

Legal Analysis of Export Subsidies under the Agreement of Subsidy and Countervailing Measures

Abstract

Export subsidies, for several decades now, have attracted significant attention due to their undesirable impacts on international trade. In the Uruguay Round 1994, the World Trade Organization (WTO) generated the Agreement on Subsidies and Countervailing Measures (ASCM) which contains global rules to regulate the different types of subsidies and to offset their adverse effects on other WTO Members. This paper, through its three sections, therefore aims to provide a legal analysis of the provisions of export subsidies contained in Articles 3 and 4 of the ASCM. By doing so, this paper answers the question of whether the ASCM is sufficient to cease the distortive effect of the export subsidy. To that end, doctrinal legal research has been conducted through analysis of the black letter of law and the case laws. In conclusion, the ASCM succeeded in giving the export subsidies *per se* prohibited nature, either in law or in fact. Unfortunately, the mere repayment of the amount of the subsidy is not always a sufficient remedy. As such, punitive countermeasures must be introduced to implement remedial provisions and to deter export subsidies.

Keywords: Agreement on Subsidy and Countervailing Measure, export subsidy, remedies, subsidy withdrawal, WTO Dispute Settlement Body.

I Introduction

Over half a century ago, most countries have witnessed a great escalation in the proportion of their imports or exports relative to domestic production for domestic consumption. From an economic perspective, the theory of comparative advantages, which was introduced by

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Adam Smith and David Ricardo, perhaps explains why international trade has a crucial role in boosting the world economy. This suggests that every country is capable, based on its national resources, of producing particular commodities at relatively competitive prices. Thus, every country exports the commodities of which it has a surplus and imports other commodities that are produced in another country at more affordable prices and can meet its market demands. Thus, this theory stands as a basis for the ongoing tendency of countries to subsidise their exports.¹

Moreover, the theory of Economic Regulation, which is also known as Economic Interventionism, justifies the growing involvement of the government in the market. The government intervenes in the market either (1) to limit or eliminate market failures or inequitable market practices, by controlling the prices of essential utilities such as electricity and gas, or by imposing or removing restrictions on economic activities, for example, taxes, tariffs and quotas,² or (2) to enhance domestic production or to favour certain products or undertakings over other (foreign) competitors. According to the World Trade Organization (WTO), the latter non-tariff measure is known as a 'subsidy'. It is noted that subsidies, particularly 'export subsidies', are most likely to have a distortion effect on the free market.³

However, the need for solid international rules in order to regulate the application of subsidies effectively has been necessary due to the failure of the Subsidy Code 1979 in this regard.⁴ The WTO Agreement on Subsidies and Countervailing Measures (ASCM), which entered into force in 1995, therefore provides a set of rules for the operation of subsidies in the goods sector and for the application of remedies to offset their harmful commercial effects. This Agreement defines 'subsidy' as a financial contribution by the government or any public body that conferred a benefit to a specific enterprise or industry or group of enterprises or industry or to a specific geographic area.⁵

Furthermore, the ASCM classifies a given subsidy based on its market distortion effects into three categories, which have different disciplines. First is the prohibited category: due to their direct trade-distorting effect, Member States are forbidden to provide any subsidy contained in this category. It involves two kinds of subsidies, as subsidy contingent upon export performance (export subsidy) and upon the use of domestic over imported goods

¹ OECD, *Globalisation, Comparative Advantage and the Changing Dynamics of Trade* (OECD Publishing 2011, Paris) 11.

² Christopher Decker, *Modern Economic Regulation: An Introduction to Theory and Practice* (Cambridge University Press 2015) 3, <https://doi.org/10.1017/CBO9781139162500>

³ Ludwig Von Mises, *Interventionism: An Economic Analysis* (Liberty Fund, Incorporated 2011) 59.

⁴ The Subsidy Code was not accepted and implemented by all the contracting parties to the GATT. It was a multilateral agreement, in which only those countries that wanted to participate in it did so. This flaw limits the effectiveness of the Code, especially if the dispute is between a contracting party and a non-contracting party. Richard H. Snape, *Export-promoting Subsidies and what to Do about Them* (World Bank Publications 1988) 22.

⁵ Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 14 (entered into force 1 January 1995) [Hereinafter the ASCM] articles 1–2.

(domestic content subsidy).⁶ In contrast, goods in the non-actionable category are not banned, and Member States are allowed to grant them. This category includes three types of subsidies, for research activities, for disadvantaged regions and for the adaptation of existing facilities to meet environmental requirements.⁷ In the middle, there is the actionable category which covers every other specific subsidy: as far as they cause trade adverse effects, they can be challenged before the WTO Dispute Settlement Body (DSB).⁸

However, the export subsidy is the centre of attention of this paper as long as it has been one of the commercial policies that have received significant consideration at the international level. Governments provide export subsidies to domestic exporters with the intention of improving competitiveness through lower production costs or increased export quantities through monetary incentives. Nonetheless, the utilization of these subsidies has raised apprehension due to their potential to distort trade patterns, create inequitable advantages, and instigate trade disputes between countries. As such, it is worth stating that the prohibition of export subsidies was not innovated by the ASCM, but was first introduced in the 1960s under Article 16 of the General Agreement on Tariffs and Trade (GATT). Further developments came with the Tokyo Round negotiations (1973–1979), through the Subsidies Code, till it had found its current upgraded and comprehensive form under the ASCM. Therefore, this paper examines the provisions of the export subsidy set out in the ASCM. By doing so, this paper answers the question whether the ASCM is sufficient to cease the distortion effect of the export subsidy. To that end, doctrinal legal research has been conducted through analyses of the black letter of law and the case laws.

This paper contains, in addition to the introduction and conclusion, six sections. A brief discussion about the definition of ‘subsidy’ in the context of the ASCM is done in the second section. The third and fourth sections gradually analyse the occasions in which the export subsidy exists and highlight the pass-through approach stipulated through the Illustrative List of Export Subsidies. Finally, the fifth section examines the effectiveness of the remedies in case of illegal export subsidy.

II The Definition of ‘Subsidy’ – in a Nutshell

The starting point of the discussion is the definition of ‘subsidy’. Unlike the GATT 1949 and the Subsidy Code 1979, Article 1 of the ASCM presents the first universal definition of ‘subsidy’ as a financial contribution by a government or public body that conferred a benefit. Three cumulative elements must be met in order for a subsidy to exist. Firstly, the financial contribution may take various forms. The basic form is the transfer of state funds or liabilities, either in cash or in kind, such as grants, loans, equity infusions, and

⁶ Art 3 of the ASCM.

⁷ Art 8 of the ASCM.

⁸ Art 5 of the ASCM.

loan guarantees.⁹ Additionally, the other form is tolerance in the collection of government revenue. The revenue resources can be divided into two main categories: (1) taxes or tariffs and (2) non-tax revenue, including fees that are charged for the enjoyment of certain services, such as issuing a passport or driving licence, waiver of fines and penalties, and others. The financial contribution materialises when the government forgives or does not collect these dues.¹⁰ Moreover, the government might participate in economic activities that go beyond the public purpose of its infrastructure for the sake of the interest of private undertakings. For instance, port services provided to a single importer or exporter, or purchasing goods at artificial prices.¹¹

Secondly, the subsidy must be provided by the ‘government or any public body’. The meaning of public body, but separate from the government has been controversial. According to the case law, it can be noted that the common characteristic of these two bodies is either ‘Public Purpose’, ‘Public Activity’, or ‘Public Authority’. The Appellate Body (AB) in the *US- Anti-Dumping and Countervailing Duties (China)* found that ‘public body’ is ‘an entity that possesses, exercises, or is vested with government authority’.¹² 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.¹³

Accordingly, the financial support issued by private enterprises does not reach the level of subsidy according to the ASCM. One exception can be found is when a government directs or entrusts a private body in order to conduct any of the above activities.¹⁴ Hence, the financial support is conveyed indirectly from the government to the private actor through a private intermediary (financial institution). It is worth mentioning that various scholars, including Flett, Jessen and Talaber-Ritz, argue that the scope of the WTO subsidy is wider (more comprehensive) than European state aid. That is understandable, because the latter limits the existence of the aid to situations that entails a cost to the government, then excludes financial support provided by the private actors from being an aid.¹⁵

⁹ Art 1.1.(a).1. i of the ASCM.

¹⁰ Art 1.1.(a).1. ii of the ASCM.

¹¹ Art 1.1.(a). 1.iii of the ASCM.

¹² Appellate Body Report, *United States (US) – Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R, 11 March 2011, Para 317.

¹³ The Panel adopted the approach that public body includes any entity controlled by the government and ownership is sufficient evidence for such control. Francois-Charles Laprévotte and Sungjin Kang, *Subsidies Issues in the WTO – An Update* European State Aid Law Quarterly, Vol 10 (Lexxion Verlagsgesellschaft mbH 2011) 448. <https://doi.org/10.21552/ESTAL/2011/3/245>

¹⁴ Art 1.1.(a).1. iv of the ASCM.

¹⁵ James Flett, Anders C. Jessen and Klara Talaber-Ritz, *The Relationship between WTO Subsidies Law and EC State Aid Law*, EC State Aid Law, International Competition Law Series, Vol 36 (Kluwer Law International 2008) 441.

Thirdly, the existence of financial contribution by the government is not sufficient, by itself, to comprise a subsidy, but a benefit in the account of the recipient is a major element to determine the subsidy practices. Unfortunately, the ASCM is silent about the definition of ‘benefit’ and the method to calculate its amount. It merely provides extensive guidelines for such a calculation through Article 14. Accordingly, there are two main requirements that any methodology to calculate benefit must meet: 1) legal nature, which means it should be created by a legal instrument of the investigating Member, such as legislation or regulation; 2) transparency and clarity regarding the application. However, the AB, in the *Canada–Soft Lumber* dispute, concluded that the terminology ‘benefit’ within the meaning of Article 1.1(b) of the ASCM shall be interpreted as every advantage that results from the governmental financial contribution and places the recipient in a better economic situation than in the case of the absence of such contribution.¹⁶ 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.¹⁷ 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.¹⁸

Furthermore, one of the essential differences between the WTO Subsidy and European State Aid is that the latter is generally prohibited, and the pre-acceptance of the European Commission must be obtained for granting such aid.¹⁹ Therefore, the existence of the above-mentioned elements is not sufficient to render a subsidy illegal, but the constitutive element has to be fulfilled, which is specificity. Thus, only a ‘specific subsidy’ can be disputed and subject to countervailing measures under the ASCM.²⁰ Hence, it should be said that specificity is an essential requirement for the application of the WTO subsidy disciplines, but not for the subsidy existence itself. 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.²¹ Besides, the subsidy is not specific if it is provided based on objective criteria or conditions that are neutral and equivalent to all enterprises.²² Over and above, a subsidy is specific when the granting authority limits its availability to

¹⁶ Panel Report, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/R, 29 August 2003, Paras 4.205 – 4.206.

¹⁷ Staff of IMF, OECD, World Bank, and WTO, *Subsidies, Trade, and International Cooperation* (IMF 2022) 33.

¹⁸ Sophia Müller, *The Use of Alternative Benchmarks in Anti-Subsidy Law, A Study on the WTO, the EU and China* (Springer 2018) 217. <https://doi.org/10.1007/978-3-319-77613-2>

¹⁹ *Consolidated version of the Treaty on the Functioning of the European Union* [2012] OJ C326/47, art 107.1.

²⁰ Art 1.2 of the ASCM.

²¹ Art 2.4 of the ASCM.

²² Footnote 2 of the ASCM. Objective criteria are based on quantifiable factors that can be assessed and verified objectively, without any subjective bias or discrimination, such as export volume, employment numbers, or investment levels.

certain enterprises situated within a designated geographical area.²³ In this kind of subsidy, the specificity criterion, based on which the eligibility of enterprises or industries arises, is the location, which is why it is called a ‘regional subsidy’. As such, it is worth noting that a regional subsidy exists even if it is provided to all enterprises in a fixed region, as long as the enterprises located outside that region are not entitled to such subsidy.²⁴

On the other hand, 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). The complaining Member has no obligation to submit any evidence on the specificity regarding these two kinds of subsidies.²⁵ That is also clear from the language of Article 4.1 of the ASCM, which allows Members that only have evidence of the existence of prohibited subsidies, to enter immediately into consultation with the granting Member.

III When does the Government Financial Contribution Constitute an Export Subsidy?

This question arises especially after knowing that it is not sufficient for the export subsidy to exist the mere fact that the subsidy is granted to an undertaking that carries out the export transactions, but other conditions should be met.²⁶ Hence, government support constitutes an export subsidy when two conditions are fulfilled: firstly, it meets the meaning of subsidy within Article 1 of the ASCM as explained above; secondly, it meets the ‘export contingency’ test as clarified in Article 3.1. (a) of the ASCM. Some scholars hence argue that an exchange rate supported by the government is not considered, by itself, contingent on exports as long as it applies across the board and includes not only investors (exporters) but also a wide range of beneficiaries such as tourists.²⁷

To begin with the language of Article 3.1. (a) that states ‘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’. Various points need to be highlighted, in particular, the terms ‘in law’ and ‘in fact’. On the one hand, export subsidy exists in law, when the government’s financial contribution is granted to facilitate exportation by means of law, such as regulations, legislation, etc. In this way, the wording of the legislation, for example, that establishes the

²³ Art 2.2 of the ASCM.

²⁴ The Panel, like the US, contested the EC’s interpretation of Article 2.2, as specificity must include both geographical region and the subset of enterprises within that region. Panel Report, *European Communities (EC) and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, 30 June 2010, Para 7.1223.

²⁵ ‘Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.’ Art 2.3 of the ASCM.

²⁶ Footnote 4 of the ASCM.

²⁷ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press 2014) 584, <https://doi.org/10.1017/CBO9781139046589>

measure in question, expressly demonstrates the existence of the export condition.²⁸ For instance, this term contained in implementing regulation serves as clear evidence on 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 upon the number of exports achieved’.²⁹

Furthermore, the AB highlighted that it is not mandatory for the legal instrument to contain an *expressis verbis* on export performance in order for the contingency in law to exist. Instead, contingency can also be acquired through the interpretation of the words that are used in the measure.³⁰ Here, the best example is the *United States (US) – FSC* dispute, in which the taxpayers can 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 U.S., 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.³¹

On the other hand, the export subsidy can appear without being introduced in a legal instrument, but the practice and the actual facts should instead demonstrate that boosting the export transactions or export earnings is the essential goal behind the governmental financial contribution.³² Moreover, the AB, in *EC-Large Civil Aircraft*, has evolved the *de facto* test as ‘is 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 made between the anticipated export sales of the subsidised product that resulted from granting the subsidy, and the situation in the absence of the 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. That means trivial promotion of export sales does not necessarily indicate the existence of an export subsidy because such a promotion can occur under normal market conditions. In the words of Lester, a *de facto* export contingency exists when the subsidy motivates producers to export their products instead of selling them domestically. As a result,

²⁸ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, para 100.

²⁹ *Ibid.*, para 104.

³⁰ *Ibid.*, para 100.

³¹ Appellate Body Report, *United States – Tax Treatment for ‘Foreign Sales Corporations’*, WT/DS108/AB/RW2 (Art 21.5), 13 February 2006, para 116.

³² Footnote 4 of the ASCM.

export sales become higher than and favoured over domestic sales.³³ Arguably, a scholar like Steger called for a more consistent interpretation of the *de facto* export contingency.³⁴ However, the author of this article stands on the side of the test developed by the Panel. The determination of the *de facto* contingency should therefore be on a case-by-case basis as long as it is derived from the actual facts, which are unlimited and unpredictable, that cannot be covered by a fixed term. Hence, while applying this test, the panel should examine every circumstance surrounding the subsidy measure that might help to understand the measure's design, structure and modalities of operation in an objective manner.³⁵

Furthermore, the next phase dives into the meaning of what the black-text call, the 'contingency upon export performance' test. Indeed, the WTO DSB provides a comprehensive explanation of the 'contingency' test. 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'.³⁶ Afterward, the Panel referred to footnote 4 of the ASCM, which is an integral part of Article 3.1(a), which interprets and replaces the term 'contingent' with 'tied to'. Additionally, as the Panel and the AB agreed in the previous dispute³⁷ the term 'tied to' was simplified as 'restrain or constrain to or from an action; limit or restrict as to behaviour'. Thus, the meaning of the term 'contingency' or 'conditionality' or 'tied to' is equivalent to an undeniable connection between the grant of a subsidy and export performance.³⁸

In practice, the Panel decided that the loan³⁹ granted by the Australian government to Howe⁴⁰ did 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

³³ 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 345–372, 358.

³⁴ Debra Steger, 'The Subsidies and Countervailing Measures Agreement: Ahead of its Time or Time for Reform?' (2010) 44 (4) Journal of World Trade 779–796, 785.

³⁵ Panel Report, *European Communities (EC) and Certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, paras 1045–1051.

³⁶ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, 25 May 1999, para 9.55.

³⁷ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, 2 August 1999, para 171.

³⁸ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, 25 May 1999, para 9.55.

³⁹ 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.

⁴⁰ 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. Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, 25 May 1999, para 2.1.

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 exporting is the only way for Howe to maintain its production and sales levels and 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’.⁴¹ This argument was rejected by the Panel, because Howe has full discretion to choose the source of funds, whether exportation or domestic sales, that will be used to repay the loan. Besides, export performance is not a provision contained in the loan contract and there is no evidence to prove that the Australian government expected at the time the loan was entered into that export sales would generate the funds to repay the loan. Therefore, this potential export earning is insufficient to conclude that the loan was contingent in fact upon anticipated exportation or export earnings.⁴²

Consequently, the definition of the term export subsidy, which was evolved by the DSB, is very broad and the legal tests on the existence of export subsidy are hardly compliant with the policies and programmes of the WTO Members. This argument was established by Annand, Buckingham, and Kerr on the basis that the decisions of the DSB were not built on appropriate and solid economic principles, but were more literal definitions instead. The DSB did not take into consideration the economic realities of international trade. Those scholars therefore questioned whether the Members would approve that, based on this new international legal standard and the extensive spectrum of export subsidies, their national marketing schemes may be illegal.⁴³

IV Illustrative List of Export Subsidies, Pass-over Approach

When analysing export subsidies, Annex I of the ASCM (which includes numerous forms of export subsidies titled ‘Illustrative List of Export Subsidies’⁴⁴) must be examined. Two significant points must be highlighted concerning this Annex. First, 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, which states ‘including those illustrated in Annex I’. The dictionary meaning of the term ‘illustrate’ is to serve as an example. Accordingly, the existence of 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 combined.⁴⁵

⁴¹ Ibid, para 9.74.

⁴² Ibid, para 9.75.

⁴³ Mel Annand, Donald F. Buckingham, William A. Kerr, *Export Subsidies and the World Trade Organization* (Estey Centre for Law and Economics in International Trade 2001) 150.

⁴⁴ This list was originated by the GATT working party in 1960, then enclosed to the Subsidy Code 1979. Müller (n 18) 20.

⁴⁵ Annand, Buckingham, Kerr (n 43) 60.

The second pertinent point is whether every export subsidy is a prohibited subsidy, considering that every item listed in Annex I is qualified as an export subsidy. Deductively, every item at hand is a prohibited export subsidy. This outcome suggests 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. If so, the complaining Member can pass over the ‘contingency’ test by demonstrating that the challenged measure is an item contained in this illustrative list. For emphasis, the Panel, in *Korea – Measures Affecting Trade in Commercial Vessels*, underlined that ‘Given the per se nature of the items set forth in the Illustrative List, no further separate analysis of the programme under Articles 1 and 3 would be necessary’.⁴⁶

However, the author of this paper partially argues for the above Panel’s finding on the basis that if the complainant Member could jump over Article 3.1 because the measure is contained in the illustrative list, it cannot for any reason ignore Article 1 of the ASCM. That is because only the measure that fulfils the requirements of Article 1 can be subject to the WTO subsidy disciplines, only then it can be prohibited under Article 3.1.⁴⁷ Article 1 is therefore 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’.⁴⁸

Moreover, footnote 5 of the ASCM must be paid great attention, due to the exemption of the prohibition of export subsidy, or, as it was named by the European Community (EC) ‘a safe haven’.⁴⁹ 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 in Annex I is the best example to explain the meaning of footnote 5. On one side of the coin, Item K considers export credits at rates lower than those that should usually be paid to be 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 organised under and confirmed by an international agreement, such as The Arrangement on Officially Supported Export Credits concluded by the Organization for Economic Co-operation and Development (OECD). The EC, as a third party, in *Canada–Civil Aircraft* therefore declared that, in order to avoid a ban on export credits, every export credit activity must be in conformity with

⁴⁶ Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, 7 March 2005, para 7.204.

⁴⁷ Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (Cambridge University Press, 2014) 118.

⁴⁸ Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, 7 March 2005, footnote 126.

⁴⁹ Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, 14 April 1999, para 7.11.

the OECD Guidelines.⁵⁰ Additionally, the EC asserted that the broad interpretation of the exemption is not warranted, so it should be interpreted narrowly.⁵¹

V Remedies

Generally, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) applies to all disputes that arise from the violations of the WTO law and obligations contained therein.⁵² This document establishes the Dispute Settlement Body, which consists of a panel and Appellate Body, which adopt decisions and recommendations in a given dispute and observe their implementation. The decision of the DSB is binding on the Member States.⁵³ Besides, 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 of *Lex specialis*.⁵⁴ Head of the list, the Agreement on Subsidies and Countervailing Measures contains Articles 4.2 through 4.12 on remedies of prohibited subsidies.⁵⁵ From the establishment of the WTO until 2021, a total of 42 disputes on subsidies have been commenced, and some of which have been proceeded under the Articles in question.⁵⁶

According to the procedures contained in the ASCM, disputes are initiated when a WTO Member dispatches a formal request for consultation, which includes the available evidence regarding the existence and nature of the prohibited export subsidy, to the member whose measure is challenged.⁵⁷ In this consultation, the Members shall discuss, without delay, the disputed matters with the aim of reaching a mutually agreed solution.⁵⁸ Usually, if consultation is successful, the mutually agreed solution should be attained within 30 days.

⁵⁰ Ibid, paras 7.11–7.15.

⁵¹ Ibid, para 7.21.

⁵² *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 (entered into force 1 January 1995) [hereinafter DSU] Art 1.1.

⁵³ Zoltan Vig, 'Interstate Relations' in Z. Fejes, M. Sulyok, A. Szalai (eds), *International Economic and Financial Organizations* (Iurisperitus Kiadó 2019) 140.

⁵⁴ This doctrine states that, if two laws govern the same factual situation, the applicable law shall 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), *The WTO dispute settlement system 1995–2003*, Vol 18 (Kluwer Law International BV 2004) 332.

⁵⁵ Appendix 2 of the DSU.

⁵⁶ The World Trade Organisation (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.

⁵⁷ Art 4.2 of the ASCM.

⁵⁸ Art 4.3 of the ASCM.

If not, either party may request the establishment of a panel to start the litigation procedure before the WTO DSB.⁵⁹

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 as to whether or not the measure in question is a prohibited export subsidy. For achieving that goal, the Panel may request the assistance of the Permanent Group of Experts (PGE), which should deliver its binding final report within the time-period fixed by the Panel.⁶⁰ Afterward, the Panel shall submit its final report to the parties, and shall circulate it to all Members within 90 days of the date of the establishment of the Panel's terms of reference.⁶¹ 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: (1) the DSB decides by consensus not to do so, or (2) one of the parties to the dispute decides to appeal against it.⁶² In the latter case, the Appellate Body will issue its final decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. It should be noted that this time-period can be extended upon a written request that expresses the reasons for the delay along with the estimated time of submission.⁶³

Furthermore, the remedies for a prohibited export subsidy fall into two main categories, as detailed below.

1 Withdrawal of the Subsidy

Whenever the Panel found that the challenged measure constitutes an export subsidy, it shall rule that the subsidy must be withdrawn by the subsidising Member within a specific time-period.⁶⁴ 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 therefore must be withdrawn.⁶⁵ Because of this, Brazil, as defendant, modified the measures at hand in order to be consistent with Article 3.1(a) of the ASCM. In return, Canada, as the complainant, argued that Brazil's modification to its export subsidy programme remained prohibited export subsidies, and did not bring it into compliance with the mentioned provision.⁶⁶

⁵⁹ Art 4.4 of the ASCM.

⁶⁰ Art 4.5 of the ASCM.

⁶¹ Art 4.6 of the ASCM.

⁶² Art 4.8 of the ASCM.

⁶³ Art 4.9 of the ASCM.

⁶⁴ Art 4.7 of the ASCM.

⁶⁵ Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/RW (Art 21.5 DSU), 21 July 2000, para 82.

⁶⁶ *Ibid*, para 20.

However, the meaning of the term ‘withdrawal’ has been controversial due to the silence of the ASCM. Several questions were then raised by Peter Stoll and Michael Koebele in this regard, and left unanswered⁶⁷ such as what withdrawal covers and whether the mere modification of an export subsidy is sufficient to render the measure compatible with the ASCM. In other words, shall the withdrawal include both the retrospective (existing) and the prospective (future) benefit?

In the course of examining the meaning of ‘withdrawal’ of a subsidy, the Appellate Body opined that the ordinary meaning of ‘withdraw’ is to ‘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. Hence the continued payments under an export subsidy measure are prohibited and are not consistent with the obligation to ‘withdraw’ prohibited export subsidies. The modification of the measure through decreasing the rate of the export subsidy is not enough to meet the meaning of the term ‘withdraw’ under Article 4.7 of the ASCM.⁶⁸ According to this prospective interpretation, it is understood that no future payment can be made under the prohibited programme.

However, how about the previously conferred benefit resulting from granting the export subsidy, whether the subsidy, which was already disbursed, should be given back or not? The Panel examined this question in the *Australia- Leather exports* dispute. It 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.’⁶⁹ The author of this paper agrees with the panel’s finding for two major reasons:

a) The aim behind this remedy is to remove the adverse effect caused by the prohibited export subsidy. As such, this goal will not only be achieved 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 because of which the adverse effects firstly occurred. Moreover, Singh relies on the AB’s statement and emphasises that the adverse effects could be caused by subsidies granted before entering the ASCM into force for as long as the Member has maintained the subsidy programme after the enforcement of the ASCM.⁷⁰ The interpretation of ‘withdraw the subsidy’ which encompasses the repayment for a previous damages is then consistent with the objective and purpose of the ASCM. Particularly, in the case of the one-time subsidy contingent in fact on export performance, where the remedy of withdrawal of

⁶⁷ Peter-Tobias Stoll, Michael Koebele, ‘WTO – Trade Remedies’ in Rüdiger Wolfrum (ed), *Max Planck Commentaries on World Trade Law*, Vol 4, (Brill 2008) 494.

⁶⁸ Ibid, para 45.

⁶⁹ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW (Art 21.5 DSU), 21 January 2000, para 6.22.

⁷⁰ Gurwinder Singh, *Subsidies in the Context of the WTO’s Free Trade System A Legal and Economic Analysis* (Springer 2017) 122–123, <https://doi.org/10.1007/978-3-319-62422-8>

subsidy will be meaningless if its effect of was limited to the future event and ignored the past event.⁷¹

b) If the subsidising Member did not withdraw the prohibited export subsidy, the complaining Member is permitted to take an appropriate countermeasure (to be discussed later) to offset the adverse effect that occurred in the past, not in the future. It is then appropriate for the first remedy to have either the same or a greater effect but not lower than the second remedy. This opinion is justified 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 subsidising Member shall ‘take appropriate steps to remove the adverse effects or shall withdraw the subsidy’.⁷² If not, the complaining Member may impose a countervailing measure.⁷³ In both cases, the aim is to compensate the adverse effect, and withdrawal of the subsidy is an alternative to some other action. Thus, repayment of the subsidy would certainly accomplish the mission of withdrawal of the subsidy by a subsidising Member, accordingly removing the adverse effect on trade.

2 Take ‘Appropriate Countermeasures’

If the time-period specified in the report of the DSB terminates without the illegal export subsidy being withdrawn by the defending Member, the complaining Member may be permitted (authorised) to adopt an appropriate countermeasure unless the DSB decides by consensus to reject the request.⁷⁴ 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’.⁷⁵ The purpose of the countermeasure can be either to enforce the recommendation and rulings of the BSD, or to rebalance mutual trade benefits.⁷⁶

Unfortunately, this countermeasure, as a remedy for non-compliance, has been criticised from various perspectives. By way of illustration, retaliation through establishing new trade barriers contradicts the idea of liberalisation emphasised by the WTO, due to the economic harmful effect, especially on the price of the products, on both the targeted Member and the

⁷¹ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/RW (Art 21.5 DSU), 21 January 2000, para 6.38.

⁷² Art 7.8 of the ASCM.

⁷³ Art 7.9 of the ASCM,

⁷⁴ Art 4.10 of the ASCM.

⁷⁵ Art 22.2 of the DSU.

⁷⁶ The World Trade Organisation (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.

Member imposing these measures.⁷⁷ Moreover, these 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 heavily relies on and was adversely affected by an prohibited export subsidy provided by the former, can have worth economic consequences than the subsidy itself.⁷⁸ This argument was emphasised by Panagariya who examined the policy of interventions on behalf of export interests and concluded that every country, in particular those with a small economy, attempts to retaliate against export subsidies with similar export subsidies or tariffs will only hurt itself.⁷⁹

Furthermore, another essential question in this regard is when the countermeasure is considered 'appropriate' for the purpose of Article 4. To begin with 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'. Besides, the Arbitrators in *the US – upland 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.⁸⁰

Indeed, this explanation is consistent with the general principles set out in the DSU, which informs that the level of the concessions shall be equal to the level of nullification and impairment caused by the illegal measure.⁸¹ That is understandable from the meaning of the term compensation under the WTO law. Hence, the term compensation here does not refer to payment for trade lost, but is rather a direct remedy, mainly to ensure a rebalancing of trade concessions or that an economic injury caused is resolved.⁸²

⁷⁷ The World Trade Organisation (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.

⁷⁸ 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* 21–50, 42. <<https://ssrn.com/abstract=1140593>> accessed 24 August 2022.

⁷⁹ Arvind Panagariya, 'Evaluating the Case for Export Subsidies' (2000) (Policy research working paper 2279), Development Research Group, 3. <<https://ssrn.com/abstract=629126>> accessed 09 February 2023.

⁸⁰ Decision of the Arbitrator, *United States – Subsidies on Upland Cotton*, WT/DS267/ARB/1 (Art 22.6 DSU) 31 August 2009, Para 4.87.

⁸¹ Article 22.4 of the DSU.

⁸² Article 18 (provisional measures) and Article 19 (CVDs) of the ASCM. See also DSU Article 6.7 for possible mutually agreed non-monetary compensation.

Moreover, the European Community, in the *US – FSC case*, requested authorisation 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 assisted based on the effect of the subsidy on European trade, which is about \$1,100 million, but not based on the amount of subsidy.⁸³

On this point, the Panel indicated that such countermeasures are ‘aimed at inducing or securing compliance with the DSB’s recommendation’.⁸⁴ Besides, there is nothing in the context of the ASCM which suggests entitlement to manifestly punitive measures.⁸⁵ The appropriate countermeasure should therefore be determined based on the effect of the subsidy on European trade, regardless of the amount the subsidising party paid while conducting the illegal action.⁸⁶ By doing so, the trade benefit between the Members concerned has been balanced, as if the US had withdrawn the illegal subsidy from the beginning.

Concisely, the author of the paper supports the viewpoint that, for a better implementation of the remedy to subsidy, it is not sufficient for the countermeasure to meet only the ‘appropriateness’ or ‘not to be disproportionate’ test. ‘Punitive countermeasures’ should be introduced as a possible approach that puts greater pressure on defending governments to withdraw an export subsidy within a dispute settlement mechanism. This approach can be justified on the basis of the *per se* nature of the prohibited export subsidy, which requests stricter subsidy discipline than the actionable subsidy. Additionally, enforcing the countermeasure, in itself, is a sanction for non-compliance with the DSB recommendation.⁸⁷ So how it is possible for a sanction measure not to include the meaning of punishment? The ‘appropriateness’ test should therefore take not only the adverse effects caused by the export subsidy into account, but also the fact the subsidising Member is guilty of acting in breach of the ASCM and then the DSB recommendation.

VI Conclusion

Although some economists believe in the existence of the universal 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

⁸³ Decision of the Arbitrator, *United States – Tax Treatment for Foreign Sales Corporations*, WT/DS108/ARB (Art 22.6 DSU) 30 August 2002, para 6.37.

⁸⁴ *Ibid*, para 5.52.

⁸⁵ *Ibid*, para 5.62.

⁸⁶ *Ibid*, paras 6.10, 6.28.

⁸⁷ ‘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 *Journal of World Trade*, 3. Available at SSRN: <<https://ssrn.com/abstract=2335157>> accessed 24 August 2022.

trade.⁸⁸ The prohibition of the export subsidy was therefore first introduced in the 1960s under Article 16 of the GATT. The Tokyo Round negotiations subsequently, escalated this prohibition until it reached its current upgraded form under the ASCM.

This paper examined and highlighted the great achievement of the ASCM, which could not be reached through the GATT and Subsidies Code before. Along with the findings of the DSB, it succeeded in giving export subsidies a *per se* prohibited nature, either in law or in fact. Based on the *per se* prohibited nature, WTO members are not required to submit any evidence on the adverse effect in order to win the dispute and to retaliate against the subsidising Member to offset their loss. On one hand, this *per se* prohibited nature of the export subsidies has explained the prompt dispute settlement procedure under Article 4 of the ASCM. On the other hand, this success is not complete when it comes to the remedy provisions that are supposed to reimburse the adversely affected Member. Hence, the essential criticism of remedies is that retaliation through establishing new trade barriers (suspension of the concessions or other obligations) contradicts the idea of liberalisation, as emphasised by the WTO. Moreover, the modification of an illegal export subsidy is not considered a remedy, nor is the mere repayment of the amount of the subsidy sufficient to prevent developed countries from granting export subsidies because the benefit conferred from the subsidy might be greater than the amount of which. Accordingly, in order to effectuate the remedial discipline and deter the illegal export subsidies, punitive countermeasures must be introduced.

⁸⁸ John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press 1997) 279.