly welcomes foreign investments, as evidenced by the latest economic figures. Back in 2016, about 3% of businesses in Europe were under the ownership or control of non-EU investors, accounting for 35% of the overall assets and contributing to

[814] Article 108(2) of TFEU.
[815] Article 16 of Regulation on application of Article 108 of TFEU, OJ L 248.
[816] Article 17 of Regulation on application of Article 108 of TFEU, OJ L 248.
[817] L. Brown (ed.) (n 307) <https://legal-dictionary.thefreedictionary.com/Recovery >
[818] *Kingdom of Belgium v Commission of the European Communities* [1990] Case C-142/87, para. 66.

approximately 16 million jobs. Notably, there has been a rise in investments from countries beyond the conventional players like the US and Canada. Over recent years, there has been a noticeable wave in investments from state-owned enterprises, along with an increasing presence of "offshore investors."[819]

In June 2020, the EU approved the White Paper on Levelling the Playing Field as Regards Foreign Subsidies. This White Paper aims to address and counteract the challenges posed by foreign subsidies in the internal market. Specifically, the focus is on non-EU subsidies that can influence activities within the EU, distort fair competition in public tenders, and facilitate the acquisition of EU companies by foreign entities. It's noteworthy that the White Paper specifically addresses subsidies beyond national borders and does not propose specific regulations for product subsidies.[820]

Hence, it is crucial to make a clear distinction between "domestic" and "foreign" subsidies. Domestic subsidies, the more traditional type, involve financial support given to recipients within the territory of the providing state. In contrast, foreign subsidies encompass financial contributions given to recipients situated in a foreign country for activities to be conducted in that country.[821] For instance, consider the government of China providing a substantial financial subsidy to a renewable energy company, called Green Power Solutions, headquartered in China. The condition for this foreign subsidy is that Green Power Solutions utilizes the funds to establish a branch and operate a solar energy farm in Hungary, which is a foreign market. In this scenario, a) China is the government providing the foreign subsidy; b) The Green Power Solutions is the renewable energy company based in China receiving the foreign subsidy; c) and Hungary is the foreign country where the subsidized company intends to set up and operate the solar energy farm. This example

[819] European Commission, 'levelling the playing field as regards foreign subsidies' (white paper COM/2020/253, 2020) para 2.1.
[820] Csongor I Nagy, 'Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?' (2021) 2 (1) Central European Journal of Comparative Law, 147, 154. <https://ssrn.com/abstract=3852175 > accessed 05 January 2024.
[821] Csongor I Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?' (2023) 57 (6) Journal of World Trade, 889, 891. < https://ssrn.com/abstract=4609259 > accessed 05 January 2024.

illustrates a foreign subsidy where a government supports a company from one country to engage in economic activities beyond its own borders.

Just like how State aid given by EU Member States can create an unfair advantage and disrupt fair competition within the domestic market, foreign subsidies can also distort competition and create an imbalanced playing field. As explored earlier, the regulations on EU State aid were mainly aimed at maintaining fair competition among member states by regulating financial aid from EU Member States. Years ago, there were no equivalent regulations governing subsidies granted by non-EU entities to businesses operating within the internal market.

However, recognizing the possible challenges and distortions that might emerge due to subsidies from third countries, the EU introduced new regulations to tackle this concern. This regulation, referred to as the "regulation on foreign subsidies distorting the internal market" (FSR) was proposed in May 2021, then entered into force and it applies since 12 July 2023.[822]

To analyze the components of the foreign subsidy definition outlined in Article 3 of the FSR,[823] it is essential to recognize that this definition comprises four distinct elements.

'Financial Contributions': it includes various forms, such as (a) Transfer of funds or liabilities, encompassing capital injections, grants, loans, loan guarantees, fiscal incentives, the offsetting of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt-to-equity swaps, or rescheduling. (b) Foregoing of revenue that is otherwise due, like tax exemptions or the granting of special or exclusive rights without adequate remuneration. (c) Provision of goods or services or the purchase of goods or services.[824] It is important to highlight that, a foreign subsidy is deemed conferred

[822] European Commission Official Website, 'Legislation (Foreign Subsidies)' < https://competition-policy.ec.europa.eu/foreign-subsidies-regulation/legislation_en > accessed 05 January 2024.
[823] '*a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries'*.
[824] Article 3(2) of European Union, Regulation on foreign subsidies distorting the internal market, 14 December 2022, Official Journal of the European Communities L 330/1. (hereinafter FSR).

once the recipient gains the right to receive it. The actual disbursement of the financial contribution is not obligatory for it to be covered by this Regulation.[825] In comparing the treatment of financial contributions in the FSR and ASCM[826], it's evident that both regulations share a common aspect. They both encompass various forms of financial assistance, such as grants and loans, underlining the need for a broad interpretation of the term. However, distinctions may arise in the precise definitions and categorizations of specific financial instruments, as well as the criteria used to identify the presence of a financial contribution.[827]

'The government or public authorities of a non-EU country': it includes, besides central government and public authorities at all other levels, any public or private entities whose actions are attributable to that third country. While assessing, some factors should be considered such as entity characteristics, legal and economic environment, and the government's role in the economy.[828]

In this context, it's clear that the FSR significantly broadens the scope of entities empowered to grant subsidies. Unlike restricting the authority solely to government and public bodies that benefit from public authority—not just actions incurring costs for the government—the FSR also encompasses private actors whose activities are closely aligned with public authority. To put it simply, the FSR includes private entities entrusted or directed by the government, mirroring the conditions articulated in Article 1.1(iv) of the ASCM.[829]

'Benefit': the notion of conferring a benefit on an undertaking, as stipulated in this context, involves providing an advantage that the undertaking would not have acquired under typical market conditions. The determination of this benefit relies on comparative

[825] para 15 of the FSR
[826] Article 1(1) of the ASCM.
[827] Pascal Friton, Max Klasse, and Christopher Yukins, ' The EU Foreign Subsidies Regulation: Implications for Public Procurement and Some Collateral Damage' (2023) 65 (11) The Government Contractor, 1, 4. < file:///C:/Users/shady/Downloads/SSRN-id4403363.pdf > accessed 06 January 2024.
[828] Article 3(2) of the FSR.
[829] Raymond Luja, 'The Foreign Subsidies Regulation: The Challenge of Notifying Non-Selective Tax Expenditure' (2023) 8(1) Competition Law & Policy Debate, 1, 3. < https://ssrn.com/abstract=4455471 > accessed 05 January 2024.

benchmarks, which may include private investor practices, prevailing market financing rates, comparable tax treatments, or appropriate remuneration for a particular good or service. In cases where direct benchmarks are unavailable, adjustments to existing benchmarks or the establishment of alternative benchmarks using widely accepted assessment methods are permissible. Benefits can manifest in scenarios involving the relationship between public authorities and public undertakings, especially if such relationships, particularly financial support from public authorities to public undertakings, deviate from normal market conditions. However, transactions involving the provision or purchase of goods or services, conducted through a competitive, transparent, and non-discriminatory tender process, are presumed to align with normal market conditions.[830]

Additionally, in order for the foreign subsidies to be covered by the FSR, the benefit must be conferred to an undertaking operating within the internal market, not by sister companies located outside the EU. That is clear from the language of Article 3(1) of the FSR '*a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market'*. For instance, if the Chinese government provides a subsidy to a Chinese company, which subsequently transfers the benefit to its EU subsidiary, facilitating an unduly advantageous bid in a public tender, the FSR may be applicable. Conversely, if the Chinese company employs the financial contribution for constructing a facility in China, it will not be qualified as a foreign subsidy under the FSR.[831]

'Specificity': the advantage must be granted to one or more enterprises or sectors among other competitors within the internal market. The specificity of the foreign subsidy may be determined either through legal provisions or practical circumstances.[832] In Article 107(1) TFEU, subsidies are referred to as 'state aids', while the requirement of 'specificity' as 'selectivity'. The crucial aspect to note is that the application of the TFEU is contingent on its impact on inter-state commerce. It's important to emphasize that this condition pertains to jurisdiction rather than being an evaluative criterion. While the FSR does not explicitly

[830] Para 13 of the FSR.
[831] Csongor I Nagy (n 821) 896.
[832] Para 14 of the FSR.

restate this requirement, it is implied that the regulation applies only when the measure influences trade beyond the borders of the EU, which falls under the exclusive competence of the EU.[833]

One might question if the foreign subsidies fall outside the scope of the EU State aid law, why cannot the WTO rules on subsidies be employed to address and mitigate the resulting distortion effects? To put it differently, do the WTO rules effectively govern foreign subsidies?

Firstly, as discussed in the first chapter of this dissertation, it's crucial to note that the ASCM exclusively addresses product subsidies, leaving service subsidies unregulated within the WTO. Additionally, the presence of foreign subsidies necessitates the commercial and physical existence of foreign undertakings, which typically governed by the GATS. Consequently, investments, takeovers, mergers and acquisitions, as well as concession and public procurement bids that involve subsidies, are not subject to regulation under WTO law.

Secondly, as Marc has analyzed, both the GATT and the ASCM offer a thorough structure for addressing product subsidies. However, it appears that their scope is limited to subsidies provided to manufacturers within the territory of the granting state, often referred to as domestic subsidies. This framework does not seem to extend to subsidies outside the territory, where the beneficiary is located either in the country of sale or in a third country where the goods are produced and exported from.[834]

From Nagy's perspective, Article 1 of the ASCM Agreement defines a 'subsidy' as a *'financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")*,' Nagy suggests that the phrase "*within the territory of a Member*" might be connected to the term "public body" rather than "financial contribution." In other words, this phrase may merely affirm that only subsidies provided by public bodies situated "within the territory of a Member" are pertinent. This interpretation is supported by the fact that within the brackets, the text offers a shorthand

[833] Csongor I Nagy (n 821) 896.
[834] Marc Benitah (n 33) 605.

for 'a government or any public body.' If the intention were to confine the subsidy payment territorially, it would logically be placed after the brackets. Additionally, Nagy points out that Article 2.1 of the SCM Agreement contains a similar implicit reference: *'in order to determine whether a subsidy ... is specific to an enterprise or industry or group of enterprises or industries ... within the jurisdiction of the granting authority*.' Hence, one could argue that the phrase '*within the jurisdiction of the granting authority*' might encompass not only territorial but also personal jurisdiction, that cannot expand the scope of this provision to include recipients located outside the territory of the member state concerned. However, Nagy notes that Article 2.1 inserts the phrase "within the jurisdiction" into the definition of specificity. Simultaneously, Article 2.3 stipulates that per se prohibited subsidies (export and local content subsidies) are legally presumed to be specific, thus falling outside the scope of Article 2.1.1.[835]

Additionally, Annex IV of the ASCM provides for the calculation of the total ad valorem subsidization regarding only the actionable subsidies and states that '*the value of the product shall be calculated as the total value of the recipient firm's sales in the most recent 12-month period'*.[836] It defines the term *'recipient firm'* in footnote 63 as *'a firm in the territory of the subsidizing Member*'.[837] The recipient firm, in this context, must be located within the territory of the member state providing the subsidy. This emphasis on the territorial location of the recipient firm ensures that the calculation reflects the economic activities and sales within the jurisdiction of the subsidizing Member. Accordingly, one can opines that the rules of prohibited category (export and local content subsidies), but not the actional category, under the ASCM might be invoked and applied to foreign subsidies. This is because these subsidies are inherently considered detrimental to fair competition and international trade, and the ASCM explicitly addresses them as prohibited and due to unrestricted territorial location between the subsidizing county and subsidized recipient.

Moreover, this Regulation establishes comprehensive guidelines and procedures for investigating foreign subsidies that have the potential to distort the internal market and for

[835] Csongor I Nagy (n 821) 893.
[836] Para 2 of Annex IV of the ASCM.
[837] Footnote 63 of the ASCM.

addressing such distortions.[838] Distortion within the internal market is recognized when a foreign subsidy is positioned to enhance the competitive standing of an undertaking in the internal market, thereby adversely impacting competition within the internal market, either presently or potentially. The assessment of distortion in the internal market is conducted through various indicators, including but not limited to the amount and nature of the foreign subsidy, the situation of the undertaking, encompassing its size and relevant markets or sectors, the level and trajectory of economic activity within the internal market, and the intent and conditions associated with the foreign subsidy, along with its utilization within the internal market.[839]

Three categories of foreign subsidies are identified as not causing distortion within the internal market:

- The total amount of foreign subsidy is less than EUR 4 million over any consecutive three-year period.
- Foreign subsidy that constitute a de minimis subsidies, which is, as explained previously, aid that do not surpass EUR 200,000 over any consecutive three-year period.
- Foreign subsidy is intended to remedy damage resulting from natural disasters or extraordinary events.[840]

Regarding the investigation procedure and sanctions, the European Commission possesses an exclusive powers[841] to independently investigate information within ten years[842] from various origins, including Member States, individuals, or associations, concerning suspected foreign subsidies that may distort the internal market.[843] Unlike the EU state aid, this procedure shall not be carried out against the subsidizing state, but only the subsidized

[838] Article 1(1) of the FSR.
[839] Article 4(1) of the FSR.
[840] Article 4(2), (3), and (4) of the FSR.
[841] Para 8 of the FSR.
[842] Article 38(1) of the FSR.
[843] Article 9(1) of the FSR.

undertaking/s to which the decision of investigations must promptly be communicated.[844] The rationale behind that is sovereign immunity, as long as the EU has no jurisdiction to conduct investigations against third countries.[845]

Like the EU state aid, if the Commission determines that the contested subsidy is deemed an illegal subsidy, it will not result in a financial penalty but will instead impose a repayment obligation, along with interest. Additionally, it will prohibit the concentration or the award of the contract in a public procurement procedure affected by the subsidy. Alternatively, if the adverse effects can be remedied without repayment, the Commission may employ corrective measures. These measures may involve adopting structural or behavioral changes through redressive measures or commitments to address the competition issue and eliminate the need for repayment.[846] However, if the undertaking proposes to repay the subsidy with an appropriate interest rate and meets criteria such as transparency, verifiability, and effectiveness while considering the risk of circumvention, the Commission must accept the repayment, and no additional corrective measures will be adopted.[847]

The Regulation establishes a general procedure and two special regimes for concentrations[848] and public tenders. In cases where concentrations and public tenders involve subsidies that exceed the predefined thresholds, the parties involved are required to notify the European Commission of their intentions. Moreover, the Commission holds the authority to request notification even for subsidized concentrations falling below the established thresholds. Such concentrations, even though they are below the thresholds, are still considered "notifiable concentrations."[849] Failing to comply with the notification

[844] Article 41(1) of the FSR.
[845] Csongor I Nagy (n 821) 899.
[846] Articles 7, 25(3)(c) and 31 of the FSR.
[847] Article 7(6) of the FSR.
[848] Para 4 of the FSR. Concentration, like merger, *'entails a change of control over Union undertakings, where such concentrations are fully or partially financed through foreign subsidies, or where economic operators benefiting from foreign subsidies are awarded contracts in the Union'*.
[849] Article 24(1) of the FSR.

requirements and engaging in premature actions may result in the imposition of fines[850] or periodic penalty payment.[851]

On the other hand, cases that do not fall under the category of notifiable concentrations or tenders that are subject to a retrospective examination process known as "ex post investigation." This investigation procedure is formed after the EU antitrust procedure, where the Commission assesses the competition-related aspects of these cases after they have taken place.[852]

4.5. Conclusion

Analyzing and examining the classification of subsidies alongside the remedial provisions under the ASCM is the major goal of this chapter. In practice, there are two categories of subsides as prohibited and actionable, since the non-actionable subsidies provisions have expired as discussed earlier. This chapter aims not only at spotting light on the strong points of Part II, III, and IV of the ASCM, but also at calling attention to the deficiencies and drawbacks in order to suggest some alternatives. For instance, the withdrawal of illegal subsidies, as a remedial measure, should have not only prospective effects, but also retroactive effects, in particular, in the case of prohibited subsidies. One of the rationales is that in the case of a one-time subsidy, the withdrawal measure would be useless and does not reimburse the adverse effects that occurred when the effect of which is limited to the future event and ignored the past event.

Moreover, by comparing the categories of WTO subsidies and European State Aid, several differences can be highlighted and support the position of EU rules over WTO provisions. Firstly, the EU rules can be deemed as protective rules because they shall be applied before granting the aid, unless the aid is covered by the exemptions. In contrast, the WTO provisions can be deemed as remedial provisions. They are always applicable after granting the subsidy and when the concerned member demonstrates either the subsidy is prohibited

[850] Article 17(2) it does *'not exceed 1 % of the aggregate turnover of the undertaking or association of undertakings concerned in the preceding financial year'*.
[851] Article 17(3) it does *'not exceed 5 % of the average daily aggregate turnover of the undertaking or association of undertakings concerned in the preceding financial year for each working day of delay'*.
[852] Article 9 of the FSR.

or actionable that causes injury to its domestic industry or trade. Secondly, the provisions of the ASCM only involve products subsidies, while EU State aid rules include both products and service State aid (this difference is raised specifically in the next chapter).

Thirdly, the application of EU rules and the investigation process can be triggered by either the Commission, the concerned Member States, or even private competitors. Unlike the WTO provisions that require submission of an official claim only from the concerned Member. Certainly, that makes the EU rules more powerful and strongly monitored when private actors such as companies cannot complain to the WTO. This chapter also discusses the question whether the WTO ASCM covers the foreign subsidies as defined in the FSR. It argues that the rules of prohibited category (export and local content subsidies), but not the actional category, under the ASCM might be invoked and applied to foreign subsidies.

Finally, the purpose of EU State aid rules is to remove anti-competitive effects by ensuring the recovery of illegal State aid and collecting the aid from the recipient. The compensation decision under the WTO ASCM would oblige the losing party to withdraw the illegal subsidy and allow the winning party to introduce countervailing duties on subsidized products. It can be argued that although countervailing duties can potentially create trade barriers, they also serve the purpose of ensuring compliance with decisions made by the DSB. The use of countervailing duties not only helps deter future violations but also provides a means for the affected member to protect its domestic industries from the adverse effects of unfair competition resulting from subsidized imports.

Chapter 5: Service subsidies

After the creation of the GATT, there has been a longstanding debate surrounding the necessity of an international trade agreement to regulate cross-border services. Traditionally, trade in the service sector was treated as a domestically regulated area.[853] The recommendation on freedom of contract in transport insurance suggested by the GATT contracting parties was the preliminary phase towards international characteristics.[854] Services include various groups of sectors varying from hotels, restaurants, and other personal services (traditionally considered as domestic activities), passing by transportation and telecommunications (deemed as classical domains of government ownership and control), ending at health, education, and basic insurance services (described as governmental responsibilities). Since 1980, global trade in the services sector has grown promptly. In terms of the Balance of Payments (BoP) basis, the sector's share of world services exports, which was approximately 20% in 1980, increased to 24.5% by 2000 and further rose to 31% in 2010.[855] According to a recent WTO statistic, "*world trade in commercial services increased by 14% year-on-year in the third quarter of 2022*".[856] Due to the significant growth and remarkable contribution of services to global trade, which is about 50% when the assessment is made in value-added terms, it is described as a fast-developing area of international trade.[857]

Although goods and services are different from several practical perspectives, as an illustration, nature, transfer of ownership, return, production, consumption, *etc*., they might be subject to similar economic theories. For example, the comparative advantage theory, developed by David Richardo, was applied only to international trade of goods. While

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[853] Terance P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1994) Vol IV: The End Game (Part 1),* (Kluwer Law International, 1999) 793.
[854] GATT Consultative Group of Eighteen Thirteenth Meeting, ' International Trade in Services' (Note by the Secretariat CG. 18/W/U5, 1980) 1. < https://docs.wto.org/gattdocs/q/GG/CG18/W45.PDF > accessed 16 March 2023. GATT Secretariat, 'Freedom of Contract in Transport Insurance' (Recommendation BISD 8S/26, 27 May 1959).
[855] WTO Trade in Services Division, 'the General Agreement on Trade in Services an Introduction'< (Working Paper, 2013) 2. <https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf > accessed 16 March 2023.
[856] WTO Official Website, 'Statistics on trade in commercial services' <https://www.wto.org/english/res_e/statis_e/tradeserv_stat_e.htm > accessed 16 March 2023.
[857] WTO Official Website, ' The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' <https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm > accessed 16 March 2023.

Hindley and Smith perceived that despite the dissimilarity between goods and services, the powerful logic of the comparative advantage theory exceeds these differences. Additionally, Collins emphasized that the unique characteristic of services does not determine the applicability of the comparative advantage theory.[858] Likewise, the economic interventionism theory covers not only goods but services as well. Hence, the government might interfere in the market either to correct the market failure, to maintain a high quality of public services, or to enhance economic growth through providing financial contributions to private services and private service suppliers which can be called as "service subsidy".

In 1994, the Members of the Uruguay Round of multilateral trade negotiations, as discussed in the first chapter, succeeded in signing the Marrakesh Agreement and establishing the WTO as an international forum that governs multilateral trade negotiations. That is why it is also known as the "Funding Agreement". During this Round, the US invited its trading partners to include cross-border trade in services into the spectrum of the GATT.[859] However, this project was denied by most of the developing countries based on the claim that the GATT originated to only cover the trade in goods, thus it is not capable of regulating the liberalization of international service trade.[860] Some scholars opined that the rationale behind this rejection can be the desire of the detractors to keep the customary GATT subjects as the cornerstone of the negotiation and not to shift the concentration/attention to the trade in service that might affect negatively the employment and the prices.[861] Eventually, the GATS was formed as the first multilateral standing-alone agreement that covers the trade in services sector and one of the sets of mandatory agreements under the umbrella of the Funding Agreement.

Two major drafts were published till adopting the GATS as it is known today. Firstly, the chairman of the group of the negotiation in service issued the first short version in July

[858] Pietro Poretti (n 40) 26.
[859] Nellie Munin (n 20) 14.
[860] Deepak Nayyar 'Some Reflections on the Uruguay Round and Trade in Services' (1988) 22 (5) Journal of World Trade, 35, 35.
[861] Natalia T. Tamirisa, Alexander Lehmann, and Jaroslaw Wieczorek, 'International Trade in Services: Implications for the IMF' (Discussion paper IMF, 2003) 12.

1990.[862] Due to disagreement among the Members and non-inclusiveness of the draft (some issues, like dispute settlement provisions, were left unregulated), another draft was issued in December 1991 and named, Dunkel Draft, after the Director General of the GATT.[863] After a deeper discussion, the Trade Negotiation Committee adopted the final version of the GATS in 1994 which entered into force in January 1995.

The GATS has three essential pillars (a) securing transparency and predictability of relevant rules and regulations, (b) providing a common framework of disciplines governing international transactions, and (c) promoting progressive liberalization through successive rounds of negotiations.[864] Moreover, the GATS consists of 29 Articles contained in 6 sections along with 8 annexes. Like the GATT, the MFN and Transparency are the main principles provided through the GATS. However, the NT principal and Market Access rule slightly differ from the GATT due to the right of the Members to exclude some services or sectors from the competence of the GATS and collect them in the schedule of specific commitments.[865] This dissimilarity can be justified based on the unique intangible nature of services and various forms in which they can be embodied (which is discussed thoroughly herein). Despite all the comprehensive provisions contained in the GATS, it still has unfinished character. That is because it calls the Members for negotiation mandates in three different areas a) emergency safeguard measures, based on the principle of non-discrimination, b) government procurement in services, and c) developing the necessary disciplines on service subsidies which is the gist of this chapter.[866]

The goal of any subsidy discipline, like the ASCM and EU State aid Law, is the prevention of the trade distortion effect. The GATS Members acknowledge that the subsidy may have distortive effects on trade in services. To illustrate, let us consider the most common example of service subsidies when a government subsidizes the road infrastructure refers

[862] GATT Group of Negotiation in Service, 'Draft, Multilateral framework for Trade in service, Introductory Note by the Chairman on the GNS Negotiations on a Framework Agreement' (Draft Agreement MTN.GNS/35, 23 July 1990) <https://docs.wto.org/gattdocs/q/UR/GNS/35.PDF > accessed 20 March 2023.
[863] GATT General Agreement on Trade in Service, 'Draft, Final act embodying the results of the Uruguay round of multilateral trade negotiations' ('Draft Agreement MTN. TNC/W/FA, 20 December 1991. <https://www.wto.org/gatt_docs/English/SULPDF/92130093.pdf > accessed 20 March 2023.
[864] Preamble of the GATS.
[865] Articles XVI and XVII of the GATS.
[866] Articles X, XIII, and XV (sequentially) of the GATS.

to the physical components of a road network that enable and facilitate the transportation of people, goods, and services from one place to another. This subsidy can be justified for the purpose of public interest. Unlike the situation when a government provides direct financial assistance, such as a grant or loan guarantee, to help build or maintain roads or ports that are primarily used by a particular service provider. Hence, it can have negative consequences by creating an uneven playing field in the market, where some providers receive unfair advantages over others.[867]

Drawing from a real example, the New Zealand government provided funding (grants) to support the production of quality New Zealand feature films, stimulate market interest, and attract investment to New Zealand's film industry. To receive the mentioned financial assistance, films must have significant New Zealand content as defined by the New Zealand Film Commission Act 1978.[868] A film is considered to have significant New Zealand content if it meets one or more of the following criteria: the film's director, producer, and writer are New Zealand citizens or permanent residents, the film is set primarily in New Zealand or is about New Zealand, at least 50% of the film's total production budget is spent in New Zealand. Based on the above information, one could argue that the New Zealand government has provided a subsidy exclusively to domestic film producers rather than foreign ones.

The GATS, therefore, requires Members to launch negotiations and to exchange information concerning all service subsidies that they grant to their domestic suppliers. The crucial goal of this negotiation shall be developing the necessary multilateral disciplines to avoid such trade-distortive effects and to tackle the appropriateness of countervailing procedures. In the course of negotiation, the Members shall give proper consideration to the needs of the developing countries. Over two decades, several negotiation rounds have been conducted, but still no fruitful achievement. For the time being, a Member is permitted

[867] Pietro Poretti (n 40) 188.
[868] Working Party on GATS Rules, 'Communication from New Zealand, Response to the Questions to the Information Exchange Required Under the Subsidies Negotiating Mandate' (Report S/WPGR/W/16/Add.2, 23 July 1997) 7.

to invite other members for consultation whenever it considers itself adversely effected by a subsidy granted by the latter.[869]

Accordingly, the aim of this chapter is to undertake an extensive analysis of the unique nature of the GATS that differentiates it from the GATT. It also analyzes the feasibility and potential challenges of extending the application of the ASCM to the services sector from a legal perspective. By exploring this issue in depth, it is hoped to establish a framework that will emphasize along with the existing literature the importance of accomplishing the negotiation and enacting a set of rules on service subsidies in the context of international trade.

5.1. The eccentric nature of the trade in services under the GATS

5.1.1. Understanding trade in services: definition and key concepts

Like other WTO Agreements, the GATS has a limited competence. Hence, it applies and regulates all government measures[870] that effect trade in the service sector.[871] Undoubtedly, the subsidy is one of them. Before examining whether the measure is consistent with the GATS' obligations, it first shall be demonstrated to be subject to the GATS itself. For that purpose, two main elements must be met; Firstly, whether there is a trade in service according to Article I(2) of the GATS. Secondly, the measure in question negatively affects this service trade.[872] Thus, the goal of this section is to have a deep and comprehensive understanding of the GATS provisions and obligations. This insight analysis will serve as the base for the next segment by highlighting the factors and barriers, if applicable, that might disturb the extension of the implementation of the ASCM to trade in service.

To determine accurately the scope of the GATS, the discussion should commence with defining the first element "the trade-in service". It is obvious that the GATS offers no definition for the term service when only a few words on the meaning of service are

[869] Article XV of the GATS.
[870] The term *"measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form*". Article XXVIII(a) of the GATS.
[871] Article I (1) of the GATS.
[872] *DS139/142- Canada - Certain Measures Affecting the Automotive Industry, Appellate Body Report, para.* 155

provided through Article I(3)(b) as "*services include any service in any sector*". This meaningless definition along with some other provisions of the GATS might justify the argument that for a better operation of the GATS, there is no need for the term service to be defined. This argument is raised on the ground that services need to be identified, described, and classified based on the sectors because the majority of the obligations under the GATS apply only to sectors where specific commitments are undertaken. For instance, Article XVI on Market Access "*In sectors where market-access commitments are undertaken*…", Article XVII on National Treatment "*in the sectors inscribed in its schedule*…", Articles 5 and 7, *etc*.[873]

Moreover, during the GATS negotiation, the GATT Secretariat referred to the "Services Sectoral Classification List"[874] which is used, by most of the WTO Members, as a guide for the classification of services based on their sectors instead of their individual existence.[875] This list has witnessed several updates. The recent list breaks down the services into 12 major sectors. By way of illustration, business services and professional services, communication services, education services, energy services, environmental services, financial services, health, and social services, services auxiliary to all modes of transport (like tourism and travel-related services), and movement of natural persons.[876] According to this classification and suggested definition in literature, one can define

[873] Ruosi Zhang, Covered or Not Covered: That is The Question - Services Classification and Its Implications for Specific Commitments under the GATS' (Working Paper ERSD 2015/11, 2015) 2. <https://doi.org/10.30875/a9bb5d91-en > accessed 05 April 2023.

[874] This list was coded in accordance with the United Nation Department of Economic and Social Affairs, 'Provisional Central Product Classification' (Statistical paper series M, No 77, 1991) <https://www.wto.org/english/tratop_e/serv_e/cpc_provisional_complete_e.pdf > accessed 05 April 2023. Two versions followed the mentioned list. The recent updated list is United Nation Department of Economic and Social Affairs, 'Central Product Classification (CPC) Version 2.1' (Statistical paper series M, No 77 Ver.2.1, 2015) <https://unstats.un.org/unsd/classifications/unsdclassifications/cpcv21.pdf> accessed 05 April 2023.

[875] GATT Group of Negotiations on Services, 'Services Sectoral Classification List' (Note by the Secretariat, MTN.GNS/W/120, 10 July 1991) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=179576&CurrentCatalogueIdInd%20ex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True > accessed 05 April 2023.

[876] WTO Official Website, 'Sector-by-sector information' <https://www.wto.org/english/tratop_e/serv_e/serv_sectors_e.htm > accessed 05 April 2023.

services as commercial activities that are not embodied directly in tradeable, tangible products.[877]

By the same speaking, it is notable that two essential exceptions are introduced in the GATS and lessen its broad scope. Firstly, every service supplied, regardless of the sector, in the exercise of governmental authority falls outside of the GTAS.[878] Moreover, subparagraph 3(c) of Article I explains the meaning of "service of governmental authority" as "*any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers*". That means in order for the service to meet the exception, it shall be supplied only by the government or any public body through exercising their public authority for achieving the public interest. By way of explanation, whenever service is supplied on a commercial basis or in competition with one or more service suppliers, then it will be treated like any service provided by a private supplier which is subject to the GATS. Accordingly, it can be said that the criterion for drawing a distinguishing line between private service and public service is not only the exercise of the government authority but also the competition environment.[879]

Supportively, paragraph 1 (c) of the Annex on Financial Services declares that if a Member allows financial activities conducted by the central bank or any public body to be conducted in competition with a private supplier, they are nevertheless understood as services falling within the scope of the GATS. Additionally, the Appellate Body, while interpreting the specific commitments made by the US in its GATS Schedule, decided that a particular service cannot fall within two different sectors or sub-sectors of a Member's Schedule. Thus, when the Member determines in its schedule that a specific service or sector is out of competition, that means it is left to the government authority, then it is outside the scope of the GATS.[880] Notably, these services are excluded not only from the spectrum of the GATS provisions but also from the liberalization negotiations under the GATS.

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[877] Matthias Koehler, *Das Allgemeine Übereinkommen über den Handel mit Dienstleistungen (GATS)* (Duncker and Humblot, 1999) 35.
[878] Article I(3)(b) of the GATS.
[879] Rüdiger Wolfrum and Peter-Tobias Stoll, *Max Planck Commentaries on World Trade Law* (BRILL, 2010) 62.
[880] *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* [2003] WTO Appellate Body Report 7 April 2005, WT/DS285/AB/R/Corr.1, para. 180.

For further explanation, the commercial presence can have two interpretations. As Bryan C. Mercurio discussed, on the one hand, the act of buying and selling regardless of the necessity of making a profit. In this case, only the free service must be counted as non-commercial, like fees of the court and public school, while the administrative fee should be taken into account as commercial nature. Then, almost only police services and national defense would be outside the substantive scope of the GATS. On the other hand, as a broad interpretation, the commercial presence should refer to profit-seeking activities. Here, if the service is supplied for a fixed price but prohibited to make a profit, then the service can be deemed as a governmental service.[881]

However, Article XXVIII (d) of the GATS defines commercial presence as any type of business or professional establishment for the purpose of supplying a service. As a general perception, business, and professional establishments are usually incorporated to make a profit. That means Article XXVIII linked the commercial presence with the notion of profitability. In contrast, Max argued this understanding and contested that Article XXVIII extends the scope of commercial presence beyond the profit-seeking activities because it states that "commercial presence means any type of business or professional establishment, "including through the constitution, acquisition or maintenance of a juridical person". Additionally, a juridical person is any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise. Accordingly, *"services supplied on a commercial basis are services which, if not already supplied for reasons of profit-making, are at least delivered to the consumer only for payment*".[882]

Furthermore, the author of this dissertation asserts that Article XXVIII(m)(I) has an additional definition of the "juridical person of another member" as "*a juridical person which…..is engaged in substantive business operations in the territory of that Member or any other Member*". The meaning of substantive business operations should include the

[881] Markus Krajewski, 'public services and trade liberalization: mapping the legal framework' in Bryan C. Mercurio (ed.) *The Regulation of Services and Intellectual Property: Volume III* (Routledge, 2017) footnote 51 and p. 351.
[882] Article XXVIII (I) of the GATS. Rüdiger Wolfrum and Peter-Tobias Stoll (n 837) 64.

purpose of making a profit. Moreover, paragraph 5 (c) (i) of the Annex on Financial Services sets forth the meaning of the public entity as

> a government, a central bank or a monetary authority, of a member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms".

After a deep reading, it is clear that this Article relates the existence of the government or public body with the meaning of governmental functions and governmental purpose. In other words, the nature of the service, whether governmental or commercial, is based on its purpose. Hence, the governmental purposes are almost the same in all states as explained in the third chapter.

Pursuant to Article 1 of the ASCM, the subsidy can be materialized when the government provides goods or services other than the general infrastructure. It is clear that the purpose of this provision is to emphasize the fact that only services, or goods, provided within the meaning of general infrastructure are public services and constitute an integral part of the government authority. Accordingly, if the service does not belong to the public infrastructure provided by the government, then it shall be considered as provided on a commercial base, where subsidy can exist. For instance, when a government builds a road connecting only a specific factory to the port, it arguably provides a service to the producer whose factory site will now get easy access to the port, and then reduce its transportation costs. Unlike the situation when the road is used by a large number of people, road building and road maintenance are part of the traditional government responsibilities.[883]

Another example, low university registration fees for national students can be justified based on public interest. However, the same universities require international students to pay a way higher fee for enrollment. By doing so, the public universities stand on an equal

[883] Petros C. Mavroidis, Patrick A. Messerlin and Jasper M. Wauters, *The law and Economics Contingent Protection* (Elgar International Economic Law, 2008) 312.

footing with private universities that are incorporated to provide academic service on a commercial basis, then subject to the GATS.[884]

Secondly, the GATS shall not apply to traffic rights services and any other services to which they are directly related.[885] "Traffic rights" consists of

> The right for scheduled and non-scheduled services to operate and/or to carry passengers, cargo, and mail for remuneration or hire from, to, within, or over the territory of a Member, including points to be served, routes to be operated, types of traffic to be carried, capacity to be provided, tariffs to be charged and their conditions, and criteria for designation of airlines, including such criteria as number, ownership, and control.[886]

The language of this exemption includes the majority of the air transport service industry. The essential reason behind this exception is the fact that the negotiating parties desired to maintain the comprehensive network of bilateral agreements, which contains over 2000 agreements in the mentioned sector, that cannot be replaced with one multilateral agreement.[887] However, the major difference between the first and second exception is that the later has a provisional effect, because the GATS requires the Council for Trade in Services to review periodically, and at least every five years, developments in the sector in hand and to take into account the possibility for further application of the GATS in this sector.[888]

The second mandatory element to activate the provisions of the GATS is "the trade-in service must be affected". The term "affecting" in the general sense means "having an effect or impact on". From the AB perspective, the term "affecting" presents the desire of the drafters to extend the scope of the application of the GATS. That was also emphasized by the findings of previous panels that the term "affecting" cannot be limited to the terms "regulating" or "governing", instead it should have a wider interpretation.[889] Additionally,

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[884] Dan O'Brien, 'Education and Globalisation' in Joseph Zajda, Kassie Freeman, MacLeans Geo-Jaja, Suzanne Majhanovic, Val Rust, Joseph Zajda, and Rea Zajda, *International Handbook on Globalisation, Education and Policy Research Global Pedagogies and Policies* (Springer, 2005) 470-471.
[885] Para. 2 of Annex on Air Transport Services (ATS) of the GATS.
[886] Para. 4 (d) of Annex ATS of the GATS.
[887] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 611.
[888] Para. 5 of the Annex ATS of the GATS.
[889] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* [1996] WTO Appellate Body Report 9 September 1997, WT/DS27/AB/R, para. 220.

there is nothing in the GTAS shows that the measures shall regulate or have a direct impact on the trade-in service. In contrast, Article XXVIII (a) and (b) highlight that the measure of suppling service can be embodied in various forms, whether in-law or fact,[890] such as production, distribution, marketing, sale, and delivery of a service. This understanding is mentioned by Zdouc who asserted that even if the restrictive measure is not final, indirect, or *de facto*, it is totally sufficient to expand the scope of the GATS.[891] Moreover, the Panel in the *EC-Bananas III* dispute asserted that the measure affects trade in services when it bears upon "the conditions of competition in the supply of a service'.[892] Since the method of calculating the amount of "adversely affected trade-in service" lacks a specific definition, the WTO's DSB evaluates the presence of "affected trade-in service" on a case-by-case basis. This assessment involves considering how the challenged measure impacts various aspects of service provision, such as production, distribution, sale, or the service suppliers involved. By examining these factors, the DSB determines whether trade in services has been adversely affected.[893] Undoubtedly, this loophole should be at the top of the agenda in the next negotiation round on subsidies in the service sector.

5.1.2. Modes of service supply

Although the GATS, as explained before, does not define the term "service", but rather it introduces four modes of how the services are supplied. Obviously, Article I(2) GATS sets forth a broad definition of the terminology "trade-in service" which covers all the possible ways through which services pass from producer to consumer. Briefly, the four modes are described along these lines.

Mode 1 includes services that exceed the borders of a member to reach the consumers' hand in another member. This mode is known as "cross border" service. Similar to trade in goods, both service producers, which are established in territory A, and consumer, which is based in territory B, remain in their territories, while the service itself crosses the borders and

[890] Either in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.
[891] Werner Zdouc, *Legal problems: arising under the General Agreement on Trade in Services ; comparative analysis of GATS and GATT* (Bamberg : Difo-Druck 2002) 111.
[892] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* [1996] WTO Panel Report 22 May 1997, WT/DS27/R. para. 7.285.
[893] DS27- *EC - Regime for the Importation, Sale and Distribution of Bananas,* Appellate Body Report, para. 221.

moves from A to B. For instance, legal advice is supplied by a German Law Firm through telecommunications or postal infrastructure to a client in the United Arab Emirates (UAE).

Mode 2 takes place when the service consumer leaves his/her territory and enters the territory of the service provider to receive the respective service. This mode is called "consumption abroad". In this mode of supply, the service provider remains and supplies the service in territory A, while the consumers physically travel from territory B to A. Thus, the movement of people is required here. The best example is national students or patients moving to another country to receive educational services or medical treatments.

Mode 3 is commonly named "commercial presence". As the name implies, this mode requires the service supplier to have an establishment in the territory of the consumers. Hence, the supplier from territory A shall incorporate an entity, a branch, or a subsidiary for example, in territory B in order to provide respective service to the consumer in that territory. For instance, financial services are provided in Canada by American Bank which has a branch in Canada. Moreover, "commercial presence" includes "*any type of business or professional establishment, such as the constitution, acquisition or maintenance of a juridical person, or the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service*".[894]

However, the author of this dissertation argues the point of considering the representative office as meeting the commercial presence requirement. Article I(2) of the GATS explicitly states, "*trade in services is defined as the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member*". By using the expression "*through*" it is clear that in order for commercial presence to exist, and to make a difference between modes 3 and 1, the service shall be supplied by the entity that is established in another member which means direct investment abroad.[895] In other words, the service shall be supplied by the branch but not by the mother company. Bearing in mind that the main activity of the representative office is marketing and advertising for the mother company but does not provide respective services by itself. Thus, if the client

[894] Article XXVIII (d) of the GATS.
[895] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 51.

(consumer), who resides in country B and got to know about a Law Firm through its representative office established in Country B, receives legal advice from the head office located in country A. Then, mode 1 of supplies, but not mode 3, is deemed to exist. That is because the commercial presence has not been met as long as the service in question is not provided directly through the representative office which in its turn is not permitted to issue invoices or receive payments for the services provided.[896] Furthermore, the situation will be quite different when this Law Firm incorporates a branch that provides consultancy and legal advice on its own.

Mode 4, unlike mode 1, occurs when the service supplier is a natural person and moves to the territory where the consumer is based in order to provide service there. Thus, in this mode, the physical movement of the supplier is required. For example, an engineering consultant travels abroad to oversee aspects of a building project. This means the crossing of the border by a natural person of one Member is required for the purpose of delivering a service within the territory of another Member. Accordingly, the stay of the natural person is limited to the duration of the supply.[897] In any case, no Member can claim that the visa requirement for the natural person of other Members is nullifying or impairing benefits under a specific commitment.[898] Therefore, Members are free to restrict access to their employment market. During the GATS negotiation stage, the negotiators did not desire to open their labour markets using the GATS. That is clear from the language of para 2 of the Annex on the movement of natural persons which states, "*The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis*".

5.1.3. General obligations and disciplines

The GATS divides its obligations and disciplines into two main parts "general obligations" that apply to the 12 service sectors, and "specific commitments" that include only sectors

[896] Yadong Luo, *Entry and Cooperative Strategies in International Business Expansion* (Bloomsbury Publishing, 1999) 150.
[897] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 52.
[898] Footnote 1 of Annex on Movement of Natural Persons Supplying Services Under The GATS.

contained in specific commitments schedules of the Members.[899] Part II of the GATS accumulates 17 general obligations regarding the liberalization of trade in services. A summary of the most relevant disciplines is presented.

Most-Favoured-Nation Treatment sits at the top of part II. The MFN Clause is common and widely used in various Bilateral and Multilateral treaties concerning economic and business relations, especially Investment treaties.[900] Despite the wording dissimilarity among treaties, the intended meaning of this clause is similar. The MFN clause in the context of the GATS, like the GATT, requires WTO Members to treat services and service providers from one Member no less favourably than the like services and service suppliers from any other country. In other words, every WTO Member shall stand on an equal footing, immediately and unconditionally, regarding favorable treatment provided by a Member to like services and services providers of another country whether or not the beneficiary country is a Member of the WTO.[901]

However, Article 2 sets forth two exemptions to the MFN Clause. On one hand, Members are allowed to maintain exemptions to MFN treatment if they, at the entry into force of the WTO Agreement or during the Ministerial Conference,[902] listed the exempted measures in the Annex on Article II Exemptions.[903] Bearing in mind two facts a) every exemption issued for more than 5 years shall be reviewed by the Council of Trade in Service to examine the necessity of this exemption; b) exemptions, in general, should not be granted for more than 10 years and shall be subject to negotiation in upcoming rounds of multilateral negotiations.[904] On the other hand, the MFN Clause does not apply to "Advantageous" conferred on "*adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed*".[905]

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[899] Chad P. Bown and Joost Pauwelyn, *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press, 2014) 593.
[900] The MFN clause can be found, For example, in NAFTA Article 1103.1, and Energy Charter Treaty Article 10.7. OECD, 'Most-Favoured-Nation Treatment in International Investment Law (Working Papers on International Investment No 2004/2, 2004) 2.
[901] Article II (1) of the GATS.
[902] Articles 1 and 2 of the Annex on Article II Exemptions.
[903] Article II (2) of the GATS.
[904] Articles 2,4, and 6 of the Annex on Article II Exemptions.
[905] Article II (3) of the GATS.

Therefore, the mentioned exemptions are only relating to the upward discrimination that releases the Member from its commitments under Article II but are irrelevant to specific obligations like market access and national treatment.[906]

The second obligation the Members shall adhere to is "Transparency". In general, transparency has a vital role in enhancing trade in all sectors and contributes to significant confidence in the WTO system, because it guarantees predictability and legal certainty, and allows Members to inspect the legality of regulatory authority.[907] Pursuant to Article 3, this obligation requires the Members to ensure that all relevant measures adopted by the Member and any international agreements that might impair the operation of the GATS are publicly available whether through publication[908] or by any other means, such as creating a website. All Members shall obey this obligation unconditionally and without any delay.[909]

Furthermore, this obligation does not only include the measures that were adopted at the time of entry into force of the GATS, but also any new, or any changes to existing, laws, regulations, or administrative guidelines that significantly affect trade in services covered by its specific commitments under this Agreement. Such notification shall be delivered to the Council of Trade in Service on time and at least once annually.[910] Bearing in mind that the transparency obligation does not include "*confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private*".[911]

Unarguably, this obligation plays a crucial role in examining subsidy programs, particularly during the phase of determining their specificity. This obligation emphasizes the importance of providing clear and comprehensive information about subsidy measures to

[906] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 91.
[907] Yuka Fukunaga, 'Transparency and the Role of Domestic Process Connecting Citizens to WTO dispute Settlement' in Junji Nakagawa (ed.) *Transparency in International Trade and Investment Dispute* (Routledge 2013) 33.
[908] Sometimes publication requirements may not be achievable due to the administrative burden, the lack of human resources, and the costs involved. Rüdiger Wolfrum and Peter-Tobias Stoll (n 837) 96.
[909] Paras. 1 and 2 of Article III of the GATS.
[910] Article III (3) of the GATS.
[911] Article III bis of the GATS.

other trading partners and relevant authorities. It ensures that all relevant information regarding the design, implementation, and operation of a subsidy program is accessible to interested parties, including other countries and trade authorities. Also. transparent subsidy programs allow other trading partners to assess the potential impact of such measures on their own industries and plan their trade strategies accordingly. It allows trade authorities to evaluate the criteria and conditions under which the subsidy is granted, the sectors or beneficiaries targeted, and the potential distortive effects on trade.

Moreover, in order to fulfill the transparency requirements, the Members are bound to provide promptly all the additional information and respond to all queries raised by another Member on any of its measures and international agreements. For that purpose, Members are asked to establish inquiry points within two years from the date of implementing the WTO Establishing Agreement. Those inquiry points should not be depositories of laws and regulations.[912] Some scholars, like Max, criticized this method as not complete because the access to information is limited to government-to-government relations, and does not allow major private actors, such as service suppliers and individuals, to make use of this right.[913]

However, if any Member does not meet its notification obligation, all other Members have the full right to report to the Council of Trade in Service about any measure taken by the concerned Member as long as the reporting Member considers it as affecting the operation of the GATS.[914] Undoubtedly, this right has a crucial role in spotting the light on potential service subsidies. In an online event held in Washington DC jointly organized by IMF, OECD, WTO, and World Bank Group, Julia Nielson Deputy Director of the OECD's Trade and Agriculture Directorate said, "*Improving transparency is a fundamental first step in addressing subsidies*". Besides, Alex Keck, head of Global Economic Analysis with the WTO's Economic Research and Statistics Division, added "*Experience has also shown that improved transparency, analysis, and dialogue has helped to develop better rules. This also applies in going forward*".[915]

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[912] Article III (4) of the GATS.
[913] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 102.
[914] Article III (5) of the GATS.
[915] Staff teams from the International Monetary Fund, the Organisation for Economic Cooperation and Development, the World Bank, and the WTO, ' Transparency, analysis, cooperation key to address trade

Another pertinent point is that Public International Law embraces the diversity of Trade Agreements, like bilateral, regional, and multilateral. Hence, it does not give any of them superior power over the others.[916] Pursuant to this general rule, the GATS confers the right of all Members to enter into private trade agreements for the sake of liberalizing trades in service which is also known as the right of economic integration. Two conditions shall be met in order for the legality of the economic integration agreement: a) The agreement shall have comprehensive sectoral coverage and shall not exclude any mode of supply. While assessing this condition, some factors should be taken into account, such as the number of sectors, amount of trade affected, and modes of supply included;[917] b) The agreement shall eliminate and ban any existing or potential discriminatory measures, in particular National Treatment obligation.[918]

To enumerate some other obligations imposed by the GATS, all the Members shall guarantee that the MFN obligation and Members' specific commitments are respected and are not breached by the monopoly supplier of a service in their territories, whether the monopoly supplier is acting inside or outside the scope of its monopoly. This obligation arises also in the case of an exclusive service supplier when a Member, in-law or in-fact, "*(a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory*".[919] Additionally, both monopoly or exclusive suppliers shall be reported by the Member to the Council of Trade in Service within 3 months before the application of the grant of monopoly or exclusive rights.[920] This obligation is remarkable because it ensures that the monopoly supplier will not abuse its monopoly position to compete outside its rights inconsistently with the specific commitments.

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impacts of subsidies' (Joint report, 22 April 2022) <https://www.wto.org/english/news_e/news22_e/igo_22apr22_e.htm> and <https://www.wto.org/english/news_e/news22_e/scm_06may22_e.htm > accessed 03 March 2023.

[916] Rafael Leal-Arcas (ed.) *International Trade ans Sustainability Perspective from Developing and Developed Countries* (Springer 2022) 22.

[917] Footnote 1 of the GATS.

[918] Article V (1) of the GATS.

[919] Article VIII (5) of the GATS.

[920] Article VIII of the GATS.

Finally, Members are not permitted to impose restrictions on international transfers and payments for current transactions relating to their specific commitments. Thus, the meaning of international transfer and payments includes only the cross-border transactions between residents and non-residents. As long as liberalization of trade-in service is a major goal of the GATS, then the term "restrictions" should have a wide interpretation to include any measures that could negatively affect the transactions at hand.[921] For instance, exchange restrictions and discrimination currency arrangements. However, the GATS sets forth some exemptions to this rule, such as the non-discriminatory restrictions in the case of safeguarding serious balance-of-payments and external financial difficulties or threat thereof,[922] any restriction covered by the general exceptions and justified on the basis like protection of public moral, health, animals, and safety, etc.,[923] and concerning current transactions only, any restriction that is consistent with the rights and obligations of such Member under the IMF Agreement.[924]

5.1.4. Specific commitments

The GATS requires all Members to enter into negotiation with the aim of achieving a higher level of liberalization and to reduce or eliminate the adverse effects of any measures on trade in the service sector.[925] Through these rounds, all Members are required to create schedules of specific commitments that may differ from one Member to another. In other words, the specific commitments are additional obligations (limitations, restrictions, or requirements) imposed by Members to provide market access and national treatment for the service activity indicated in the schedules. That means these commitments shall be implemented only in sectors and sub-sectors mentioned in the schedules.[926]

By way of explanation, imagine a scenario in the telecommunication sector where a country decides to open up its market to foreign service providers by making specific market access commitments. What this essentially means is that the country agrees to allow

[921] Preamble of the GATS.
[922] Article XIII of the GATS.
[923] Articles XIV and XIV bis of the GATS.
[924] Article XIII (2) of the GATS.
[925] Article XIX of the GATS.
[926] Article XX of the GATS.

foreign telecommunication companies to operate in its market on an equal footing with domestic service providers. To support the growth and development of the domestic telecommunication industry, the government may offer subsidies in various forms. For instance, they could provide direct financial assistance, tax breaks, or even low-interest loans to domestic companies for deploying or upgrading their network infrastructure. These subsidies are intended to give domestic service providers a competitive edge by reducing their costs or enhancing their capabilities. However, it is important to note that in the context of the specific market access commitments, it becomes crucial for the government to ensure that these subsidies are not discriminatory. This means that foreign service providers should also have the opportunity to avail themselves of similar subsidies if they meet the necessary criteria. By treating both domestic and foreign providers fairly, the country upholds the principle of equal treatment and fosters a level playing field for all participants in the telecommunication market. In such a case, the member state would need to justify the subsidies and show that they are not trade-distorting. Accordingly, specific commitments themselves do not constitute subsidies, as they do not involve a financial contribution or other form of benefit provided by a government.

The schedules of specific commitments must indicate the mode of supply for which limitation is imposed and must include the following information: "*(a) terms, limitations, and conditions on market access; (b) conditions and qualifications on national treatment; (c) undertakings relating to additional commitments; (d) where appropriate the time-frame for implementation of such commitments; and (e) the date of entry into force of such commitments*".[927] By adopting these schedules, Members secure a certain level of market access and national treatment regarding specific service sectors and undertake not to impose any other restriction or limitation to the services in question. For the purpose of economic stability, these commitments can be modified or withdrawn only after three years from entering into force of the commitments.[928] For example, Hungary provides for a limitation on market access regarding insurance services. Hungary imposes two restrictions on foreign insurance services a) it may only be purchased by entrepreneurs carrying out

[927] Article XX of the GATS.
[928] Article XXI of the GATS.

international business activity specified in the legal rules on foreign exchange; b) only insurance events occurring abroad can be insured. These restrictions cover two modes of supply the cross-border supply and consumption abroad.[929]

5.1.4.1. Market access

With the aim of regulating market access in the goods sector, the government usually refers to imposing various tariff barriers. On the contrary, the governments are limited to use tariff barriers on trade in service, due to the intangible nature of the service that enables it to escape from physical control on the borders. Therefore, introducing the market access obligation in the GATS had a crucial importance in this regard.[930] The market access obligation does allow the Members to levy quantitative restrictions on services listed in the schedule. While doing so, the Members must not provide less favorable treatment to any Members with regards to these restrictions. Thus, all Members are equal before the non-tariff restrictions contained in the schedule, and no service or service supplier of any member can enjoy a lower restrictive treatment than that mentioned in the schedules. This non-discrimination obligation is expressly stated in Article XVI (1) of the GATS. Moreover, every Member does not adopt or maintain any restriction under this Article, which means that this Member provides full access to its market.

Bearing in mind two pertinent points, if the market access commitments are related to cross-border services where the movement of capital is an essential element for the service itself, then the Member concerned does not have the right to forbid such movement. By the same speaking, when the commitments are made in commercial presence services, then the Member in charge must permit the transfer of related capital into its territory.[931]

Although the GATS allows the Members to force some restrictions on their market access, they cannot enjoy unlimited liberty as long as some types of restrictions are not permitted to be maintained or adopted by any Member. Generally, all the measures imposed to limit

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[929] WTO Trade in Service, Hungary Schedule of Specific Commitments, Supplement 3' (Report GATS/SC/40/Suppl.3, 1998) 3. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC40S3.pdf&Open=True > accessed 10 May 2023.
[930] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 371.
[931] Footnote 8 of the GATS.

market access must be administered in a reasonable, objective, and impartial manner.[932] For instance, limitations on the number of service suppliers or the total value of service transactions or assets in any form (numerical quotas, monopolies, or the requirements of Economic Needs test, etc.), limitations on the total number of service operations or the total quantity of service output; limitations on the total number of natural persons that may be necessarily employed in a particular service sector in any of the above-mentioned forms; measures which restrict or require specific types of legal entity or joint venture for supplying a service, or limiting the maximum percentage of foreign capital in foreign shareholding or total value of foreign investment.[933]

It is worth mentioning that the Economic Needs test mentioned in Article XVI(2) of the GATS is one of the forms through which the quantitative restriction can be imposed by the Member. Unfortunately, this test has no clear definition in the GATS.[934] According to the economic literature, the Economic Needs test refers to the question of whether or not the demand of the concerned market for a specific service will create an over-supply of that service. In other words, does the market have the capacity to accept a foreign service or suppliers without causing a surplus?[935]

In practice, on the one hand, Canada, for example, determines the criteria of the Economic Needs test concerning courier communication services that may include the level of service, if the market conditions need to expand the services, willingness, and ability of the applicant to provide proper service.[936] On the other hand, the Members' schedule contains various alternative terminologies for this test. For instance, Australia imposed a horizontal restriction that applies to all sectors regarding mode 4 of supply and requires that "*Specialists subject to individual compliance to labour market testing for periods of initial*

[932] Article VI of the GATS.
[933] Article XVI (2) of the GATS.
[934] WTO Council for Trade in Services, 'Economic Needs Tests' (Note by the Secretariat S/CSS/W/118 30 2001) 1.
[935] Markus Krajewski, *National Regulation and Trade liberalization in Services* (Kluwer law international 2003) 89.
[936] WTO Trade in Service, 'CANADA Schedule of Specific Commitments' (Report GATS/SC/16, 1994) 41. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC16.pdf&Open=True > accessed 11 April 2023.

stay up to a maximum of 2 years provided the total stay does not exceed 4 years".[937] Also, the United States subjected the establishment of hospitals to a "needs-based quantitative limits" test.[938] Accordingly, quoting the finding of the Council of Trade in Service in this regard "*These examples illustrate the difficulty in attaching a precise meaning to the concept of "economic needs". For that reason, the context of Article XVI would suggest a broad reading of the words "economic needs", and that ENTs be regarded above all as "tests" that condition market access*".[939]

5.1.4.2. National treatment

Generally, like the GATT, the national treatment principle in the context of GATS implies that domestic and foreign similar services and service suppliers shall be treated equally without any discrimination with regard to all laws and regulations, etc.,[940] and shall be subject to similar conditions of competition. However, the essential disparity between the GATT and GATS regarding the National Treatment principle is that in the context of the former, this principle is a general obligation that applies to all goods sectors.[941] In contrast, the GATS inscribes this principle under specific commitments. That is to say, this principle does not apply in all service sectors, but only in sectors listed in the Members' schedule of specific commitments. In other words, the obligation to treat foreign services and suppliers similarly to national services and suppliers arises only with respect to sectors included in Members' schedules, then subject to any conditions and limitations provided for therein.[942]

Moreover, as Max highlights, the national treatment should exist regarding the supply of services which includes "the production, distribution, marketing, sale, and delivery of a

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[937] WTO Trade in Service, 'AUSTRALIA Schedule of Specific Commitments Supplement 2' (Report GATS/SC/6/Suppl.2, 1995) 4. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC6S2.pdf&Open=True > accessed 11 April 2023.

[938] WTO Trade in Service, 'THE UNITED STATES OF AMERICA Schedule of Specific Commitments' (Report GATS/SC/90 15 April 1994) 69. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC90.pdf&Open=True > accessed 11 April 2023.

[939] WTO Council for Trade in Services (n 934) 6.

[940] Article XVII (1) of the GATS states "in respect of all measures affecting the supply of services". The meaning of term "measure" includes " any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form" Article XXVIII(a) of the GATS.

[941] Article III of the GATT.

[942] Article XVII (1) of the GATS.

service", but excludes the mere consumption of services.[943] He justified his finding based on the comparison between the expressions "supply of service" and "trade-in service" as defined under Article XXVIII of the GATS when the latter is broader and includes not only the purchase, and payment of services but also their use.[944]

Finally, the Member is not required to meet this obligation in sectors that fall outside its commitments. Otherwise, the member fails to fulfill this obligation if it provides less favorable treatment in the sense that modifies the conditions of competition in favor of services or service suppliers of a Member in comparison to similar services or service suppliers of any other Member.[945] That means the Member may fulfill this obligation even if it provides more favorable treatment of foreign services or suppliers. Thus, under the GATS, Members are permitted to provide more favorable treatment to foreign service suppliers than what they provide to domestic service suppliers, as long as such treatment does not violate other GATS obligations.[946] For example, a country may decide to offer a special tax incentive or regulatory exemption to foreign service suppliers to attract foreign investment and promote economic growth. In this case, there is no breach of national treatment obligation, if it does not modify the competition in favor of domestic service or suppliers.[947] This would be considered more favorable treatment than what is provided to domestic service suppliers. This example shows the importance of the anti-subsidy set of rules in service sectors with the absence of any subsidy provision in the GATS.

Additionally, the favorable treatment might be totally identical or totally different. This non-discrimination formula finds its root in the finding of the Panel in *the US—Section 337*, which held that "*there may be cases where the application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a*

[943] Rüdiger Wolfrum and Peter-Tobias Stoll (n 879) 399.
[944] Article XXVIII (c) of the GATS.
[945] Article XVII (3) of the GATS.
[946] Peter Van den Bosshe, *the Law and Policy of the World Trade Organization; Text, Cases, and Materials* (Cambridge University Press 2005) 363.
[947] Ibid 369.

contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in-fact no less favourable".[948]

5.2. A Comprehensive analysis of the negotiation of service subsidies: key considerations and practical suggestions

As a general rule, the preamble of all legal instruments, including treaties and agreements, highlights and emphasizes the purposes and objects of the legal text entirely.[949] In connection to this point, the Appellate Body stated that "*As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement*".[950] Thus, all the provisions contained in the GATS along with ongoing negotiation rounds shall be understood and conducted as aiming at achieving progressively higher levels of liberalization of trade-in service, securing a balance of rights and obligations, and giving due consideration to the needs of developing members to expand their contribution to the trade-in service.[951] That being the case of Article XV of the GATS that should be understood and enforced to progressively elevate the degree of liberalization of trade-in service.

During the negotiation round of the GTAS, participants acknowledged that subsidies are likely to harm trade-in services like in the case of trade-in goods.[952] In a meeting of the

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[948] GATT Panel Report, 'United States - Section 337 of The Tariff Act of 1930' (Report L/6439 - 36S/345, 1989) para. 5.11. < https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87tar337.pdf > accessed 14 April 2023.

[949] According to the Oxford Public International Law "*A treaty's preamble defines, in general terms, the purposes and considerations that led the parties to conclude the treaty*". <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1456#:~:text=A%20treaty's%20preamble%20defines%2C%20in,'Conscious%20of'%2C%20etc> accessed 21 June 2023.
Additionally, Article 31 of the Vienna Convention on Law of Treaties considers the preamble as integral part of the treaty and main element for the purpose of treaty interpretation. Public international law gives the preamble a limited legal power, thus it does not create any legal obligations but serves as introductory part that shows the intents and motivations of the parties behind concluding the agreement. Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, and Nikolai Wessendorf, (eds.) *The Charter of the United Nations: A Commentary*, (Vol I) (Oxford University Press, 2012) 13.

[950] *United States - Import Prohibition of Certain Shrimp and Shrimp Products,* [1996] WTO Appellate Body Report 12 October 1998, WT/DS58/AB/R, para. 153.

[951] Preamble of the GATS.

[952] Dorothy I. Riddle, Leni G. Sutcliffe, International Trade Centre, and Commonwealth Secretariat, *Business Guide to the General Agreement to Trade in Service* (International Trade Center, 2000) 21.

Working Party on GATS Rules[953] held in 2011, the representatives of India, Chile, and Mexico the clarity and specificity of the mandate outlined in Article XV. They emphasized that the language used in this Article was robust and obligatory, and "*contained an unambiguous recognition by Members of the potential trade-distortive effects of subsidies*".[954] Therefore, Article XV was articulated to call the Members to engage in negotiations to establish an international set of rules that prevent the predictable negative impact of subsidies on trade in the services sector. These negotiations may also examine the suitability of measures to counteract such effects. In the course of negotiations, greater consideration and flexibility should be given to the development programs of developing nations. To facilitate these negotiations, Members will share information regarding all subsidies that are relevant to trade-in services and that they offer to their domestic service providers.[955] This information exchange helps to promote transparency and accountability in the use of subsidies, and it enables Members to identify potentially trade-distortive subsidies.

Moreover, every Member has the right to initiate consultations with another Member if it is convinced that the subsidy provided by the latter is having a negative impact on the former's interests. One of the primary concerns in this context is how the Member can demonstrate the existence of a subsidy or its adverse effects with the absence of a definition of subsidy in service sectors or any other rules that govern this matter. Although the ASCM belongs to the goods sector and has no competence in the service sector, the question that arises here is whether or not the DSB or the Members refer, theoretically, to the ASCM to assess the challenged measure. That is to ask are the provisions of the ASCM sufficient and adequate to regulate the service subsidies? shall the Members adopt similar provisions of the ASCM to control the service subsidies? These questions are to be discussed in this

[953] The Working Party on GATS Rules was assigned, by the Council on Trade of Service, to carry out the negotiating mandates under the GATS. Besides the subsidy negotiation mandate (Article XV), two other mandates are included emergency safeguard measures (Article X), and government procurement in services (Article XIII). WTO Official Website, 'WTO Negotiation on GATS Rules' <https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm > accessed 22 June 2023.

[954] Working Party on GATS Rules, Report of The Meeting Held on 14 February 2011 (Report S/WPGR/M/72 24 March 2011) 5. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/S/WPGR/M72.pdf&Open=True > accessed 22 June 2023.

[955] Article XV of the GATS.

segment. It also highlights the challenges around regulating service subsidies in line with the need for further discussion and exploration of potential solutions.

The Working Party held its last meeting in October 2016.[956] During this meeting, the Chairman, Mr. Gustavo Héctor Mendez of Argentina, noted that there had not been any significant deliberations on subsidies for a while. Afterward, he invited members to share their opinions, but none of them spoke up. Thus, he suggested that the Working Party should discuss this matter at its upcoming meeting.[957]

5.2.1. Discussion on definition of service subsidies

At prior meetings, the Working Party noticed greater discussions in the area of subsidies. Pursuant to the obligation of information exchange on subsidies under Article XV(1) of the GATS, the Working Party received reports from a total of 18 Members, which included the European Union (considered as a single member) until February 2011.[958] The first step of negotiation aimed at formulating a provisional definition of subsidy in order to facilitate the information exchange process. This working definition was proposed jointly by delegations of Chile, Hong Kong, Mexico, Peru, and Switzerland in 2005. It mainly relied on Article 1 of the ASCM.[959] This definition covers any government action that provides a financial contribution or benefit to a specific service supplier or group of service suppliers, and that is contingent upon the use of domestic over imported services.[960] As the representative of Hong Kong, China declared it is not necessary, at this stage, to have a commonly agreed definition of service subsidies for information exchange. That does not

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[956] WTO Official Website, 'WTO Negotiation on GATS Rules' <https://www.wto.org/english/tratop_e/serv_e/gats_rules_negs_e.htm > accessed 22 June 2023.

[957] Working Party on GATS Rules, 'Report of The Meeting Held on 5 October 2016' (Report S/WPGR/M/91, 11 November 2016) 2. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/S/WPGR/M91.pdf&Open=True > accessed 23 June 2023.

[958] Working Party on Gats Rules, 'Report of The Meeting Held on 24 November 2010', (Report S/WPGR/M/71, 11 February 2011) 8. <https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx?filename=t%3A%2Fs%2Fwpgr%2Fm71.doc& > accessed 23 June 2023.

[959] Working Party on GATS Rules, 'Report of The Meeting of 21 September 2005' (Report S/WPGR/M/53, 30 September 2005) para. 42. < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=59006,74979,51509,40673,68349,77435,52581,944,85121,63154&CurrentCatalogueIdIndex=0&FullTextHash= > accessed 23 June 2023.

[960] Kerm Alexander and Mads Andenas (eds.) *The World Trade Organisation and Trade in Service* (Martinus Nijhoff, 2008) 139.

mean the proposed definition should be so narrow and limited to two service sectors as the US and Turkey[961] suggested. Instead, it should be wider and cover at least five self-selected sectors[962] excluding the public services (such as healthcare and education).[963] Moreover, Pakistan put forward a general definition "*Subsidies could entail specific financial contributions or concessions made by a government at federal, state, provincial or lower levels to an entity providing services locally or exporting and competing with entities not enjoying these benefits. The definition would only target sectors where Members had already made commitments*".[964]

Additionally, Switzerland confirmed the provided definition as long as it is intended to collect information on service subsidies. It emphasized that a more comprehensive definition is required for developing the disciplines to avoid the distortion effects of subsidies in the services sector. In particular, the export subsidy in which the distortion effect was inherent.[965] Thus, all measures that can be deemed as export subsidies must be prohibited.[966] According to the limited accessible information about the meeting deliberations, this proposal is discussed. Switzerland proposed numerous essential remarks on service subsidy disciplines different from the ASCM.

Firstly, the definition of service subsidy doesn't need to include the case of delegation of power as a form of granting a subsidy as long as this matter is already considered within Article I(3)(a)(ii) of the GATS. This Article defines the term "measure by Members" as every measure that is conducted by "*non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities*". Then, the new subsidy disciplines would automatically govern service subsidy provided through delegation of powers because these new disciplines will be a subsidiary agreement of the GATS like in

[961] Working Party on GATS Rules, 'Report of The Meeting of 21 September 2005 (n 959) para. 46.
[962] Working Party on GATS Rules, 'Report of The Meeting of 6 October 2009' (Report S/WPGR/M/65, 5 November 2009) para. 21. < https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=100557,68726,69738,101222,75181,81626&CurrentCatalogueIdIndex=0&FullTextHash= > accessed 24 June 2023.
[963] Working Party on GATS Rules, 'Report of The Meeting of 21 September 2005 (n 959) paras. 43-44-45.
[964] Ibid para. 48.
[965] Working Party on GATS Rules, 'Report of The Meeting of 6 October 2009' (n 959) para. 17.
[966] Ibid para. 24.

the case of the affiliation of the ASCM to the GATT.[967] Unfortunately, neither the US nor Japan were satisfied with the proposal and required further explanation on how services differed from goods after discussing the implications of each mode of supply for subsidies.[968]

Arguably, the potential firm definition of service subsidy should cover all service sectors. That is because the GATS included the subsidy provision (Article XV) within the general obligations that contain all sectors with two exceptions as services supplied, regardless of the sector, in the exercise of governmental authority (public services) and all related traffic rights services. Furthermore, as discussed in the third chapter, the ASCM requires three elements for subsidy to exist and a fourth element (specificity) to be challenged. Regarding the forms of financial contribution as a first element, the delegation of Chile emphasized at the earliest communication that the service subsidies, unlike the goods subsidies, may take various forms other than direct and indirect financial contributions. For instance, the incentive for commercial presence is enacted in a legal instrument on direct foreign investment.[969]

However, the author of this dissertation argues this point. Incentives on direct foreign investment (which can exist through Mode 3 of supply) should not be deemed as a "subsidy" that can be challenged unless they entail a transfer of financial resources from the government, directly or indirectly, to private businesses. In other words, the incentives to be subject to anti-subsidy provisions should be embodied in a financial form such as tax exemptions, grants, etc., because the non-financial incentives that merely simplify and facilitate the process of obtaining permits, licenses, or visas and reduce the administrative burden are generally considered to be procedural or administrative measures in the

[967] Working Party on GATS Rules, 'Report of The Meeting Held on 27 April 2010' (Report S/WPGR/M/68, 28 May 2010) para. 25. <https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=58054&filename=Q/S/WPGR/M68.pdf > accessed 24 June 2023.
[968] Ibid paras. 20- 22.
[969] Working Party on GATS Rules, 'Communication from Chile: The Subsidies Issue' (Report S/WPGR/W/10, 2 April 1996) 2. <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/S/WPGR/W10.pdf&Open=True > accessed 24 June 2023.

country's long-term economic development and competitiveness rather than a prohibited or actionable subsidy in the traditional sense.[970]

Case in point, the UAE furnishes over 40 diverse free zones to investors, allowing expatriates and foreign investors to have complete ownership of their companies. These free zones are recognized for their exceptional infrastructure, as well as specialized services that streamline workflows and minimize the time and effort required to conduct business. All these administrative and procedural incentives serve the economic development strategies. However, it is worth mentioning that the foreign investors in these free zones enjoy 100% Exemption from Corporate and Income Taxes and 100% Exemption from Customs Duty.[971] Hence, someone can claim that this tax exemption available under this program might constitute a financial contribution in the form of "*government revenue that is otherwise due is foregone or not collected*", then it might be challenged as a subsidy if the other elements have been proven to exist.

Additionally, Chile highlighted the significance of distinguishing between permitted subsidy programs with legitimate economic and social development objectives and programs aimed at obtaining an unfair trade advantage.[972] Thus, the argument of Chile might be given considerable weight as a call for a new set of rules that contain an illustrative list of permitted subsidies, like the EU State aid law. For instance, subsidies provided for social programs, educational programs, or subsidies granted to promote the economic development of regions where the prevailing standard of living is exceptionally low or where there is a significant level of underemployment or other subsidies that aim at offering equal opportunity to the more disadvantaged sectors. Putting it into practice, Switzerland in its response to the questionnaire on the information exchange mandate in December 2005, excluded some sectors, namely educational, environmental, and health-

[970] Alex Hathaway, Jorge Martinez-Vazquez, Chris Thayer (eds.) *Tools for State and Local Fiscal Management: From Policy Design to Practice (Studies in Fiscal Federalism and State-local Finance series*) (Edward Elgar Publishing, 2022) 350-351.
[971] United Arab Emirate Ministry of Economy Official website, ' More Than 40 Multidisciplinary Free Zones in the UAE' <https://www.moec.gov.ae/en/free-zones > accessed 27 June 2023.
[972] Working Party on GATS Rules, 'Communication from Chile: The Subsidies Issue (n 969) 2.

related services, from the scope of notification as long as they should be allowable subsidies.[973]

Therefore, as evidenced by reviewing the service subsidies that have been notified by Members to the Working Party, it can be argued that Article 1 of the ASCM encompasses all possible forms through which service subsidies may be granted. Although Members have relied on the mentioned definition to report their service subsidies in the course of the information exchange mandate, there has been no indication to suggest the inclusion of any additional forms of financial contribution.

The second element is the granting body. The financial contribution must be granted either directly by "the government or public body" or indirectly through "directing or entrusting a private entity". To circumvent conflicts that arose due to the ambiguous meaning of "public body" as seen in the context of the ASCM, a proper definition of public body should be included in the new agreement. Thus, the negotiators ought to take cues from the AB's findings on this matter, which are discussed thoroughly in the third chapter. Also, they can learn from the definition of public entity as provided in Article 5(c) of the annex on financial services of the GATS.[974]

Consequently, this dissertation implies the following definition of "public entity" as an entity that meets either of these criteria: (i) it is owned or controlled by a Member government and primarily performs government functions or activities for governmental purposes, or (ii) it is a private entity that performs functions typically carried out by government through the delegation of authority when exercising those functions.

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[973] Working Party on GATS Rules, 'Communication from Switzerland, Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate' (Report S/WPGR/W/16/Add.5, 22 December 2005) 3- 4. < file:///C:/Users/shady/Downloads/10%20Informationsaustausch%20%C3%BCber%20Subventionen%20(englisch).pdf > accessed 22 June 2023.

[974] "*Public entity" means (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions*." Annex on financial services of the GATS.

To illustrate this with an example, consider a scenario in the context of healthcare services. Suppose there is a government-funded hospital that operates as a public entity. The hospital is owned and controlled by the government, and its primary purpose is to provide healthcare services to the public. It receives government funding and operates under the authority and oversight of the government. In this case, the government-owned hospital meets the criteria of a "public entity" under the first part of the definition. Its ownership, control, and primary function of providing healthcare services align with the definition of a public entity.

Now, consider a different scenario. Suppose there is a privately-owned clinic that has been granted a contract by the government to provide healthcare services to a specific community. The clinic receives funding from the government and is authorized to deliver healthcare services to the designated population on behalf of the government. Even though the clinic is privately owned, it performs a function typically carried out by the government. In this case, the privately-owned clinic would also meet the definition of a "public entity" under the second part of the definition. Its delegation of authority and provision of healthcare services on behalf of the government qualify it as a public entity.

However, the situation would be quite different if this privately-owned clinic, acting as a public entity, offered financial assistance in the form of grants to a different privately-owned clinic in the same healthcare sector. This financial contribution is provided with the intention of giving the recipient clinic an unfair advantage over its competitors, distorting competition in the market. That is to say, this financial contribution might be classified as a "Subsidy provided by a public entity" because the financial support, but not authority delegation, has moved from the delegated privately-owned clinic to another private clinic.

In light of the "benefit occurred to the recipient" being considered as a third element. The ASCM does not explicitly define the term "benefit" or lay out a specific method for calculating its amount. It offers comprehensive guidelines for such calculations. Hence, based on the interpretation which has been strongly supported by both the Panel and the AB, the term "benefit" should refer to economic advantageous resulting from a financial contribution by a government, which places either the direct recipient or the actual

beneficiary in a better economic position than they would have been in without such contribution. Accordingly, a comparison of the economic situation of the subsidized service provider before and after granting the subsidy should be conducted.[975]

However, the delegation of Japan opined that the rules governing the calculation of benefits and the implementation of countervailing measures cannot be applied directly from goods to services.[976] Then, the general approach demands to collect data on the costs of the subsidy program, including the amount of funding provided and any associated administrative costs. Plus, additional data on the benefits of the subsidy program, including any economic impacts that can be attributed to the program. Ultimately, compare the costs and benefits of the subsidy program to determine whether it is generating a net benefit. This may involve conducting a cost-benefit analysis or other types of economic analysis. Due to scrutiny of concrete examples of subsidies having distortive effects on trade in services, the methods used to calculate subsidies are still an open question and require further research.

As previously discussed, one of the essential characteristics of the WTO subsidy law, unlike the EU law, is that it does not have a general prohibition on subsidies. Instead, access to subsidy programs must be limited, either in-law or in-fact, to certain private enterprises among other competitors in order to be able to distort the competition in the market, then to be prohibited. On one hand, the ASCM sets forth an irrebuttable presumption on the specificity of export subsidies and domestic content subsidies. Then, it enfolds them into the category of prohibited subsidy. On the other hand, positive evidence is required by the complaining Member on the specificity of the actionable subsidy.[977]

Moreover, the ASCM provides a robust rule in the case of regional subsidies that balance between protection of competition and regional economic and social development purposes. Hence, the specificity of a subsidy depends on the granting authority, with a subsidy granted by a regional government to all eligible enterprises within its jurisdiction

[975] For further discussion, see chapters 3 and 4.
[976] Working Party on GATS Rules, 'Report of The Meeting Held on 14 February 2011' (n 954) para. 37.
[977] Article 2 of the ASCM. For further discussion, see chapter 3.

considered non-specific, whereas the same subsidy granted by the central government would be considered specific.[978]

In practice, the Norwegian Industrial and Regional Development Fund and 15 county municipalities provide grants or loans to enterprises located in assisted areas for regional policy. The policy objective is to create jobs and promote permanent and profitable business activity in areas with special employment problems or low economic activity. The assisted areas are divided into three zones with specific aid ceilings. For instance, the highest aid is granted to zone A with the maximum aid ceiling of 35% of the total cost of the projects. In-law, all service providers and sectors are eligible for this program except primary production in agriculture, forestry, fishing, and oil extraction or refining activities.[979]

Debatably, this subsidy program would constitute a specific subsidy under the ASCM, if it were applicable, either under Article 2(1)(c) if it is proven that this program is specifically granted to certain enterprises among others which only, in-fact, meet the required criteria; Or under Article 2(2) if the subsidy is granted by the central government but not by the county municipality because it is limited to certain enterprises located within designated geographical regions under its jurisdiction. Unfortunately, the subsidy has been in effect since 1966. Norway claimed that its trade effects are unknown due to the lack of statistical data.[980] In light of the above, it is possible to argue that the specificity rule under the ASCM could find its place within the new agreement on service subsidies.

5.2.2. Discussion on categorization of service subsidies

The Swizz proposal focuses on contingent export subsidies and ignores the subsidy measures that favour the use of domestic over imported services. There are two pertinent justifications. On the first side of the coin, export subsidies have a multilateral dimension because they do not only have distorting effects on trade between the granting Member and

[978] *United States - Countervailing Duty Measures on Certain Products from China* [2012] WTO Appellate Body Report 18 December 2014, WT/DS437/AB/R, paras. 4.165- 4.166.
[979] Working Party on GATS Rules, 'Communication from Norway, Response to the Questions Relevant to the Information Exchange Required Under the Subsidies Negotiating Mandate' (Report S/WPGR/W/16/Add.1, 23 June 1997) para. 2.2.
[980] Ibid para. 2.2.7.

the effected Member but also could affect trade with other Members. On the flip side of the coin, export subsidies should be given higher consideration than the case of favouring the use of domestic over imported services since the latter is already governed by Article XVII of the GATS. Thus, Members that had made specific commitments are prohibited from maintaining them.[981] Additionally, Korea encouraged the Swizz export proposal and called for a more comprehensive discussion in line with the information provided by the Member.[982]

Beyond a shadow of a doubt, to achieve a solid and comprehensive set of rules on service subsidies, it would be preferable to create a unified agreement that regulates all aspects related to this matter. Thus, the author of this dissertation discusses the possibility of the new agreement taking inspiration from both the ASCM and EU State aid law and adopting its best practices in the context of the categorization of subsidies to increase its effectiveness. Accordingly, service subsidies can be broken down into three categories based on their trade-distorting effects.

At the top of the list, there is "permitted subsidy". Many of the WTO Members, such as Switzerland[983] and Chile[984], excluded some subsidies provided in certain service sectors from the notification mandate under Article XV GATS. That may indicate the desire of the negotiators to gather these types of subsidies in the scope of permitted category, like the EU State aid law,[985] due to their social and development purpose in line with unknottable trade-distorting effects. Thus, the Members might be allowed to grant the following subsidies (a) subsidies having a social character, granted to individual consumers in the service sector, could include subsidies provided to low-income households for essential services such as healthcare or education. Such aid would need to be granted without discrimination related to the origin of the services concerned, to ensure fair competition between service providers; And (b) subsidies to make good the damage caused

[981] Working Party on GATS Rules, Report of The Meeting Held on 27 April 2010 (n 967) para. 24.
[982] Ibid para. 17.
[983] Working Party on GATS Rules, Communication from Switzerland (n 973) 3- 4.
[984] Working Party on GATS Rules, Communication from Chile, The Subsidies Issue (n 969) 2.
[985] For instance, Aid for research and innovation, regional development aid, training aid, employment aid, aid in the form of risk capital, environmental aid. Alberto Heimler and Frédéric Jenny, 'The Limitations of European Union Control of State Aid' (2012) 28 (2) Oxford Review of Economic Policy, 347, 354-356.

by natural disasters or exceptional occurrences in the service sector. It could include financial assistance provided to businesses in the tourism sector that have been impacted by a natural disaster such as a hurricane or earthquake or the most current one Covid-19 Crisis. This aid would be intended to help these businesses recover from the disaster and resume their operations, supporting the overall service economy in the affected region. In 2020, the 27 EU Member States granted €227.97 billion to assist businesses, in particular healthcare, tourism, and transportation sectors, seriously affected by the coronavirus pandemic to remain viable.[986] Bearing in mind that the period and amount of these subsidies must be limited to offset the loss that occurred due to the disaster and not to place the beneficiary in a better economic situation than it was before.[987]

Learning from the EU State aid law and not giving full discretion to the Members, the Members should be obliged to notify all subsidies granted under this category to the Council of Trade in Service which should circulate them to all Members, one month before entering into force. The pre-notification will allow the Members to review the subsidy at hand and examine its compatibility with the mentioned purposes. If the notifying member has not received any rejection, which must state the reasons and supportive evidence, it, then, should be permitted to implement the subsidy program. Otherwise, it must enter into consultation with the rejected member to clarify any concerns. Accordingly, the essential difference between the suggested permitted category and the non-actionable category stipulated in ASCM is the non-provisional implementation. Thus, it would not have an expiry date.

"Actionable subsidy", from a theoretical perspective, should include every subsidy on which the affected Member has submitted positive evidence on its specificity and adverse effects. While examining the specificity, some factors should be considered, such as the limited number of recipients of subsidy, whether the authority was neutral regarding the criteria to grant the subsidy, unfair distribution of the subsidy where some recipients may

[986] European Commission, 'State Aid Scoreboard 2021' (report policy and strategy, 2022) 22. < https://competition-policy.ec.europa.eu/system/files/2023-04/state_aid_scoreboard_note_2021.pdf > accessed 05 May 2023.
[987] Article 107(2) TFEU.

receive a disproportionate or inequitable share of the funding, etc.[988] In reality, the Swiss proposal did not contain any provisions regarding the adverse effect or injury of subsidy. That is because the parallel provisions in the ASCM cover the actionable subsidies but not the export subsidy that is the cornerstone of the proposal.[989] In the same speaking, the negotiators slightly addressed the issue of the distortive effects resulting from the measure at hand.[990] Then, the US, to facilitate and enhance the negotiations on service subsidies, pointed out that the mere general information on subsidy measures is not sufficient to develop adequate discipline on service subsidies. Instead, it is more appropriate to fully understand the nature and extent of the measures. Therefore, the reporting Member should, among other several questions, answer these two essential questions

> What trade-distortive effects have services and service suppliers encountered due to subsidies not subject to the provisions of Articles II and XVII of the GATS" and "Why has it not been possible to deal with these problems, if they involve discriminatory subsidies, through negotiating Article XVII commitments on national treatment?[991]

Such examination shall include the volume of the subsidized service, its effects on the price in the relevant market for the like services, and its impact on the market as a whole.[992] Disappointingly, there was no valuable notification on subsidies' adverse effects in Members' reports that allows for examining the implementation of part III of the ASCM to service subsidies.

The third category is "Prohibited Subsidies" which should include, like the ASCM, subsidies with a high level of trade-distorting effects. After examining the Members' communications, it is widely agreed that subsidies that are linked to export performance or the use of domestic services over imported ones are considered specific subsidies. As such, they can have considerable distortive impacts on international trade. More precisely, Members, like Pakistan, highlighted that solid subsidy disciplines should go beyond a general definition of subsidies. They believe that having a clear and commonly accepted

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[988] Rüdiger Wolfrum, Peter-Tobias Stoll, and Michael Koebele (eds.) (n 249) 879.
[989] Working Party on GATS Rules, Report of The Meeting Held on 27 April 2010 (n 967) para. 24.
[990] Working Party on GATS Rules, Report of The Meeting of 6 October 2009 (n 962) para. 25.
[991] Working Party on GATS Rules, 'Communication from The United States, GATS Article XV (Subsidies): Questions for Members by the United States' (Report S/WPGR/W/59, 28 May 2010) 1.
[992] Rüdiger Wolfrum, Peter-Tobias Stoll, and Michael Koebele (eds.) (n 249) 897.

definition for export subsidies is of utmost importance in ensuring effective regulations and addressing potential distortions in international trade. For instance, suppose doctors and engineers receive subsidized education and then offer mode 4 service. In that case, it raises the question of whether the education subsidy they received can be classified as an export subsidy. Likewise, if companies that have affiliates in another country receive special tax incentives or start-up bonuses, it may be considered an export subsidy since the benefits might indirectly impact the global or holding company.[993]

In order for a precise determination of the spectrum of this category, significant consideration must be given to the "contingency test" as developed in Chapter 4. Thus, the subsidy should be considered prohibited only if there is positive evidence confirming that the grant of financial contribution by the government or public body is contingent, tied to, or conditional, upon either export performance or favoring domestic over imported services or service suppliers. To explain it differentially, a direct and solid connection between the grant of subsidy and export performance or supporting domestic use must be demonstrated. Based on the case law under the ASCM, the contingency can exist in-law or in-fact. Then, the new agreement on service subsidies should treat export and domestic content subsidies equally regarding the existence of contingency.

By applying this test to Pakistan's example, it can be noticed that the education subsidy granted to national universities can never constitute an export subsidy in mode 4 of supply. This is due to the fact that doctors and engineers, for instance, trained under this subsidy program have full discretion to offer their services domestically or internationally.[994] Additionally, export performance, logically, will not be a condition to grant this subsidy as long as it has never been heard about any governments that encourage financially skilled and well-educated nationals to work abroad. On the contrary, these professionals might be obliged to practice their profession within the state and contribute to the national economic

[993] Working Party on GATS Rules, Report of The Meeting of 6 October 2009 (n 962) para. 23.
[994] This argument was supported by the panel in a similar context. DS126- *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather,* Panel Report, para. 9.75.

growth for a fixed period of time.[995] Hence, the link between the subsidy granted and the export performance most probably does not exist.

Moreover, the four modes of supply render the number of services that can be exported fairly large.[996] Thus, another decisive point that should be discussed is the meaning of export subsidies within the context of four modes of supply. In particular, the interaction between Modes 1, 2, and 3 can be complex. For example, a company may use Mode 3 to establish a branch office in another country in order to provide services to consumers in that country. It might also supply services to customers in other countries through cross-border transactions (Mode 1). Additionally, customers from another country might travel to that country, where the branch exists, to receive the service there (Mode 2). In this way, Modes 1, 2, and 3 can be complementary and mutually reinforcing.[997]

Let us recall the example of Free Zone areas which are designated within the UAE where foreign businesses can operate with 100% ownership, tax exemptions, and other incentives. Undoubtedly, free zones are not unique to the UAE and are a common practice in many countries around the world. The essential aim of the free zone can vary depending on the country. Some common objectives include attracting foreign direct investment in the form of companies, promoting national economic growth, and diversifying the economy.[998] The scenario would be that the foreign bank will offer its financial services within the UAE by establishing a branch in the free zone area (Mode 3). Then, the free zone bank might also export its services through cross-border transactions (Mode 1). The question that arises in this regard is whether the tax exemptions granted by the financial free zone authority are considered export subsidies. The answer is although free zones give the opportunity for the companies to increase their exports, the mere fact that the export has been increased is not

[995] OECD, *Equity and Quality in Education: Supporting Disadvantaged Students and Schools* (OECD publication, 2012) 24-25.
[996] See the tables that shows the commonly exported services (pp. 21-22) and the most common modes of supply used in exporting different types of services (p. 6). International Trade Center, *All about Promoting Trade in services: A Complete Handbook* (International Trade Center UNCTAD/WTO, 2007).
[997] Working Party on GATS Rules, 'Communication from Argentina and Hong Kong, China, Development of Multilateral Disciplines Governing Trade Distortive Subsidies in Services' (Report S/WPGR/W/31, 16 March 2000) 5.
[998] Thomas Farole, *Special Economic Zones in Africa, Comparing Performance and Learning from Global Experience* (the World Bank 2011) 78.

sufficient to prove the existence of export subsidies according to footnote 4 of the ASCM. Instead, the "contingency" test must be implemented.

In practice, Article 4 of Federal Law No. (8) of 2004 Regarding the Financial Free Zones in the UAE states that "*(b) Companies and Establishments licensed in the Financial Free Zones shall not deal in deposit taking from the State's markets and shall not deal in the UAE Dirham*".[999] That means the services offered by branches of foreign banks established in these financial free zones are only limited to other companies established in the relevant free zone and to the international market. Thus, it can be argued that due to the restrictions on physical access to the domestic market along with limitations on the use of local currency, the banks are obliged to export their services in order to sustain their business and generate revenue. Unlike the above-mentioned example of education subsidies, the export contingency test in-law is positive only regarding Mode 1 of supply. As for Mode 3, the commercial presence is considered an import service from the UAE perspective based on the origin rule of service.[1000] Accordingly, from the viewpoint of the author of this dissertation, there should be no irrebuttable presumption on export contingency regarding the free zones, instead an examination must be conducted on a case-by-case basis. Besides, it is suggested that the issue of the separability of modes of supply provided by a single entity be included for discussion in WTO negotiations.

5.2.3. Discussion on remedies

Let us say that Country A provides a subsidy, in the form of a loan with less economically competitive terms, to a service provider in its country. It then allows the service provider

[999] Dubai Financial Service Authority (DFSA) Translation, Federal Law No. (8) of 2004 Regarding the Financial Free Zones. <https://www.dfsa.ae/application/files/6615/8211/4065/Federal-Law-No-8-of-2004.pdf > accessed 28 June 2023.

[1000] The rules of origin for services are not well-defined and are considered to be one of the most complex issues in the General Agreement on Trade in Services (GATS). In contrast to goods, where rules of origin have been extensively discussed, services have received much less attention. Although rules of origin for services can be derived from Article XXVIII of the GATS, the definition provided is considered to be inadequate as it primarily focuses on legal criteria, such as place of incorporation, rather than economic factors, such as where value is added. This has resulted in a lack of clarity in the rules of origin for services, particularly for Mode 3, which covers the commercial presence of a foreign service provider in another country. As services become an increasingly important aspect of international trade, it is essential to address this issue and develop clear and comprehensive rules of origin for services under the GATS. Johanna Jacobsson, *Preferential Services Liberalization: The Case of the European Union and Federal State* (Cambridge University Press, 2019) 69- 70.

to offer services in Country B at a lower price than domestic service providers. This subsidy is causing injury to the domestic service providers in Country B. Generally, the first phase of the dispute settlement procedure should start with consultation between the subsidizing member and the injured member upon a request from the latter. The aim of the consultation is to reach a mutually agreed solution. If it fails, the injured member may request the establishment of the panel. Regarding the remedies and dispute settlement mechanism, Switzerland in its proposal realized that the relevant provisions in the ASCM can be implemented in the service sector. However, due to the scrutiny of statistical data required to determine the amount of countermeasures, the proposal recommended the possibility of the Members to ask for some kind of compensation or suspension of concessions. The assistance in this regard should be requested from the Permanent Group of Exports under the ASCM.[1001]

However, the author of this dissertation mostly shares the same view with some remarks. To counteract the negative effects of the subsidized service, Country B should have the right to either:

- Require the subsidizing member to withdraw the subsidies. The withdrawal decision should not only have a prospective effect but also a retroactive effect as contented in chapter 4.[1002] Additionally, it might require the exporter, not the government, to undertake to modify the price of its services to the extent that convinces the investigation authorities that the distortion effect of the subsidy is diminished. In any event, price increases shall be equal to or lower than the amount of subsidy as long as such a lower price is sufficient to cease the injury to the domestic industry.[1003] Like the recovery decision of unlawful aid under the EU law, the purpose of this remedial measure is to re-establish the situation that used to prevail before granting the subsidy; or
- Apply provisional measures, like countervailing duties, the aim of which is to prevent injury during the investigation period. Thus, they can only be applied for a

[1001] Working Party on GATS Rules, Report of The Meeting Held on 27 April 2010 (n 967) para. 26.
[1002] Article XXIII (3) of the GATS.
[1003] Article 18(1) of the ASCM.

short period and after 60 days from the start of an investigation, when a preliminary affirmative determination has been made on subsidy, injury, and causal link. In order to meet its purpose and not to create a new trade barrier, the amount of countervailing duties should be calculated in accordance with the estimated amount of injury that occurred, but not the benefit obtained by the subsidized service. Generally, the injury is determined either based on the volume of the subsidy and its impact on the price of the like service, or the consequences impact, such as loss of business and revenue, on the like service supplier.[1004]

- If the DSB gives its recommendations on the dispute, then these recommendations and ruling have not been fulfilled, the prevailing (winning) member should have the right to retaliate by suspending or withdrawing some of its concessions related to the subsidized service sector. As discussed in Chapter 4, it cannot be achieved only by taking "appropriate" countermeasures as provided in the ASCM. Instead punitive countermeasures should be taken to put more pressure on subsidizing Members to comply with their commitments.

5.3. Conclusion

Definitely, the four modes of service supply cut off the smooth flow of the negotiation rounds, particularly regarding the definition of service subsidies, the origin rule of service, and direct or indirect beneficiaries. Several additional factors complicated the discussion on service subsidy disciplines, such as concerns regarding the suitability of countervailing duties, and frequent use of subsidies for the purpose of achieving public policy and social goals.[1005]

This chapter has undertaken a comprehensive analysis of the distinctive features of the GATS that set it apart from the GATT. It has also evaluated the feasibility and potential obstacles associated with extending the application of the ASCM to the service sector, from a legal standpoint. Based on the preceding discussion, it can be inferred that the provisions outlined in the ASCM can, for a certain point, be applied to the service sector. However, to

[1004] Article 15 of the ASCM, Article 13(c)(i) of the Agreement of Agriculture.
[1005] That was the opinion of India and two of its co-sponsors (Chile and Mexico). Working Party on GATS Rules, Report of The Meeting Held on 14 February 2011 (n 954) para. 27.

ensure optimal implementation, several modifications are recommended to enhance efficiency.

Regarding the definition of service subsidy, it can be asserted that Article 1 of the ASCM covers all possible forms of service subsidies, as demonstrated by the review of notifications submitted by Members to the Working Party. The existing definition of "public entity" has been utilized by Members to report their notifications. Thus, this dissertation proposes a fresh understanding of "public entity" that includes both government-owned or controlled entities that primarily carry out government functions or activities for governmental purposes, as well as private entities that perform government functions through delegation of authority. Moreover, the general approach for collecting data on subsidy programs includes information on costs, funding, administrative expenses, and benefits such as economic impacts. Comparing these costs and benefits can determine whether the program generates a net benefit, which may require conducting a cost-benefit analysis or other economic analysis. While the methods used to calculate subsidies remain an open question, the specificity rule under the ASCM could potentially be incorporated into a new agreement on service subsidies.

With respect to the classification of service subsidies, this dissertation suggests creating the "Permitted Subsidy" category, which allows certain subsidies in the service sector for social and developmental purposes. Thus, Members are not free of any restrictions, but a pre-notification period is required. The EU State aid law is used as a model in this discussion. Additionally, this discussion emphasizes the importance of the "contingency test" in precisely determining the scope of prohibited subsidies. Then, the new agreement on service subsidies should treat export and domestic content subsidies equally regarding the existence of contingency.

Finally, the dispute settlement procedure in the case of a subsidy causing injury to domestic service providers in a different country might follow the phases stipulated in the ASCM as Switzerland's proposal suggests. The author of this dissertation recommends that the injured member should have the right to require the subsidizing member to withdraw the subsidies, with retroactive effect, or apply provisional measures like countervailing duties.

In either case, the remedial measure should aim to re-establish the situation that existed before the subsidy was granted. However, if the DSB's recommendations are not fulfilled, the member that is adversely affected by the subsidized service sector may respond by implementing retaliatory measures, such as suspending or withdrawing concessions specifically related to the subsidized sector. These punitive countermeasures are intended to exert pressure on the members providing the subsidies, compelling them to adhere to their commitments and cease the subsidization practices.

Chapter 6: Conclusion

The WTO negotiators have recognized the detrimental effects that subsidies can have on international trade. In response, they have dedicated their efforts to establishing a comprehensive set of rules to regulate subsidies and foster fair competition in global trade. Among the significant agreements born out of these efforts is the ASCM. This Agreement does not only provide stringent guidelines for the controlled implementation of government subsidies but also offers a framework for effectively resolving related disputes.

While the ASCM stands as a pivotal international agreement governing subsidies in the realm of trade in goods, an intriguing gap emerges when considering subsidies in the context of trade in services. It is important to recognize that services play an increasingly vital role in the global economy, and subsidies have become a prevalent means of supporting service industries. Yet, the literature on the legal and economic dimensions of service subsidies remains surprisingly sparse, particularly in comparison to the fruitful research available on products subsidies.

This dissertation embarks on a compelling journey to address this knowledge gap, exploring the challenges and complexities surrounding the implementation and enforcement of the ASCM. Moreover, it aims to shed light on the necessity for international subsidy provisions in service-related sectors, captivating readers with its unique contribution to the field. By filling this gap in the literature, this research endeavors to provide valuable insights into an underexplored area, inviting readers to delve into the fascinating realm of service subsidies and their implications for global trade.

Accordingly, this dissertation has explored the challenges associated with subsidies within the framework of the WTO system, focusing on both the products and services sectors as integral components of international trade. While the research has delved into the historical and legal development of subsidy provisions under the GATT, ASCM, and GATS, it is essential to clarify that it has not examined specific provisions concerning individual products or services. Particularly, this dissertation does not encompass the Agreement on Fisheries Subsidies, which specifically targets marine wild capture fishing and related activities, nor the Agreement on Agriculture, which pertains solely to agricultural products.

While these agreements address specific subsidy-related issues, they refer to the ASCM as the primary instrument for regulating subsidies in international trade. The ASCM has been recognized as a comprehensive framework for addressing the complexities surrounding subsidies and countervailing measures.

Additionally, this research provides a comprehensive evaluation from a legal perspective rather than an economic one. As such, it does not analyze the direct economic effects of subsidies on industries or economies. The broader economic implications of subsidies, such as their impact on market competition and consumer welfare, fall outside the scope of this study.

To comprehensively and systematically address the research questions raised in this dissertation, a combination of research methodologies has been employed. Doctrinal legal research has been conducted, involving a meticulous analysis of legal materials such as statutory instruments, legal treaties and agreements (such as TEFU, GATT, and ASCM), case law, and legal commentaries. This rigorous approach facilitates an in-depth understanding and interpretation of pertinent legal concepts, principles, and rules, ensuring a thorough and reliable analysis of the research questions.

The dissertation employs the historical legal method to discover the rationale behind specific provisions found in the mentioned agreements. Furthermore, the comparative legal method, including functional and analytical approaches, extracts valuable insights from diverse jurisdictions. Academic literature and judicial interpretations serve as authoritative sources for this comprehensive comparative study.

The evolution of anti-subsidy provisions in international trade has been shaped by historical developments and legal challenges within the GATT framework. Subsequently, the ASCM was established to address deficiencies in the GATT system. For instance, it fell short of providing a clear and comprehensive definition. Instead, it indirectly referenced certain actions, such as price support, that may qualify as subsidies if they confer a competitive advantage on domestic products. This ambiguity raises concerns about the prioritization of a state's interests over the broader public interest in international trade during subsidy negotiations. It is plausible to argue that a state affected by adverse subsidy

effects may choose to overlook these harmful impacts to exert political pressure on the subsidizing state, with the expectation of receiving similar forms of support in the future. Furthermore, if mutual agreement is not reached during consultations, the subsidizing state is not obligated to reduce or eliminate the subsidy. The general provisions of the dispute settlement system would then apply.

Determining whether a measure taken by a country constitutes a subsidy with potential negative effects on other countries can prove to be a complex task due to the lack of clear rules regarding subsidies. The absence of explicit guidelines in Article XXIII of the GATT means that the seriousness of a measure warranting sanctions must be assessed on a case-by-case basis.

Moreover, the Subsidies Code has placed non-signatory developing countries at a significant disadvantage in trade relations, highlighting the urgent need for greater clarity and transparency in subsidy regulation. Effective remedies must be developed to address the detrimental impacts of subsidized trade on the global economy. Additionally, the Code's differing characterizations of the same action based solely on the economic status of the country involved can be viewed as unfair. As such, it created a double standard in the treatment of certain actions. In light of these shortcomings, it is crucial to strive for a more precise and equitable framework that ensures transparency, clarity, and effective remedies in the regulation of subsidies, thereby fostering fair and balanced international trade.

However, the effectiveness of the ASCM relies on the clarity and precision of its definition of "subsidy." Ambiguities surrounding the interpretation of various concepts, such as "public body" and "benefit", have created challenges in its implementation.

This dissertation has yielded several key findings. At the top of the list, concerning the timing of when a subsidy should be considered granted in cases involving direct fund transfers, it is determined as the date when actual payment is made to the recipient according to the terms of the grant. It is vital to note that the grant, in its written form without any physical money transfer, may incentivize and stimulate private entities but may not be sufficient to effectuate a tangible economic change and confer a benefit. This argument raises potential confusion regarding two specific aspects. Firstly, the calculation

of the benefit, especially when there is a significant time gap between the written grant and the actual transaction. Secondly, the written grant is subject to the government's discretion and may be revoked before the completion of the transaction.

Regarding modifications to existing subsidies, such modifications should be considered subsidies if they are complementary measures that cannot stand alone and are integral to the principal action. Conversely, if the essential measure itself is not deemed a subsidy, the modifications would not be classified as such. The author of this dissertation justifies this argument by asserting that actions such as extending loan maturities, reducing interest rates, and implementing loan-equity swaps are independently sufficient to qualify as a transfer of funds. Although there may not be a typical monetary transaction, the funds belonging to the government remain in the hands of the recipient in various forms, resulting in discriminatory enrichment.

Concerning income and price support as a form of financial contribution, the numerous government measures falling under this category necessitate a focus on the nature and intent of the government action, rather than the uncertain effects of the measure. Specifically, price support should encompass government actions intended to stabilize prices at a particular level, particularly in cases of surplus production or excessive goods in the market. Governments employ price support measures to prevent prices from plummeting too low due to the surplus. The focus is on addressing the specific issue of surplus production and its potential impact on market prices. However, this narrower approach would exclude price support measures that indirectly arise as side effects of government actions, such as tariffs and quantitative restrictions. Therefore, the increase in domestic prices resulting from these measures is only an incidental effect.

The AB has made some progress in defining the concept of a "public body." By introducing the conjunction "or" to the definition, the AB suggests that each element alone is sufficient to establish the existence of a public body. However, this approach is not entirely accurate as the entity possessing the authority may choose not to exercise it. It is important to consider that the government itself sometimes engages in economic activities without relying on its public authority.

Furthermore, this dissertation argues that by including an alternative to the government, the ASCM intends to broaden its scope and encompass more than just governmental entities. In this sense, the Agreement aims to establish a new category, known as a semi-government entity, which falls between the government and private entities. This category does not possess the full power and functions of the government but enjoys certain distinguishing characteristics that set it apart from private entities. It is worth noting that a public body may delegate the performance of specific functions or activities, as outlined in subparagraphs (iv) of Article 1, to a private entity through "entrustment" or "direction."

In conclusion, the proposed definition combines three criteria: i) governmental control, with ownership and other elements mentioned by the Panel serving as substantial evidence; ii) the entity's reliance on public funds, public policies, or public objectives; and iii) the delegation of authority. This definition strikes a balance, neither being excessively narrow nor overly broad. It does not encompass all SOEs solely based on government control, and it is less flexible than the AB's approach, which could potentially strengthen the provisions of the ASCM.

Furthermore, the term "benefit" as defined in Article 1.1(b) of the ASCM should refer to any advantageous outcome resulting from governmental financial contributions that place the recipient in a better economic position compared to the absence of such contributions. This interpretation has been widely supported by both the Panel and the AB. Consequently, any government financial contribution that does not enhance the market conditions available to the recipient falls outside the scope of the ASCM.

When examining the existence of benefits a significant query arises. In essence, the question is whether the benefit that passes from an upstream producer (direct recipient) to another upstream producer (indirect recipient/beneficiary) constitutes a subsidy. After careful consideration, two conditions have been identified as necessary for the existence of a pass-through approach. Firstly, the product being sold must have already undergone manufacturing by the recipient of the subsidy. Secondly, some amount of the subsidy must contribute to the manufacturing process of the product. This condition confirms that the

benefit received by the direct recipient has played a role in the production of the specific product being passed on to the indirect recipient.

From the author's perspective, the AB's interpretation adequately addressed the meaning of the terms "condition" and "market." However, it was insufficient in clarifying the term "prevailing." This dissertation argues that the market must possess the same characteristics it had at a specific point in time. In the context of government intervention, the "particular time" refers to the market's condition before such intervention. At that time, the market operated under ordinary circumstances, where the forces of supply and demand interacted to determine market prices without any external intervention.

As stated earlier, Article 14 of the ASCM adopts the market benchmark for calculating the amount of benefit based on which the amount of subsidy shall be decided. However, this Article does include only four forms of subsidies but not all forms as stipulated in Article 1 of the ASCM. Thus, alternative benchmarks are required. This dissertation discussed three alternative benchmarks as follows: The Third-Country Market Approach: The investigating authority can use the price of a like product in a third country or a constructed value in that country. The authority's discretion in selecting the third country ensures accurate calculation by considering the "actual" trade level of that country's market.

Importing-Country Market Approach: The investigating authority compares the price of the alleged subsidized product with the price of a like product in its own market. Adjustments are made to reflect reasonable profits, and calculations are based on prices at the same level of trade and as close to the time of operations as possible. This dissertation emphasizes the importance of those two benchmarks. Additionally, the third Approach is the World-Market benchmark: which refers to the price of a like product in the global market. However, the author argues that this approach doesn't reflect the actual price of subsidized products and fails to consider trade levels, potentially leading to higher costs than necessary.

On the other hand, on some occasions the commercial benchmark is not needed for the calculation of the amount of benefit, instead, theoretical reasoning is fully adequate. For instance, the case of tax exemption resulting in government revenue constitutes a financial

contribution under Article 1.1(a)(1)(ii) of the ASCM. Hence, the amount of this benefit is equal to the amount of tax exemption that would have otherwise been paid in the absence of this exemption.

In certain instances, as previously demonstrated, the entity receiving the subsidy may not be the same as the beneficiary. In such cases, an important question arises regarding whether specificity should be considered in relation to the recipient or the beneficiary. This dissertation put forth the argument that specificity should be associated with the receipt, irrespective of the beneficiary, and this is supported by two interconnected reasons.

Firstly, considering specificity in terms of the recipient is essentially equivalent to addressing discrimination. Discriminatory treatment occurs when the government treats different receipts in distinct ways, while the beneficiaries, who are often unaware of such subsidies, cannot be clearly identified at the time of issuance. Consequently, establishing specificity based on the beneficiaries becomes challenging. Therefore, it is more appropriate to focus on the treatment of the receipts themselves.

Secondly, the intention of the government plays a pivotal role in this context. The government sets the requirements and criteria for eligibility to receive a subsidy, which must be fulfilled by the direct recipient. On the other hand, the beneficiaries, whether direct or indirect, are not specifically considered in this process. As a result, the determination of specificity should primarily center around the requirements imposed on the direct receipt, rather than the beneficiaries.

Another significant finding is that every export subsidy contained in the Annex is categorized as a prohibited subsidy. In this regard, the panel added that "*Given the per se nature of the items set forth in the Illustrative List, no further separate analysis of the program under Articles 1 and 3 would be necessary*". However, this dissertation partially challenges this statement. If a complainant Member can bypass Article 3.1 based on the measure being included in the illustrative list, it cannot disregard Article 1 of the Agreement on Subsidies and Countervailing Measures (ASCM) for any reason. This is because only measures that fulfill the requirements of Article 1 can be subject to WTO subsidy disciplines and subsequently prohibited under Article 3.1. Therefore, Article 1

serves as the initial step in validating and implementing the other provisions contained in the ASCM.

Furthermore, while the ASCM provides remedies to counteract the adverse effects of subsidies, their application and scope remain unclear. This dissertation emphasizes that the term "withdraw the subsidy" should be understood to include repayment of any portion of a prohibited subsidy, it would have a retroactive effect. That is to say, the purpose of this remedy is to eliminate the adverse effects caused by the illegal subsidy. Simply terminating the future effects of the measure would not fully achieve this goal. This is particularly relevant in cases of one-time subsidies tied to export performance or the use of domestic over imported goods, where the withdrawal remedy would be meaningless if it only addressed future events and ignored past events.

Besides, if the subsidizing Member fails to withdraw the prohibited subsidy, the complaining Member may be allowed to take appropriate countermeasures to offset the past adverse effects, rather than future ones. Therefore, the first remedy (withdrawal) should have an equal or greater impact, but not a lesser one, compared to the second remedy (countermeasures). Thus, repayment of the granted subsidy would effectively achieve the objective of withdrawing the subsidy by the subsidizing Member and consequently eliminate the adverse effects on trade.

This dissertation supports the idea that the remedy of illegal subsidy requires more than just meeting the test of appropriateness or proportionality. It argues for the introduction of a "punitive countermeasure" that would exert greater pressure on defending Members to withdraw prohibited subsidies. This approach is justified by the stricter discipline needed for prohibited subsidies compared to actionable subsidies. The countermeasure should encompass punishment as long as it is a sanction for non-compliance with the DSB's recommendation. Therefore, the appropriateness test should consider both the adverse effects of the export subsidy and the guilty behavior of the subsidizing Member in violating the ASCM and DSB recommendations.

Unlike the EU foreign subsidies regulation, it is evident that the WTO rules, particularly the ASCM, have limitations when it comes to effectively governing foreign subsidies and addressing the resulting distortion effects.

The ASCM primarily focuses on product subsidies and does not regulate service subsidies within the WTO framework. This leaves a significant gap in the regulation of subsidies, as service subsidies play a crucial role in many sectors of the global economy. Moreover, the ASCM's scope is limited to subsidies provided to undertakings within the territory of the granting state, commonly known as domestic subsidies. Subsidies provided outside the territory, where the beneficiary is located in the country of sale or in a third country, are not adequately addressed under the ASCM.

The definition of "subsidy" in Article 1 of the ASCM includes the phrase "within the territory of a Member," which some scholars argue is connected to the term "public body" rather than "financial contribution." This interpretation suggests that only subsidies provided by public bodies within the territory of a Member are relevant under the ASCM. Moreover, Article 2.1 of the ASCM Agreement contains a similar implicit reference to jurisdiction, stating that subsidies must be specific to an enterprise or industry within the jurisdiction of the granting authority. While this reference might encompass personal jurisdiction, it does not expand the scope of the provision to include recipients located outside the territory of the member state concerned.

Annex IV of the ASCM provides for the calculation of total ad valorem subsidization, but it defines the term "recipient firm" as "a firm in the territory of the subsidizing Member." This emphasizes the territorial location of the recipient firm and ensures that the calculation reflects economic activities and sales within the jurisdiction of the subsidizing Member.

However, the rules of the prohibited category under the ASCM, such as export and local content subsidies, may be invoked and applied to foreign subsidies. These subsidies are inherently considered detrimental to fair competition and international trade, and the ASCM explicitly addresses them as prohibited. However, this does not necessarily apply to subsidies falling within the actionable category.

In conclusion, the negotiation process regarding service subsidies has faced significant challenges related to defining subsidies, determining their origin and beneficiaries, and addressing concerns about countervailing duties and the use of subsidies for public policy objectives. This dissertation has conducted a comprehensive analysis of the unique features of the GATS and evaluated the feasibility of extending the ASCM to the service sector from a legal standpoint.

The findings suggest that the provisions outlined in the ASCM can, to a certain point, be extended to the service sector. However, certain modifications are recommended to enhance their efficiency and optimal implementation. The definition of "public entity" should encompass both government-owned or controlled entities performing governmental functions and private entities carrying out government functions through delegated authority.

Moreover, data collection on subsidy programs should include comprehensive information on costs, funding sources, administrative expenses, and benefits, with a focus on conducting cost-benefit analyses to determine net benefits. The specificity rule under the ASCM could be integrated into a new agreement on service subsidies to establish clear methodologies for calculating subsidies.

In terms of the classification of service subsidies, this dissertation proposes the establishment of the "Permitted Subsidy" category. This category would permit specific subsidies in the service sector that serve social and developmental objectives. It is important to note that Members would still be subject to certain restrictions, including the requirement of a pre-notification period. The discussion draws inspiration from the European Union's State aid law as a model for this proposal. Furthermore, the significance of the "contingency test" in accurately delineating the boundaries of prohibited subsidies is highlighted. Consequently, the new agreement on service subsidies should treat export and domestic content subsidies equally in terms of their contingent nature.

Regarding dispute settlement procedures, it is recommended that the injured member should have the right to demand the withdrawal of subsidies or apply provisional measures, such as countervailing duties, if a subsidy causes injury to domestic service providers in

another country. If the recommendations of the DSB are not complied with, the affected member may resort to retaliatory measures, such as suspending or withdrawing concessions related to the subsidized sector. These measures are designed to exert pressure on subsidizing members, ensuring their compliance with commitments and cessation of subsidization practices.

In summary, addressing service subsidies within the framework of international trade agreements requires careful consideration of the unique characteristics of the service sector. By incorporating the proposed modifications and approaches, policymakers can enhance the effectiveness and fairness of subsidy disciplines, promoting a balanced and conducive environment for international trade in services.

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