

“Specificity” Test
In the Agreement of Subsidies and
Countervailing Measures

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Diagram 1: Closed Economy: Domestic Subsidies

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ABSTRACT

According to the WTO disciplines of subsidies and countervailing measures, domestic subsidies are actionable in the WTO or WTO members' jurisdictions when they are specific to an enterprise, industry, or a group of enterprises or industries. In practice, some issues can be raised concerning the specificity test. The purpose of this thesis topic is to examine the questions surrounding the legitimacy of the specificity test.

For this purpose, this thesis is divided into four chapters. Chapter I introduces the origin and rationale of the specificity test and reviews its drafting history within the Agreement of Subsidies and Countervailing Duties. The specificity test originated in the US and was introduced into WTO rules from the Uruguay Round. Chapter II analyzes the provisions and practices of the specificity test in the WTO. The specificity test differs in terms of prohibited subsidies and actionable subsidies under WTO rules and specificity and non-specificity for actionable subsidies are discussed in detail in this chapter. Chapter III analyzes the relevant provisions and practice of the specificity test in the US and EU jurisdictions and considers current US national law which has translated the pertinent WTO rules into national rules. Chapter IV discusses the legitimacy of the specificity test, in terms of both rationale and provisions and questions whether certain subsidies are countervailable or not within the jurisdiction of an individual Member's authority and also whether some subsidies are justified. Theoretical discussions regarding the scope of "certain enterprises", the non-accumulating factors for de facto specificity and the intention of the granting authority are evaluated.

CHAPTER I INTRODUCTION

According to the WTO disciplines on subsidies and countervailing measures, only those subsidies which are deemed to be specific to an enterprise, industry, or a group of enterprises or industries, are considered to be countervailable in the WTO Member's national jurisdictions and actionable on the multilateral level. This chapter will discuss the origin and rationale of the specificity test and its background in the Agreement on Subsidies and Countervailing Measures (ASCM).

1.1 Origin and rationale of the Specificity Test

The United States initially introduced specificity tests on subsidies in order to approve and implement the agreements reached in the Tokyo Round of Multinational Trade Negotiations, including the 1979 Subsidies Code¹ when the United States adopted the Trade Agreements Act of 1979 ("TAA")². In administering the US countervailing measures, the US Department of Commerce ("USDOC") had made a narrow application of Section 771(5)(B) of the Tariff Act of 1930³, which had become known generally as the "specificity test" of subsidies.⁴ This test was not necessarily required by the 1979 Subsidies Code (discussed *infra*) and was possibly not found in other countries' legislation.

¹ *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* ("1979 Subsidies Code"), reprinted in GATT, *Basic Instruments and Selected Documents (BISD)* 26th Supp. at 56 (1980).

² Trade Agreements Act of 1979, Pub. L. No. 96-39, §101, 93 Stat. 144 (codified at 19 U.S.C. §1671-1677(g) (1982)) ("TAA"). Also see PANZARELLA, Jay L. 1986. Is the Specificity Test Generally Applicable?, in *Law and Policy in International Business*, 18(2), p417, footnote 1.

³ The Section 771(5)(B) of the Tariff Act of 1930 is contained in 19 U.S.C. §1677(5)(B) (1982). §1677(5) states:

"(5) Subsidy--The term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 1303 of this title, and includes, but is not limited to the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a *specific* enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

19 U.S.C. § 1677(5) (1976 & Supp. III 1979)." (emphasis added)

⁴ PANZARELLA, Jay L. 1986. Is the Specificity Test Generally Applicable?, in *Law and Policy in International Business*, 18(2), p417

The basic idea of the specificity test is that when a foreign government subsidy affects trade, in order to offset the subsidy by imposing countervailing duties, an importing country must first establish that the subsidy is specific and not generally available to every person, enterprise or industry in the exporting country.

There are two arguments supporting the specificity test. First, the economic rationale is that subsidies that are not generally available to all of society and all of the sectors within a country will distort the comparative advantage.⁵ The economic theory of comparative advantage indicates that gains from international trade are maximized if countries export goods that they produce relatively more efficiently than producers in other countries and import goods that other countries can produce more efficiently than themselves.⁶ Such specific subsidies supposedly shift resources artificially from a country's efficient sector with comparative advantage toward its inefficient sector which lacks such an advantage.

Second, it is useful to limit the number of claims by the US producers for imposing countervailing measures, since the subsidies generally available (such as public infrastructure like hospital, roads, school, etc.) would be excluded from being countervailable.⁷ Otherwise, the burden placed on the investigating authorities would be overwhelming, implicating far more than mere administrative inconvenience.⁸ Besides, it is impossible for the authorities to calculate the benefit to industry in general, accruing from construction of a public highway in a reasoned and evenhanded manner.⁹

1.2 Legislative History of the Specificity Test in the ASCM

1.2.1 GATT1947 and the 1979 Subsidies Code

The subject of subsidies and countervailing measures was not new to the multilateral

⁵ See JACKSON, John H. (ed.). 1997. *The World Trading System: Law and Policy of International Economic Relations (2nd)*. Cambridge MA, London: MIT Press, at p296-297. Also see PANZARELLA, Jay L. 1986. Is the Specificity Test Generally Applicable?, in *Law and Policy in International Business*, 18(2), p423.

⁶ See SOUTHWICK, James D. 1988. *The Lingering Problem with the Specificity Test in United States Countervailing Duty Law*, in 72 *Minnesota Law Review*, at p1174(1988)

⁷ See JACKSON, John H. (ed.). 1997. *The World Trading System: Law and Policy of International Economic Relations (2nd)*. Cambridge MA, London: MIT Press, at p297. Also see SOUTHWICK, James D. 1988. *The Lingering Problem with the Specificity Test in United States Countervailing Duty Law*, in 72 *Minnesota Law Review*, 1159-1192 (1988), at p1162.

⁸ See *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983)

⁹ *Ibid.*

negotiations and the General Agreement on Tariffs and Trade (“GATT1947”)¹⁰, Article VI and XVI address this problem.¹¹ Nonetheless, they merely set out a very loose and general discipline of subsidies and countervailing measures and never touch the question of, or concerning, specificity of subsidies.

Because of the increase in the use of subsidies by governments in the time between the GATT1947 and the Tokyo Round negotiations (1974-1979), some contracting parties to the GATT produced the 1979 Subsidies Code in an effort to reduce or eliminate non-tariff barriers.¹² The 1979 Subsidies Code elaborates Article VI and XVI of the GATT1947 and makes it clear that the signatories are not prohibited from using the domestic subsidies normally granted either regionally or by sector.¹³ Accordingly, the specificity of subsidies is mentioned for the first time; albeit the 1979 Subsidies Code seems not to address the definition of a subsidy and the specificity test.

1.2.2 Draft Guidelines on Specificity

After completion of the Tokyo Round, the problems of subsidies were not resolved by the 1979 Subsidies Code, including determination of whether a practice constitutes a countervailable subsidy¹⁴. In 1982, the specificity test issue was first put forward in *Certain Steel Products from Belgium*¹⁵ within the US jurisdiction. In this case, some petitioners contended that many of the conclusions in USDOC’s preliminary determinations erred in finding that particular programs of general applicability and availability within a country were not considered to be domestic subsidies. They assert that subsidies must be found to exist from any governmental programs providing benefits, irrespective of whether those programs are generally available.¹⁶ However, the USDOC interpreted Section 771(5) of the Tariff Act

¹⁰ The General Agreement on Tariffs and Trade (“GATT1947”), in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 1994.

¹¹ See GATT1947, Art. VI and XVI.

¹² See STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume I: Commentary, at p815-816 (1993).

¹³ 1979 Subsidies Code, Art. 11:3

¹⁴ See *Problems In the Area of Subsidies and Countervailing Measures, Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG10/W/3 (17 March 1987). In the first formal meeting (16-17 March 1987) of the negotiating group, the Secretariat to the negotiating group on subsidies and countervailing measures pointed out that such a problem has arisen in the operation of Article VI and XVI of the GATT1947 and the 1979 Subsidies Code and that, in the discussion on that problem, the concept of specificity plays an important role.

¹⁵ *Notices Department of Commerce International Trade Administration Final Affirmative Countervailing Duty Determinations; Certain Steel Products From Belgium*, 47 Fed.Reg. 39304, 39328, 7 September 1982

¹⁶ *Ibid*, Appedix 4, Comment 1.

of 1930¹⁷ to require that a domestic subsidy must be provided either *de jure* or *de facto* to a “specific enterprises or industry, or group of enterprises or industries” in order to be countervailable. Therefore, USDOC was not in a position to treat such generally available benefits from domestic programs as subsidies.¹⁸

In April 1985, the Committee on Subsidies and Countervailing Measures (“Committee”) considered a document which is entitled “Draft Guidelines for the Application of The Concept of Specificity in the Calculation of the Amount of a Subsidy other Than an Export Subsidy” (“Draft Guidelines on Specificity”)¹⁹ and was prepared by a Group of Experts (based on the closely held “Annecy Group” discussions of the US, the EC, Canada, Japan and Switzerland.) It is the first time that the specificity test came up in writing on the multilateral level following the US countervailing duty measures begun in *Certain Steel Products from Belgium* of 1982²⁰. In the view of the Draft Guidelines on Specificity, as for subsidies other than export subsidies, only those measures which are specific to an enterprise or industry, or group of enterprises or industries, can be countervailable (domestic) subsidies.²¹

In the beginning, by invoking Article 11: 3 of the 1979 Subsidies Code, the designers of the Draft Guidelines on Specificity opined that the 1979 Subsidies Code provides a legal basis for the specificity test on subsidies.²²

Further, the Draft Guidelines on Specificity clarifies two types of specificity, namely *de*

¹⁷ See *supra* footnote 3.

¹⁸ See *supra* footnote 15, Appendix 4, DOC Position.

¹⁹ See *Draft Guidelines for the Application of the Concept of Specificity in the Calculation of the Amount of a Subsidy other Than an Export Subsidy* (“Draft Guidelines on Specificity”), GATT Doc. No. SCM/W/89 (April 25, 1985).

²⁰ See *supra* footnote 15.

²¹ See *Problems In the Area of Subsidies and Countervailing Measures, Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG10/W/3 (17 March 1987).

²² See *supra* footnote 19, *Draft Guidelines on Specificity*, Part I:

“1

It is recognized that the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade intended that only certain government financial, assistance measures – those measures which are granted ‘with the aim of giving an advantage to certain enterprises’ and which “are normally granted either regionally or by sector’ (Article 11:3) - were to be considered as subsidies.”

Also see Article 11:3 of the 1979 Subsidies Code:

“Article 11: Subsidies other than export subsidies

...

3. Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are: 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; government financing of research and development programs; fiscal incentives; and government subscription to, or provision of, equity capital.”

jure and *de facto*. The former refers to explicit restrictions on access to a measure placed by the granting authority; the latter means that the measure which, in effect, deliberately grants an advantage to certain enterprises, is specific although certain criteria or conditions for eligibility are established.²³

It is also noted that the Draft Guidelines on Specificity expressly mentions an advantage granted to certain enterprises for several times.²⁴ The designers seem to consider that there should be high correlation between whether an advantage is granted to certain enterprises or industries and whether the government financial assistance measures are specific to those enterprises or industries.

However, during the Uruguay Round negotiation, the United States (with both eyes on the *Softwood Lumber* case against Canada) stated that specificity should be in the negotiated Round rather than adopted in the Draft Guidelines. According to the United States, the concept of specificity was not referred to in the GATT1947 or in the 1979 Subsidies Code. Moreover, it concluded, from its national practice, that the specificity test had no economic justification.²⁵ On the contrary, the EC disagreed with the United States and noted that the

²³ See *supra* footnote 19, *Draft Guidelines on Specificity*, Part II.

“II

In seeking to determine whether government financial assistance measures (hereinafter referred to as a measure) are specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as certain enterprises), and as such grant an advantage to those enterprises or industries over those available to other enterprises or industries the following considerations shall be taken into account:

- (a) A measure may be specific to certain enterprises to the extent that restrictions on access are placed by the granting authority;
- (b) In determining whether any restrictions on access to a measure exist, only those restrictions which affect access within the jurisdiction of the granting authority are to be taken into account;
- (c) Where the granting authority explicitly limits access to a measure to certain enterprises, such a measure would be specific;
- (d) Where the granting authority acts to exclude certain enterprises from access to a measure, specificity may or may not exist;
- (e) Where the granting authority establishes certain criteria or conditions for eligibility, no specificity would normally exist to the extent that the criteria or conditions for eligibility were based on neutral factors and eligibility was automatic once the criteria or conditions were met;
- (f) Evidence based on the above may not in certain cases give sufficient guidance for a finding of non-specificity. It may be necessary in those cases for the investigating authority to look beyond any nominal non-specificity of a measure to determine whether the measure is, nonetheless, *de facto* deliberately granting an advantage to certain enterprises. Any determination of specificity in such cases must be clearly substantiated;
- (g) Where neutral criteria are used by governments to determine access to a measure, they must be clearly spelled out in law or regulation and be capable of verification. In this regard, the granting authority should ensure that assistance is granted on the basis of the criteria established.”

²⁴ *Ibid.*

²⁵ See *Minutes of the Meeting Held on 25 October 1990*, GATT Doc. No. SCM/M/48 (21 December 1990), at para. 74.

specificity test was stated in the Omnibus Trade and Competitiveness Act of 1988 even though the United States stated simultaneously that it had no economic meaning.²⁶

Finally, the Draft Guidelines on Specificity were not adopted by the Committee and, additionally, did not address the question whether measures limited to certain regions should be considered to be specific.²⁷

1.2.3 Overviews of Participants' Proposals in the early and mid Uruguay Round Negotiations

From late 1985 and early 1986 when the Uruguay Round was launched²⁸ until 1989, some participants separately submitted proposals regarding specificity.²⁹ The EC proposed, in its submission of 11 June 1987, that a lot of subsidies do not distort trade and should not be actionable, *inter alia*: (1) generally available subsidies, such as tax concessions; (2) regional subsidies; (3) structural adjustment subsidies; and (4) indirect subsidies.³⁰

At the meeting on 1-3 February 1988, Switzerland proposed the redefinition of existing types of subsidies and classification into three categories: prohibited subsidies, actionable subsidies, and non-actionable subsidies.³¹ Switzerland suggested that it was necessary to define prohibited subsidies and non-actionable subsidies narrowly and precisely by taking account of governmental cost and specific application as cumulative elements. By contrast, according to Switzerland, the definition of actionable subsidies might be more flexible and is not necessarily limited to cost and specificity of measures.³² Also at that meeting, another participant proposed that the Negotiating Group would have to work on general availability/specificity criteria allowing for disciplining effectively trade distorting measures as a category.³³

At the meeting of 28-29 June 1989, a number of participants advocated making the

²⁶ *Ibid*, para. 75.

²⁷ See *supra*, footnote 21.

²⁸ See STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume I: Commentary, at p840-842 (1993).

²⁹ See STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume I: Commentary, at p847-870 (1993).

³⁰ See *Communication from the EEC*, GATT Doc. No. MTN.GNG/NG10/W/7 (11 June 1987), at p4-5.

³¹ See *Meeting of 1-3 February 1988, Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG10/6 (15 February 1988), at para. 2. See *Communication from Switzerland*, GATT Doc. No. MTN.GNG/NG10/W/17 (1 February 1988), at p3-6.

³² See *Communication from Switzerland*, GATT Doc. No. MTN.GNG/NG10/W/17 (1 February 1988), at p6.

³³ See *Meeting of 1-3 February 1988, Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG10/6 (15 February 1988), at para. 4.

concept of specificity one of the bases for defining actionable subsidies.³⁴ In particular, Canada brought up the Draft Guidelines on Specificity (mentioned *supra*) again.

Following this meeting, Japan, the Nordic countries, the EC, India and Korea³⁵ supported the concept of specificity once again by submitting their proposals until the Brussels Ministerial Meeting was held in December 1990.

1.2.4 Dunkel SCM Draft and the Cartland Drafts

Just prior to the Brussels Ministerial Meeting, Mr. Micheal D. Cartland, the Chairman of the Negotiating Group on Subsidies and Countervailing Measures, circulated the forth version of the Draft Text on Subsidies and Countervailing Measures (“Cartland IV”)³⁶, which covered the specificity test that refers to a lot of communications from participants, and forwarded it to Brussels as a part of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (“Brussels Draft Final Act”)³⁷, the basis for the ministerial level negotiations.³⁸

On 20 December 1991, the “Dunkel Text”³⁹ was put forward by Mr. Arthur Dunkel, the Chairman of the Trade Negotiation Committee. Within the Dunkel Text, the subsidies and countervailing measures text is found in Section I and is titled “Agreement on Subsidies and Countervailing Measures” (“Dunkel SCM Draft”). The specificity test was set forth in Article 2 of the Dunkel SCM Draft.⁴⁰

³⁴ See *Meeting Of 28-29 June 1989, Note by the Secretariat*, GATT Doc. No. MTN.GNG/NG/12 (14 July 1989), at para. 5.

³⁵ See *Elements on the Framework for Negotiations, Submission by Japan*, GATT Doc. No. MTN.GNG/NG10/W27 (6 October 1989), at p2. See *Elements on the Framework for Negotiations, Submission by the Nordic Countries*, GATT Doc. No. MTN.GNG/NG10/W30 (27 November 1989), at p3. See *Elements on the Framework for Negotiations, Submission by the European Community*, GATT Doc. No. MTN.GNG/NG10/W31 (27 November 1989), at p5-6. See *Elements on the Framework for Negotiations, Submission by India*, GATT Doc. No. MTN.GNG/NG10/W33 (30 November 1989), at p3. See *Elements on the Framework for Negotiations, Submission by the Republic of Korea*, GATT Doc. No. MTN.GNG/NG10/W34 (27 November 1989), at p3.

³⁶ See *Draft Text on Subsidies and Countervailing Measures (“Cartland IV”)*, GATT Doc. No. MTN/GNG/NG10/23 (7 November 1990).

³⁷ See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Revision (“Brussels Draft Final Act”)*, GATT Doc. No. MTN.TNC/W/35/Rev.1 (3 December 1990).

³⁸ See STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume I: Commentary, at p874-875 (1993).

³⁹ See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. No. MTN.TNC/W/FA (20 December 1991). It is also known as “Dunkel Draft”.

⁴⁰ See Dunkel Text, *supra* footnote 40. Article 2 of the Dunkel SCM Draft reads:

“Article 2 Specificity

2.1 In order to determine whether a subsidy, as defined in Article 1.1 above is specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as "certain enterprises") within the territory of the subsidizing country, the following principles shall apply:

Generally speaking, the specificity provisions of the Dunkel SCM Draft and various proceeding draft texts produced by the negotiating group on subsidies and countervailing measures, Cartland I through IV⁴¹ are developed from those of the Draft Guidelines on Specificity. In contrast to the Draft Guidelines on Specificity, Article 2.1 of the Dunkel SCM Draft describes the conditions to determine whether a subsidy is specific to an enterprise or industry or group of enterprises or industries “within the territory of the subsidizing country”⁴². In particular, it details “the objective criteria or conditions governing the

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions¹ governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b) above, there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities in the subsidizing country, as well as of the length of time during which the subsidy programme has been in operation.

2.2 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. 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.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

¹Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application such as number of employees or size of enterprise.” (emphasis added)

⁴¹ See *Status of Work in the Negotiating Group, Report by the Chairman to the GNG* (“Cartland I”), GATT Doc. No. MTN/GNG/NG10/W/38 (18 July 1990); *Draft Text by the Chairman* (“Cartland II”), GATT Doc. No. MTN/GNG/NG10/W/38/Rev.1 (4 September 1990); *Draft Text by the Chairman* (“Cartland III”), GATT Doc. No. MTN/GNG/NG10/W/38/Rev.2 (2 November 1990); and also see *supra* footnote 36, Cartland IV.

⁴² Article 2.1 of the Cartland IV did not involve the restrictive phrase “within the territory of the subsidizing country”. The Dunkel SCM Draft includes this phrase based on the proposal of 26 November 1990 by Mexico. The reason for submitting this proposal is that, in Mexico’s view, :

“[T]here must be no discrimination between enterprises nor between industries. But the draft does not contain a fundamental clarification that must be made, namely that this requirement of non-discrimination must refer to - and only to - production facilities located in the national territory of the signatory country.

In the absence of such a clarification, the condition as set forth in the Chairman's draft means directly that countries endowed with natural resources renounce their comparative advantages, or otherwise that they be exposed to the application of countervailing measures in their export markets. This means that National Treatment is applied beyond the territory of contracting parties, which is fundamentally inconsistent with this basic GATT concept.”

See *Communication from the Permanent Delegation of Mexico*, GATT Doc. No. MTN.TNC/W/38 (26 November 1990), at p1.

eligibility”⁴³ for a subsidy and provides some factors which may be considered in determining *de facto* specificity.

Apart from that, three substantive provisions on specificity are added into the Dunkel SCM Draft compared with the Draft Guidelines on Specificity. Firstly, Article 2.2 of the Dunkel SCM Draft states that “a subsidy ... available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority.”⁴⁴ Secondly, two types of subsidies, i.e. subsidies for R&D and for development of poor regions, are designed to be non-actionable if they meet certain conditions, meaning they cannot be challenged even if specific to certain enterprises or industries.⁴⁵ Thirdly, the Dunkel SCM Draft stipulates that any prohibited subsidy as provided in Article 3 is deemed to be specific.⁴⁶

1.2.5 Final Uruguay Round Negotiations

From the date when the Dunkel Text was put forward, the Uruguay Round negotiations came to the final phase. In this stage, Canada and Mexico participated in discussions that led to substantive changes to the provisions of the Dunkel SCM Draft related to specificity test.
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In December 1992, Canada proposed elimination of such a provision in Article 2.2 of the Dunkel SCM Draft.⁴⁸ According to this provision, any subsidy offered by a provincial government in Canada is deemed to be specific even if it was generally available throughout the province. Hence, Canada expressed the concern that Article 2.2 of the Dunkel SCM Draft broke the balance between parties with federal systems of government and those with unitary systems of government, and that “the text ran contrary to the principle under which GATT had

⁴³ See *supra* footnote 40, footnote 1 to the Dunkel SCM Draft.

⁴⁴ See *supra* footnote 40, Article 2.2 of the Dunkel SCM Draft.

The provision is similar to Article 4.2 of the Cartland II and the same as Article 2.1(d) of the Cartland III and IV.

⁴⁵ See *supra* footnote 39, Dunkel Text or Dunkel Draft. Article 8 of the Dunkel SCM Draft does not include environmental subsidies to the category of non-actionable subsidies as opposed to Article 8 of the Cartland II, III and IV.

⁴⁶ See *supra* footnote 40, Art. 2.3 of the Dunkel SCM Draft. The Cartland II, III and IV had only deemed any “export subsidy” to be specific.

⁴⁷ See *supra* footnote 12, at p228.

⁴⁸ See STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume IV: The End Game (Part I), at p221-222 (1993).

always striven to be neutral as to the constitutional make-up of contracting parties.”⁴⁹ The United States supported this proposal, as a consideration of Canada’s support of the US proposal’s to change the antidumping draft.⁵⁰

In January 1993, Mexico proposed the inclusion of certain subsidies granted for environmental protection into the “green light”, i.e. non-actionable subsidies.⁵¹ It implied that if the environmental subsidies meet certain requirements, they are not actionable regardless of their specificity.

Finally, the proposals by Canada and Mexico were accepted. That is, a revision of Article 2.2 of the Dunkel SCM Draft states that a subsidy which is “limited to certain enterprises” (rather than “available to all enterprises”) located within a designated geographical region shall be specific; and a revision to Article 8 of the Dunkel SCM Draft added a new paragraph (c) on the third type of non-actionable subsidies, environmental subsidies.⁵²

In April 1994, such revisions were included as a part of the final Agreement on Subsidies and Countervailing Measures (“ASCM”) embodying one of the final results of the Uruguay Round negotiations. The ASCM has no substantively different provisions pertaining to the specificity test from that of the Dunkel SCM Draft, except for two aspects, namely regional specificity and environmental subsidies. The next chapter will address the specificity test which is provided for in the ASCM.

CHAPTER II RELEVANT PROVISIONS AND PRACTICE OF THE SPECIFICITY TEST IN THE WTO

Pursuant to Article 1.2 of the ASCM, the disciplines of the ASCM only apply to subsidies that are "specific" within the meaning of Article 2 thereof.⁵³ Prior to analysis of the specificity test in the WTO, in the light of the close linkage between the categories and the

⁴⁹ See *Minutes to Trade Negotiations Committee Thirty-third Meeting of 19 November 1993*, GATT Doc. No. MTN.TNC/37 (29 November 1993), at para. 25.

⁵⁰ STEWART, Terence, P. (ed.), *The GATT Uruguay Round: A negotiating History (1986-1992)*, Volume IV: The End Game (Part I), at p237, footnote 61 (1993).

⁵¹ Article 8 of the Dunkel SCM Draft on identification of non-actionable subsidies does not involve subsidies to protect environment. See *supra* footnote 12, p221-222. Although the Cartland IV had contained the provision concerning environmental protections, it had been deleted from the Dunkel SCM Draft.

⁵² *Ibid.*

⁵³ See Report of the Panel, *Korea – Measures Affecting Trade In Commercial Vessels (“Korea – Commercial Vessels”)*, WT/DS273/R, 7 March 2005, at para 7.192.

specificity test, it is necessary to clarify types of subsidies. In the ASCM, subsidies are classified into the following three categories: prohibited subsidies, actionable subsidies and non-actionable subsidies. All export subsidies are prohibited subsidies and all actionable subsidies and non-actionable subsidies are domestic subsidies. The specificity test is significant to determine whether domestic subsidies are actionable or not. That is, domestic subsidies which are not specific shall be considered as non-actionable subsidies pursuant to Article 8.1(a) of the ASCM.⁵⁴

In sum, Article 2 of the ASCM⁵⁵ provides for the specificity test and Article 8 on the

⁵⁴ See Agreement on Subsidies and Countervailing Measures (“ASCM”), in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p239. Article 8.1(a) states:

“Article 8 Identification of Non Actionable Subsidies

8.1 The following subsidies shall be considered as non actionable :

(a) subsidies which are not specific within the meaning of Article 2;

...”

⁵⁵ See Agreement on Subsidies and Countervailing Measures (“ASCM”), in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p232. Article 2 states:

“Article 2 Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions² governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.³ In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. 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.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

² Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

³ In this regard, in particular, information on the frequency with which applications for a subsidy

identification of non-actionable subsidies related to it.

2.1 Specificity Test for the Prohibited Subsidies

According to Article 2.3 of the ASCM, the subsidies which fall within Article 3 of the ASCM, i.e. the prohibited subsidies, are deemed to be specific. This means that as long as such subsidies are proved to be within the meaning of Article 3 of the ASCM, they are viewed to be specific without being further proved.

In the Panel Report of the *Canada -- Aircraft*⁵⁶, as modified by the Report of the Appellate Body, the Panel simply found that Canada Account debt financing and TPC assistance to the Canadian regional aircraft industry constituted export subsidies inconsistent with Article 3.1(a) and 3.2 of the SCM Agreement⁵⁷ and did not find whether they were deemed to be specific. The same reasoning goes for the *Australia – Automotive Leather*⁵⁸ case where the Panel found that the payments under the grant contract were prohibited subsidies within the meaning of Article 3.1(a) of that Agreement though the Panel never mentioned the specificity test or Article 2.3 of the ASCM. It seems that there was no need for the panels in those cases to find that those projects were specific when they have been already been found to constitute export subsidies.

Another example related to the specificity test and prohibited subsidies is in the *Korea – Commercial Vessels*⁵⁹, when, after the Panel first found that KEXIM APRGs are "contingent ... upon export performance" within the meaning of Article 3.1(a) of the ASCM, it addressed the issue of specificity briefly. The reasoning of the Panel was merely that since Article 2.3 of the ASCM provides that "[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific", it concluded that KEXIM APRGs, found to be export subsidies, were specific.

are refused or approved and the reasons for such decisions shall be considered."

⁵⁶ See Report of the Panel, *Canada – Measures Affecting the Export of Civilian Aircraft* ("Canada - Aircraft"), WT/DS70/R, 14 April 1999, para. 9.231, 9.348 and 10.1.

⁵⁷ See Agreement on Subsidies and Countervailing Measures ("ASCM"), in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p233. Article 3.1(a) and 3.2 of the ASCM states:

"3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

- (a) 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;

.....

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1."

⁵⁸ See Report of the Panel, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* ("Australia-Automotive Leather"), WT/DS126/R, para. 10.1.

⁵⁹ See Panel of the Report, *Korea – Commercial Vessels*, at para. 7.192.

Similarly, in that case, the Panel found, based on the same reasoning, that the export subsidies, KEXIM PSLs, were also specific.⁶⁰

Therefore, the specificity test is less important when determining on prohibited subsidies which have fallen within Article 3 of the ASCM. Such subsidies are deemed to be specific without analysis of the relevant facts on issue, once they are found to be prohibited subsidies.

2.2 Specificity Test for the Actionable Subsidies

In contrast to prohibited subsidies, the specificity test is key in determining whether certain domestic subsidies are actionable or not under the WTO or national jurisprudence. Article 2.1 and 2.2 of the ASCM⁶¹ establishes a specificity test for the actionable subsidies, which includes not only principles where *de jure* specificity and *de facto* specificity shall be determined, but also conditions where specificity of subsidies shall not exist.

2.2.1 Specificity for the Actionable Subsidies

Pursuant to Article 2.1 of the ASCM, two types of specificity exist: *de jure* specificity and *de facto* specificity.

2.2.1.1 De jure Specificity

De jure specificity means that certain domestic subsidies must be specific, in law, “to an enterprise or industry or group of enterprises or industries”, if access is “explicitly” limited to a subsidy to certain enterprises by the granting authority or the legislation according to which the granting authority operates, as provided for in Article 2.1(a) of the ASCM⁶².

As an example, in *EC — Countervailing Measures on DRAM Chips*⁶³, the Panel found that the EC’s determinations that the May and October 2001 Restructuring Programs, were specific to Hynix and consistent with Article 2 of the ASCM.⁶⁴ In order to help Hynix pull out of a financial crisis in Korea of 1997, the eighteen Hynix creditor banks, directed by Korea, agreed to a recapitalization plan, i.e. the “May 2001 Restructuring Programs”, by

⁶⁰ See Panel of the Report, *Korea — Commercial Vessels*, at para. 7.308.

⁶¹ See *supra* footnote 55. Article 2.1 and 2.2 of the ASCM.

⁶² See *supra*, footnote 55. Article 2.1(a) of the ASCM.

⁶³ See Report of the Panel, *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (“*EC — Countervailing Measures on DRAM Chips*”), WT/DS299/R, 17 June 2005.

⁶⁴ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.231.

injecting fresh capital into Hynix through the offering of KRW 1.3 trillion of global depositary receipts ("GDRs"), by extending the maturities of short and long-term debt (a debt roll-over), and by purchasing convertible bonds ("CBs") worth KRW 1 trillion.⁶⁵ In October 2001, the Creditors Financial Institutions Council ("CFIC") which consisted of a hundred and ten financial institutions including seventeen banks and fifteen investment trust companies⁶⁶, decided on a second restructuring package for Hynix, the so-called "October 2001 Restructuring Program". Creditor banks were given three options, ranging from walking away from Hynix and collecting part of the amount owed as determined by a liquidation report, to providing even further financing. Six banks provided new funds to Hynix and agreed to a new loan of KRW 1 trillion to Hynix with an interest rate of 7 per cent; a debt-to-equity swap by acceptance of bonds convertible into shares; and extending the maturities of existing loans until 31 December 2004, converting the maturing corporate bonds into corporate bonds with a three year maturity and an interest rate of 6.5 per cent and adjusting the interest rate of the remaining loans in Korean currency to 6 per cent.⁶⁷ The EC determined that the creditor banks in the May and October 2001 Programs were either public bodies or entrusted or directed by the government of Korea⁶⁸ and they granted benefits to Hydix⁶⁹.

In the Panel stage, Korea argued that all the transactions were carried out under the broader framework which attempted to bring creditors together to address the debt of troubled but viable companies, in a way recommended by the IMF and based on the so-called "London approach". Korea submitted that if the programs were found to be specific in this context, it would be like saying that a country's bankruptcy laws are company specific.⁷⁰

In this regard, the EC emphasized that Korea admitted that the transactions were unparalleled, and that it was therefore not ingenuous to argue that these Programs were a variation of the normal application of generally applicable bankruptcy laws.⁷¹

The Panel noted that the EC never made any findings with respect to the Corporate

⁶⁵ *Ibid*, para. 7.15.

⁶⁶ COMMISSION REGULATION (EC) No 708/2003 of 23 April 2003 imposing a provisional countervailing duty on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea ("the Preliminary Determination"), para. 49.

⁶⁷ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.16.

⁶⁸ *Ibid*, para. 7.110 and 7.114.

⁶⁹ *Ibid*, para. 7.203 and 7.205.

⁷⁰ *Ibid*, para. 7.219.

⁷¹ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.222.

Restructuring Agreement (“CRA”)⁷² or the Corporate Restructuring Promotion Act (“CRPA”)⁷³ as such, but its determination related to the unique bail out operation for Hynix undertaken under this general framework. According to the Panel, these restructuring programs were not simply the application of a generally available support program. On the contrary, the CRA/CRPA merely provided a procedural framework for restructuring which did not involve any financial contributions. The problem was that the EC found that, under the May and October 2001 Restructuring Programs and allowing for the Panel’s earlier findings with respect to financial contributions and benefits, a specific restructuring operation was executed for Hynix. Hynix received financial contributions which were specifically given to Hynix since the banks granted new loans or rolled-over debt and swapped debt-to-equity of Hynix. Hence, the panel found that the May and October 2001 Restructuring Programs which constituted the subsidies within the meaning of Article 1 of the ASCM, were specific as the EC had determined and that thereby the EC’s relevant determinations were consistent with the Article 2 of the SCM Agreement.⁷⁴

From the above example, it can be assumed that the May and October 2001 Restructuring Programmes were typically of *de jure* specificity. The public bodies or creditor banks were entrusted or directed by the government to operate these programs and to grant benefits only and explicitly to an enterprise, Hynix.

2.2.1.2 De facto Specificity

De facto specificity means that there are reasons to believe that some domestic subsidies may in fact be specific, although such subsidies appear generally available. Pursuant to Article 2.1(c) of the ASCM, the following factors may be considered in determining *de facto* specificity: (1) use by a limited number of certain enterprises; (2) predominant use by certain enterprises; (3) the grant of disproportionately large amounts of subsidy to certain enterprises; and (4) the manner in which discretion is exercised by administering authorities.⁷⁵

Meanwhile, Article 2.1(c) of the ASCM requires that, in determining *de facto* specificity,

⁷² Corporate Restructuring Agreement (“CRA”) of Korea, see Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, Annex F. It was set up in June, 1998.

⁷³ Corporate Restructuring Promotion Act (“CRPA”) of Korea, see Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, Annex F. In September 2001, the CRPA replaced the CRA.

⁷⁴ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.231.

⁷⁵ See *supra*, footnote 55. Article 2.1(c) of the ASCM. See also HORLICK, Gary. (2003) *WTO and NAFTA Rules and Dispute Resolution: Selected Essays on Antidumping, Subsidies and other Measures*, p23.

account be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, and the length of time during which the subsidy program has been in operation.

In comparison with *de jure* specificity, *de facto* specificity is more prevalent and more difficult to determine during the bilateral or multilateral trade disputes settlement on domestic subsidies. Under the WTO, there are several cases where the provisions of the ASCM on *de facto* specificity were applied. In the *EC — Countervailing Measures on DRAM Chips*⁷⁶, the complainant Korea claimed that the EC made an erroneous finding of *de facto* specificity, specifically with respect to the KDB Debenture⁷⁷

KDB Debenture Program was established by the government of Korea in January 2001 in response to financial instability in Korea caused by the fact that quite a lot of bonds issued by a few companies (including Hynix) were due to mature simultaneously.⁷⁸ Under the KDB Debenture Program, maturing debt was to be rolled-over and re-packaged for investors. Hynix⁷⁹ which was admitted to this program, had to pay 20 per cent of the due debt, while 80 per cent was purchased by the KDB. Then, the KDB repackaged 70 per cent of the 80 per cent of debt for sale to investors as collateralized bond obligations ("CBOs") and/or collateralized loan obligations ("CLOs"), guaranteed by the Korea Credit Guarantee Fund ("KCGF"); and 10 per cent was retained by the KDB. The EC found that the bond purchase by the KDB as part of this program constituted a financial contribution by the government of Korea which

⁷⁶ See *supra* footnote 63.

⁷⁷ The EC issued COUNCIL REGULATION (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea ("the Final Determination"), finding that, of the two Korean DRAMs producers, Hynix and Samsung, the latter did not receive a subsidy above *de minimis* and it thus decided not to impose any countervailing duty on imports from this producer. However, The EC found that, from 2000 through 2001, Korea granted subsidies through five different support and restructuring programs which were countervailable to Hynix: the Syndicated Loan, the Korea Export Insurance Corporation ("KEIC") Guarantee, the Korea Development Bank ("KDB") Debenture Program, the May 2001 Restructuring Program, and the October 2001 Restructuring Program.

See also Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 2.3 and 7.1.

⁷⁸ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.195.

⁷⁹ The Panel took note of the record which shows that Hynix's financial situation was critical during the years after 1997 when the financial crisis broke out in Korea, and that, by the end of 2000, Hynix had accumulated more than USD 9.46 billion of liabilities, almost twice its net worth and more than four times the market capitalisation of the company. The important problem that Hynix was facing seems to consist of the maturing of the majority of these liabilities in the year 2001, which would imply serious liquidity problems for Hynix.

Hence, the EC determined that, by November 2000, Korea decided to take action to "alleviate Hynix' cash crunch" and provided subsidies through five different support and restructuring programs from December 2000 to October 2001.

See also Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.11.

conferred a benefit on Hynix.⁸⁰

Further, the EC concluded that the KDB Debenture Program constituted a *de facto* specific subsidy to an exporter of Korea, Hynix, based on (1) the limited number of users of the subsidies; (2) the predominant use of the subsidy programs by Hynix; and (3) the granting of disproportionately large amounts of subsidy to certain companies.⁸¹ In the Preliminary Determination, the EC found that 79 per cent of the total expenditure under the KDB Debenture Program went to Hyundai group companies.⁸² In the Final Determination, the EC reasoned that the KDB Debenture program was only used by six companies, four of which belonged to Hyundai Group, including Hynix, and that Hynix used 41 per cent of the funds of the program. However, according to the Final Determination, it is noted that the information on the record indicates that more than 200 companies in Korea would have fulfilled the selection criteria of the program.⁸³ The EC pointed out that, after the participants in the program had been announced, there was a lot of criticism within Korea from companies in similarly difficult situations complaining about the lack of transparency and the eligibility criteria. These criticisms indicate that the EC also considered the manner in which discretion was exercised in admitting companies to the KDB Debenture Program.⁸⁴ Finally, the EC concluded that the large proportion of Hyundai Group of companies in the participants and the predominant use by Hynix of the total funding of the program clearly fulfils the specificity criteria and leads to the conclusion that the KDB Debenture Program, as applied, constituted a *de facto* specific subsidy to Hynix.⁸⁵

Korea argued that the KDB Debenture Program was not specific to Hynix but attempted to deal with a common problem of maturing bonds in the Korean market. The creditors' decision to apply for the KDB program was based on commercial considerations.⁸⁶ In addition, the fact that Hynix used 41 per cent of the funds, asserted by Korea, did not necessarily indicate the predominant use of the alleged subsidies, since such data needs to be considered in light of the importance of the DRAM sector in Korea.⁸⁷ In this regard, Korea

⁸⁰ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.14.

⁸¹ *Ibid*, para. 7.223.

⁸² See *supra*, footnote 66, the Preliminary Determination, para. 64.

⁸³ See *supra*, footnote 77, the Final Determination, para. 52 and 65.

⁸⁴ *Ibid*, para. 69.

⁸⁵ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.223 and 7.227.

⁸⁶ *Ibid*, footnote 31.

⁸⁷ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.217.

argued that the six companies which used the KDB Debenture Program were distinguishing in size, distinguishing in industry, and distinguishing in terms of their financial circumstances, and that such differences would temper the specificity of this subsidy.⁸⁸ At last, Korea argued that the EC should have taken account of the extent of the diversification of the Korean economy and the length of time the program had been in operation as clearly provided by Article 2.1(c) of the SCM Agreement.⁸⁹

In any event, Korea submitted that 70 per cent of the KDB bonds were repackaged in the May 2001 CBOs/CLOs program, and, as this program was not specific, such bonds should have been excluded. Korea argued that the EC's allegation that the bonds were sold via the CBOs under different conditions was simply incorrect and unsupported by evidence.⁹⁰

In this case, the Panel first confirmed Korea's argument that it was not enough to determine the existence of specificity by merely relying on the use of the program by a limited number of certain enterprises when the eligibility criteria were broad enough and the restricted use of the program depended on the extent of the commitments which companies were willing to make rather than on any government behavior.⁹¹ Next, the Panel considered the reasoning and conclusion by the EC that the KDB Debenture Program was *de facto* specific to Hynix.⁹² Nevertheless, it did not opine the fact that the bonds, once purchased by the KDB and resold via the CBOs/CLOs program had any effect on the specificity analysis. The countervailable subsidy consisted of the financial contribution through the purchase of a bond and thus the granting of a loan by the KDB – a public body – to Hynix. The fact that the KDB later resold the bonds via the CBOs/CLOs programs, together with bonds of other participating companies, was not relevant in this respect.⁹³ Moreover, the Panel was of the view that Korea did not provide any supporting evidence to demonstrate that the EC failed to take account of the economic diversification of the Korean economy and the length of time the program. The panel considered that the parties did not put forward the issue that the disproportionate use of the Program's funds for Hynix was somehow as a result of the lack of diversification of the Korean economy or the length of time the program had been run.⁹⁴

⁸⁸ *Ibid*, footnote 187 and para. 7.217.

⁸⁹ *Ibid*, para. 7.217.

⁹⁰ *Ibid*, para. 7.218.

⁹¹ *Ibid*, para. 7.224.

⁹² *Ibid*, para. 7.226 and 7.227.

⁹³ *Ibid*, para. 7.228.

⁹⁴ See Report of the Panel, *EC — Countervailing Measures on DRAM Chips*, para. 7.229.

By examining all four factors mentioned in Article 2.1(c) of the ASCM for *de facto* specificity, the Panel concluded that the KDB Debenture Program was *de facto* specific to Hynij and that the EC determination of specificity with regard to the KDB Debenture Program was consistent with Article 2.1 of the ASCM.

It is noted that the Panel in the *EC — Countervailing Measures on DRAM Chips* examined all four factors considered in determining *de facto* specificity. However, this was not always the case. In the *US – Softwood Lumber IV*⁹⁵, the Complainant Canada argued that US should have examined all four factors found in Article 2.1(c) of the ASCM when analyzing whether stumpage programs at issue were specific, rather than only taking into account the first two factors.

In this regard, the Panel noted that Article 2.1(c) of the ASCM provides that if “there are reasons to believe that the subsidy may in fact be specific, other factors may be considered”⁹⁶. In the Panel’s view, the use of the verb “may” rather than “shall” indicates that there are reasons to believe that the subsidy may in fact be specific; an authority may want to analyze any of the four factors or indicators of specificity. Meanwhile, the Panel also compared the language between Article 2.1(c) of the ASCM and, for example, Article 15.4 of the ASCM⁹⁷ on determination of injury which provides that “the examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry including ...”, and then lists the factors which must be included in the evaluation. According to the Panel, Article 15.4 of the ASCM contained an obligation on the part of the investigating authority to at least examine and evaluate all factors listed in the provision. Further, the Panel considered that, if

⁹⁵ See Report of the Panel, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada* (“*US – Softwood Lumber IV*”), WT/DS257/R, 29 August 2003.

⁹⁶ See *supra*, footnote 55.

⁹⁷ See *supra*, footnote 55, the ASCM, in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p250. Article 15.4 states:

“Article 15 Determination of Injury

...

15.4 The examination of the impact of the subsidized imports on the domestic industry *shall* include an evaluation of *all relevant economic factors* and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programs. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. (emphasis added)

...”

the drafters had wanted to impose a formalistic requirement to examine and evaluate all four factors mentioned in Article 2.1(c) of the ASCM in all cases, they would have equally and explicitly provided so, as they have done elsewhere in the ASCM. Hence, the Panel concluded that there was no obligation on the USDOC to examine the last two factors mentioned in Article 2.1(c) of the ASCM, (which the USDOC had not explicitly examined), that is, whether disproportionately large amounts of the subsidy were granted to certain enterprises or the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.⁹⁸ This issue was not appealed to the Appellate Body.

In the light of the above discussion, it is allowed that not all four factors set forth in Article 2.1(c) of the ASCM should be considered or taken into account by an investigating authority in order to determine whether a subsidy is of *de facto* specificity. In other words, the factors for determination of *de facto* specificity are not accumulative.

In addition, the issue of “the extent of diversification” in the context of Article 2.1(c) of the ASCM was only briefly discussed by the Panel in the *US – Softwood Lumber IV*. In that case, Canada contended that the US failed to take account of the extent of diversification of provincial economies. In British Columbia, the value of forestry-related shipments in 2000 accounted for more than half the value of all manufactured shipments in the province. In 1999, the various forest products industries accounted directly for 24 per cent of the goods-producing industries’ provincial GDP, and 6 per cent of the total provincial GDP.⁹⁹ However, the Panel stated that, while it is clear that the USDOC did not explicitly and as such address the extent of economic diversification in its Final Determination, it considered that, in noting that “the vast majority of companies and industries in Canada does not receive benefits under these programmes”, the USDOC had showed that it had taken account of the extent of economic diversification in Canada and its provinces, i.e. the publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies. Therefore, in the view of the Panel, although the wood product industry is an important industry for Canada, it is clear that the Canadian economy is more than just wood products alone.¹⁰⁰

Except for the *US – Softwood Lumber IV*, in the WTO forum, it has not been found

⁹⁸ See Report of the Panel, *US – Softwood Lumber IV*, para. 7.123.

⁹⁹ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.232.

¹⁰⁰ See Report of the Panel, *US – Softwood Lumber IV*, para. 7.124.

anywhere else, until now, that the panels and the Appellate Body have discussed the question concerning “the extent of diversification” within the meaning under the last sentence of Article 2.1(c) of the ASCM. Nevertheless, this issue is important to small developing countries whose economy mainly relies on one or two major industries. For example, the petroleum sector in Saudi Arabia accounts for 45 per cent of its GDP, while agriculture and services sectors merely account for about 33 per cent of its GDP in 2004.¹⁰¹ Another example is that, around 40 years ago, the copper industry in Chili accounted for nearly 85 per cent of manufacturing sector, but agriculture and services sectors only represented for about 20 per cent of Chili GDP.

2.2.2 Non-specificity for the Actionable Subsidies

In addition to provision of *de jure* and *de facto* specificity under the WTO, Article 2 of the ASCM also sets forth circumstances where specificity does not exist. Generally speaking, subsidies are considered to be non-specific in two cases: (1) criteria or conditions governing the eligibility for subsidies are objective; and (2) generally available subsidies within the jurisdiction of all level of government, such as certain regional subsidies, are set or changed by such a government entitled to do so.

2.2.2.1 General Non-specificity

Pursuant to Article 2.1(b) of the ASCM¹⁰², if the eligibility for a subsidy is automatic, and if the criteria or conditions for receiving such a subsidy are objective and are strictly applied to, specificity of this subsidy shall not exist. The “objective criteria or conditions” mean criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of an enterprise.¹⁰³ To this extent, Article 2.1(b) provides an exception that if access to a subsidy is limited by objective and neutral eligibility requirements; the limitations do not establish the favoritism which is necessary to find specificity.¹⁰⁴

¹⁰¹ Wikipedia, 2007. *Economy of Saudi Arabia*. Available from: http://en.wikipedia.org/wiki/Economy_of_Saudi_Arabia [Accessed 25 September 2007]

¹⁰² See *supra*, footnote 55. Article 2.1(b) of the ASCM.

¹⁰³ See *supra*, footnote 55, the ASCM, in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p232, footnote 2.

¹⁰⁴ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.225.

Furthermore, the criteria and conditions must be clearly spelled out in law, regulation, or other official document.

Article 2.1(b) of the ASCM is often referred to in conjunction with Article 2.1(c) on *de facto* specificity. For this reason, in the light of the fact that it is quite rare or, rather, there is no experience in WTO cases with Article 2.1(b) of the ASCM, the following discussion on the practice of such a provision will be insculcated with that of Article 2.1(c) of the ASCM.

Basically, a party to a dispute would attempt to invoke Article 2.1(b) of the ASCM on non-specificity in order to argue that a subsidy in question is not specific despite a requirement of “positive evidence” of specificity which is provided for in Article 2.4 of the ASCM¹⁰⁵. In the *EC and certain member States — Large Civil Aircraft* (“LCA”)¹⁰⁶, the complainant, the United States claimed that the European Investment Bank (“EIB”), otherwise named, “the EU policy-driven Bank” had provided significant financial support which has taken the form of loans to Airbus for the development of its new models of large civil aircraft.¹⁰⁷ According to the United States, the “individual loan” which cost Euro 700 million and which the EIB agreed to provide to EADS, the Airbus’s parent company, for R&D related to the Airbus A380 was specific within the meaning of Article 2 of the SCM Agreement,¹⁰⁸ since the amount of the loan was disproportionately large both in percentage and in absolute terms. Also, the United States maintained that every “individual loan” that the EIB provided is entirely discretionary.¹⁰⁹ In addition to the Euro 700 million loans, the bank had provided at least eleven additional loans for the development of specific Airbus models since 1988. The United States provided evidence that, like the Euro 700 million loans for the A380, each of these additional loans was a specific subsidy to Airbus within the meaning of Article 2 of the SCM Agreement.¹¹⁰

In response, the Defendant, the EC argued that there were international financial institutions which, although operating on a basis that was actually very similar to that of

¹⁰⁵ See *supra*, footnote 55. Article 2.4 of the ASCM.

¹⁰⁶ *European Communities — Measures Affecting Trade in Large Civil Aircraft* (“*EC and certain member States — Large Civil Aircraft*”), WT/DS316.

¹⁰⁷ See Executive Summary of the First Submission of the United States of America, *EC and certain member States — Large Civil Aircraft*, 25 November 2006, para. 37 and 38.

¹⁰⁸ See Executive Summary of the First Submission of the United States of America, *EC and certain member States — Large Civil Aircraft*, 25 November 2006, para. 15, 39 and 42.

¹⁰⁹ See Executive Summary of the First Submission of the United States of America, *EC and certain member States — Large Civil Aircraft*, 25 November 2006, para. 42.

¹¹⁰ See Executive Summary of the First Submission of the United States of America, *EC and certain member States — Large Civil Aircraft*, 25 November 2006, para. 43.

commercial banks, pursued broader public policy objectives and promoted projects of all sizes in all sectors and without any discrimination. Financing by such institutions was, by definition, non-specific.¹¹¹ As for the loans from the EIB, under its founding statute and the Treaty establishing the European Community, the EIB provided financing across all economic sectors and promoted projects in all areas of human activity, ranging from environmental protection to telecommunications, infrastructure or research and development. The details of EIB lending policy were published and available to any applicant.¹¹²

In addition, the EC disagreed with the United States that EIB financing was abused in order to promote the interests of the domestic EC LCA manufacturer, Airbus.¹¹³ In the view of the EC, the EIB financing was not designed to promote the interests of any specific EC company, including Airbus. A large number of foreign companies, including prominent US companies, had received very large loans provided under the non-discriminatory EIB lending policy. The EC submitted that, over the years of its existence, the EIB had provided exactly the same amount to airlines for the purchase of Boeing and McDonnell Douglas aircraft as it had for the purchase of Airbus aircraft. There was no bias against Boeing or any other non-European company.¹¹⁴ At the time of writing, this case remains at the consultation stage.

A further example can be seen in the *US – Softwood Lumber IV* case where the Complainant Canada argued that the determination of the US Department of Commerce (“USDOC”) that the alleged benefits of stumpage programs were limited to those entities specifically authorized to cut timber on Crown lands rendered the specificity test redundant and void. According to Canada, this is partly for the reason that the USDOC used the entire Canadian economy as a benchmark and found that the majority of companies and industries in Canada did not receive benefits under these programs.¹¹⁵ Canada was of the view that, using the entire economy as a benchmark misinterpreted Article 2 of the ASCM, since it overlooked the fact that the universe of eligible users under Article 2.1(b) could be something less than “everyone”. In the mean time, according to Canada, the relevant benchmark was the universe

¹¹¹ See Executive summary of the Closing Statement of the European Communities to the First Meeting of the Panel, *EC and certain member States — Large Civil Aircraft*, 16 April 2007, para. 10.

¹¹² See Oral Statement of the European Communities to the First Meeting of the Panel, *EC and certain member States — Large Civil Aircraft*, 20 March 2007, para. 97.

¹¹³ See Oral Statement of the European Communities to the First Meeting of the Panel, *EC and certain member States — Large Civil Aircraft*, 20 March 2007, para. 98.

¹¹⁴ See Oral Statement of the European Communities to the First Meeting of the Panel, *EC and certain member States — Large Civil Aircraft*, 20 March 2007, para. 98.

¹¹⁵ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.51.

of eligible users, as in Article 2.1 (b) which contemplates a situation where non-specificity of a subsidy exists if a subsidy is limited pursuant to neutral and objective criteria.¹¹⁶ Further, Canada argued that a subsidy was specific only when access to the subsidy was deliberately limited to certain enterprises within the group of enterprises eligible or naturally apt to use the subsidy.¹¹⁷

However, the Panel in that case noted that the availability of a subsidy which was limited by the inherent characteristics of the good cannot be considered to have been limited by "objective" criteria within the meaning of footnote 2 to Article 2.1 (b) of the ASCM, i.e. "criteria or conditions which are neutral, which do not favor certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".¹¹⁸ Therefore, in the Panel's view, even if the inherent characteristics of the good provided had indeed limited the possible use of the subsidy to a certain industry, the subsidy could still be found to be of *de facto* specificity. This issue was not appealed to the Appellate Body.

Apart from the fact that a party often makes arguments to prove existence of non-specificity by referring to Article 2.1(b) of the ASCM, the other party sometimes intends to establish that a subsidy at issue does not meet the provision of Article 2.1(b) of the ASCM, as a rebuttal, in order to prove existence of *de facto* specificity as provided for in Article 2.1(c) of the ASCM. In the *Indonesia-Automobile* case¹¹⁹, one of the complainants, the EC, claimed that the measures in question which were import duty and luxury sales tax exemptions on CBU Timers imported by PT TPN from Korea, import duty exemptions on parts and components used or to be used in the assembly of the Timer in Indonesia, and luxury sales tax exemptions on Timers assembled in Indonesia, were specific subsidies within the meaning of Articles 1 and 2 of the ASCM.¹²⁰ According to the EC, the eligibility for the subsidies at issue was limited to certain enterprises belonging to a certain industry and the subsidies met certain non-objective criteria. Moreover, the decision whether to grant the subsidies was a

¹¹⁶ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.137 and footnote 177.

¹¹⁷ See Report of the Panel, *US – Softwood Lumber IV*, para. 7.116.

¹¹⁸ See Report of the Panel, *US – Softwood Lumber IV*, footnote 179.

¹¹⁹ See Report of the Panel, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Automobile*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998.

¹²⁰ See Report of the Panel, *Indonesia – Automobile*, para. 8.20 and 8.26 – 8.28. Completely Built-Up motor vehicle ("CBU"), see Report of the Panel, *Indonesia – Automobile*, para. 2.2. PT Timor Putra Nasional ("PT TPN" or "TPN"), an Indonesian national motor vehicle enterprise.

discretionary one and, in practice, only one enterprise, PT TPN, had been granted the benefits.¹²¹ In this case, the Defendant Indonesia did not argue that the subsidies were non-specific before the Panel. Thereby, the Panel considered there was no dispute and the subsidies in question were specific.¹²²

In sum, until now, in the practice of the WTO forum, there has not been a case where existence of non-specificity has succeeded in being established.

2.2.2.2 Certain regional subsidies

The second case where non-specificity exists is set forth in Article 2.2 of the ASCM. Despite the provision of the first sentence of Article 2.2 of the ASCM¹²³ that a subsidy limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific, “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” in accordance with the second sentence of Article 2.2 of the ASCM¹²⁴.

In other words, similar to the case which Article 2.1 of the ASCM sets forth, if a sub-national government grants a subsidy only to certain enterprises within its jurisdiction, the subsidy is specific. However, if such a regional subsidy is generally available within the geographical region within the sub-national government’s power, this subsidy shall not be deemed to be specific. This provision shows that the discipline of certain regional subsidies in the ASCM has been lessened from that of the Dunkel SCM Draft¹²⁵ (discussed *supra*) where all regional subsidies were deemed to be specific no matter whether they were limited to certain enterprises or available to all enterprises within the region.

For instance, in order to accelerate the development of the western regions,, lessen the imbalance of economic development among different areas and accelerate the development of the regions, the Chinese central government has made preferential tax policies in the western

¹²¹ See Report of the Panel, *Indonesia – Automobile*, para. 8.20.

¹²² See Report of the Panel, *Indonesia – Automobile*, para. 14.155.

¹²³ See *supra*, footnote 55.

¹²⁴ See *supra*, footnote 55.

¹²⁵ See *supra*, footnote 41. See also HORLICK, Gary. (2003) *WTO and NAFTA Rules and Dispute Resolution: Selected Essays on Antidumping, Subsidies and other Measures*, p24.

regions so as to attract foreign and domestic investment to those areas.¹²⁶ According to the pertinent regulations of the Ministry of Finance (“MOF”), Ministry of Commerce (“MOFCOM”), State Administration of Taxation (“SAT”) and other relevant authorities under the central government, the State Council,¹²⁷ the income tax on enterprises, domestic and foreign-invested, established in the western regions which are engaged in industries encouraged by the State shall be levied at the reduced rate of fifteen per cent from the year 2001 to 2010.¹²⁸ In this case, the subsidy, taking the form of preferential tax treatment was granted by the central government to certain industries which are encouraged by the State and which are located within the western regions. Since the subsidy was not available to all enterprises or industries located within the country-wide territory where the jurisdiction of the central government covers, it was considered to be specific.¹²⁹

In a slightly different example, when preferential tax treatment is granted by a sub-national government, such as the government of Yunnan Province (which belongs to the western regions) and to all enterprises located within Yunnan Province under the jurisdiction of the government of Yunnan Province, without regard to whether the industries are encouraged by the government or not, such subsidy should not be deemed to be specific in accordance with Article 2.2 of the ASCM. Also, if the subsidy were only available to certain enterprises belonging to the industries encouraged by the government of Yunnan Province and located within jurisdiction of the government of Yunnan Province, such a subsidy would also be considered to be specific.

¹²⁶ See *Subsidies: New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, People's Republic of China*, G/SCM/N/123/CHN, 13 April 2006, p17.

¹²⁷ See *Subsidies: New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, People's Republic of China*, G/SCM/N/123/CHN, 13 April 2006, p17. See also State Council Circular Guo Fa No. 33 of 2000; General Office of State Council Circular Guo Ban Fa No. 73 of 2001; MOF Circular Cai Shui No. 202 of 2001; and SAT Circular Guo Shui Fa No. 172 of 1999.

¹²⁸ See *Subsidies: New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, People's Republic of China*, G/SCM/N/123/CHN, 13 April 2006, p17.

¹²⁹ Since the Notification of G/SCM/N/123/CHN by China is made under Article 25 of the ASCM, it is assumed to be consistent with Article 25.2 of the ASCM which states that:

“Members shall notify any subsidy as defined in paragraph 1 of Article 1, which is specific within the meaning of Article 2, granted or maintained within their territories.”

Therefore, the subsidy program discussed here can be assumed to be specific within the meaning of Article 2 of the ASCM.

Meanwhile, it is noted that Article 25.7 of the ASCM provides that:

“Members recognize that notification of a measure does not prejudice either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.”

CHAPTER III RELEVANT PROVISIONS AND PRACTICE OF THE SPECIFICITY TEST IN CERTAIN WTO MEMBERS' JURISDICTIONS

In addition to the provisions and practice of the specificity test under the WTO, some WTO Members have their own national legislation on specificity which is constrained by their obligations under the ASCM and which is probably more practicable than the permanent provisions in the ASCM. The practice of such national legislation in an individual Member thereby may also assist us by understanding the specificity test in the ASCM under the WTO. This Chapter introduces two Members' relevant provisions and practice, namely the US and the EU.

3.1 Relevant Provisions and Practice of the Specificity Test in the US Jurisdiction

The US is the country which has taken the most countervailing measures in the world and which first applied the specificity test during investigation on subsidies even before such a test had appeared in the WTO.

In the United States, Section 771(5A) of the Tariff Act of 1930 ("the Act")¹³⁰ elaborates

¹³⁰ Tariff Act of 1930 ("the Act") was updated through Pub.L. 103-465 (Uruguay Round Agreements Act-12/8/94). Title VII of the Act is named "Countervailing and Antidumping Duties". 771(5A) of the Tariff Act of 1930 reads as follows:

"(5A) Specificity.

(A) In general. A subsidy is specific if it is an export subsidy described in subparagraph (B) or an import substitution subsidy described in subparagraph (C), or if it is determined to be specific pursuant to subparagraph (D).

(B) Export subsidy. An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.

(C) Import substitution subsidy. An import substitution subsidy is a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions.

(D) Domestic subsidy. In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:

(i) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.

(ii) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not

specific as a matter of law, if

(I) eligibility is automatic,

(II) the criteria or conditions for eligibility are strictly followed, and

(III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification.

For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.

(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific *if one or more* of the following factors exist:

(I) The actual recipients of the subsidy, whether considered on *an enterprise or industry* basis, are

the specificity test on subsidies. In comparison with Article 2 of the ASCM, it could be found that the provisions in US countervailing duty law are similar to Article 2 of the ASCM with some slight differences.

In 1998, the USDOC issued final countervailing duty regulations (“Final Rule”)¹³¹ to conform to the Uruguay Round Agreements Act¹³². In the Final Rule, the USDOC translated Section 771(5A) of the Act on specificity test into specific and predictable rules as provided for in Section 351.502.¹³³ Therefore, Section 771(5A) of the Act, together with Section 351.502 of the Final Rule, consists of the US domestic regulations on the specificity test.

In contrast with Article 2 of the ASCM, the US domestic regulations on specificity are the development of the WTO regulations with respect to the specificity by the US itself.

limited in number.

(II) *An enterprise or industry* is a predominant user of the subsidy.

(III) *An enterprise or industry* receives a disproportionately large amount of the subsidy.

(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy *indicates that an enterprise or industry is favored over others*.

In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

(iv) Where a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific.

For purposes of this paragraph and paragraph (5B), any reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a *group* of such enterprises or industries.”(emphasis added)

¹³¹ *Countervailing Duties, Final Rule - 19 CFR Part 351*, International Trade Administration, the US Department of Commerce, 63 FR 65347, Nov 25, 1998.

¹³² See 19 U.S.C. Chapter 22, §§ 3501-3624, December 8, 1994, as amended 1996

¹³³ Specific and predictable rules on specificity test are set forth in Section 351.502 of the Final Rule which reads as follows:

“ § 351.502 Specificity of domestic subsidies.

(a) Sequential analysis. In determining whether a subsidy is *de facto* specific, the Secretary will examine the factors contained in section 771(5A)(D)(iii) of the Act sequentially in order of their appearance. If a single factor warrants a finding of specificity, the Secretary will not undertake further analysis.

(b) Characteristics of a “group.” In determining whether a subsidy is being provided to a “group” of enterprises or industries within the meaning of section 751(5A)(D) of the Act, the Secretary is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, a subsidy.

(c) Integral linkage. Unless the Secretary determines that two or more programs are integrally linked, the Secretary will determine the specificity of a program under section 771(5A)(D) of the Act solely on the basis of the availability and use of the particular program in question. The Secretary may find two or more programs to be integrally linked if:

(1) The subsidy programs have the same purpose;

(2) The subsidy programs bestow the same type of benefit;

(3) The subsidy programs confer similar levels of benefits on similarly situated firms; and

(4) The subsidy programs were linked at inception.

(d) Agricultural subsidies. The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to the agricultural sector (domestic subsidy).

(e) Subsidies to small-and medium-sized businesses. The Secretary will not regard a subsidy as being specific under section 771(5A)(D) of the Act solely because the subsidy is limited to small firms or small-and medium-sized firms.

(f) Disaster relief. The Secretary will not regard disaster relief as being specific under section 771(5A)(D) of the Act if such relief constitutes general assistance available to anyone in the area affected by the disaster.”

3.1.1 Characteristics of a “Group”

The last paragraph of Section 771(5A) of the Act acknowledges that the specificity test applies to not only a subsidy granted to an enterprise or industry but also a subsidy provided to a group of such enterprises or industries.¹³⁴ Such a provision in the Act is similar to that in Article 2 of the ASCM.

However, Section 351.502(b) of the Final Rule considers that, since the purpose of the specificity test is merely to ensure that subsidies that are generally available are not countervailed, there is no basis for adding the further requirement that subsidies that are not widely granted are also confined to a group of enterprises and industries that share similar characteristics. Hence, it is clarified that the USDOC do not need to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, a subsidy.

In *Softwood Lumber from Canada*¹³⁵, the respondents contend that the product-based approach for defining an industry should be used in the case. According to the respondents, no fewer than 201 separate products are manufactured by companies which have rights to be granted the stumpage programs at issue. The respondents argue that the USDOC’s finding that industries using stumpage constitute a “group” of industries was not thereby supported which demonstrates that the programs are not limited to a group of industries.¹³⁶ However, in USDOC’s view, section 351.502(b) of the CVD Regulations states that, in determining whether a subsidy is being provided to a “group” of industries within the meaning of section 771(5A) (D) of the Act, the Department is not required to determine whether there are shared characteristics among the industries that are eligible for, or actually receive, a subsidy.

3.1.2 Four Factors with Respect to Determination of De Facto Specificity

It is noted that the language of four *de facto* specificity factors enumerated in Section 771(5A)(D)(iii) of the Act is slightly distinguishing from those in Article 2.1(c) of the ASCM

¹³⁴ See *supra* footnote 129.

¹³⁵ *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545, (2 April 2002). See *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (“*Memorandum for the Final Results on Softwood Lumber*”), available from <http://ia.ita.doc.gov/frn/summary/canada/canada-fr.htm>, [Accessed 29 August 2007]

¹³⁶ *Ibid.*

with respect to the following three aspects.

First, the US domestic regulations provide a sequential analysis. According to Section 771(5A) (D)(iii) of the Act, a subsidy will be considered specific “if one or more” of four factors exists. Section 351.502(a) of the Final Rule¹³⁷ defines the methodology of analysis, under which, if a subsidy is *de jure* specific or meets any one of the enumerated *de facto* specificity factors which appear in Section 771(5A)(D)(iii) of the Act, further analysis is unnecessary and is not undertaken. It is noted that Article 2.1(c) of the ASCM did not explicitly require Members to consider all four factors listed in determining *de facto* specificity. Even in the *EC — Countervailing Measures on DRAM Chips* and the *US — Softwood Lumber IV*, the case introduced in the previous chapter, there was a different practice by the Panel with this respect. The competent authority, the USDOC, inferred that none of the provisions in the ASCM precluded a finding of specificity on the basis of the presence of a single factor.

In practice, one instance shows how the sequential approach works. In *Softwood Lumber from Canada*, the USDOC concluded that stumpage programs are *de facto* specific because of the limited number of users of these programs. However, the respondents argued that the USDOC failed to take account of the remaining factors for *de facto* specificity and that it must deal with each of the criteria enumerated in Section 771(5A)(D)(iii) of the Act. According to the USDOC, Section 771(5A) (D) (iii) of the Act clearly states that the USDOC will find *de facto* specificity if one or more of the four factors exists. Further, Section 351.502(a) of the Final Rule states that if a single factor warrants a finding of specificity, the Department will not undertake further analysis. Therefore, the Department is not required to address the other factors listed in Section 771(5A) (D)(iii) of the Act.¹³⁸

Secondly, the language of Section 771(5A) (D) (iii) of the Act states “an enterprise or industry” rather than “certain enterprises” as used in Article 2.1(c) of the ASCM.¹³⁹ In this regard, the Final Rule clarifies that when a certain industry receives disproportionate amounts of a subsidy, this constitutes positive evidence of specificity even if there are numerous

¹³⁷ See *supra* footnote 133.

¹³⁸ See *supra* footnote 129. See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545, (2 April 2002). See *Memorandum for the Final Results on Softwood Lumber*

¹³⁹ See *supra* footnote 55 and 129.

enterprise users of the subsidy and there is little discretion in awarding benefits.¹⁴⁰

Finally, the fourth *de facto* specificity factor, as provided for in Section 771(5A) (D) (iii)(IV) of the Act, does not focus on discretion alone.¹⁴¹ Rather, it states that discretion is relevant only to the extent that it is exercised in a manner that favors one enterprise or industry over others. However, the fourth factor listed in Article 2.1(c) of the ASCM does not require that measures of administrative discretion which indicates that “an enterprise or industry is favored over others”. The rationale of the US regulation regarding to the fourth factor is that, based on the USDOC experience, discretion exists in the operation of almost every alleged subsidy program. If specificity is found simply based on the exercise of this type of discretion, the other *de facto* specificity factor would be made meaningless, since eventually, every subsidy in the world could be considered specific merely on the basis of the discretion factor.¹⁴² Nevertheless, the USDOC acknowledges that the discretion factor is valuable when the analysis of the other *de facto* specificity factors is inconclusive or needs to be enhanced.¹⁴³

3.1.3 Integral Linkage

The US domestic regulations on the specificity test establish a provision on “integral linkage” which is not set forth in Article 2 of the ASCM. In spite of the fact that there is not any relevant provision in Section 771(5A) of the Act, Section 351.502(c) of the Final Rule¹⁴⁴ sets out that if two or more subsidy programs are deemed to be integrally linked, such subsidies would be considered as a single subsidy in determining the specificity. More exactly, if the subsidy programs have the same purpose (e.g., to promote technological innovation), bestow the same type of benefit (e.g., long-term loans or tax credits), confer similar levels of benefits on similarly situated firms, and were linked at their inception, integral linkage between or among subsidies is possible and thereby would be considered as one subsidy.

As an example for this point, the previous chapter mentioned in the EU jurisdiction, that the EU competent authority determined to impose countervailing duties on DRAM chips from

¹⁴⁰ *Countervailing Duties, Final Rule - 19 CFR Part 351*, International Trade Administration, the US Department of Commerce, 63 FR 65356, Nov 25, 1998.

¹⁴¹ See *supra* footnote 129.

¹⁴² See *supra* footnote 140..

¹⁴³ *Ibid.*

¹⁴⁴ See *supra* footnote 129 and 133.

Korea partly because KDB Debenture and the May and October 2001 Restructuring Programs separately constituted a countervailable subsidy which is of specificity.¹⁴⁵ In June 2003, the USDOC determined to take countervailing duty measures to Dynamic Random Access Memory Semiconductors (“DRAMs”) from Korea too.

However, the methodology of analysis of the same subjects in the US case differs from that in the EU case. In the US case, *DRAMS from Korea*¹⁴⁶, one of the respondents, Hynix, contended that the USDOC must examine each program separately to determine whether there exists a countervailable subsidy because the USDOC could not presume that evidence of subsidization for one program necessarily meant that the Government of Korea provided subsidies for all programs.¹⁴⁷ In this regard, the USDOC examined the KDB Fast Track program, the May 2001 restructuring program, the October 2001 restructuring program and other two programs which were also covered in the EU case as part of a single program that occurred over the period from December 2000 through October 2001.¹⁴⁸ According to the USDOC, these programs had the identical objective to completely restructure Hynix financially in order to maintain the company as an ongoing concern. Moreover, these programs all belonged to lending decisions as part of the restructuring process and were all directed or entrusted by the Government of Korea.¹⁴⁹ Meanwhile, the KDB Fast Track program overlapped with the May 2001 restructuring program and fed into the October 2001 restructuring program.¹⁵⁰

For these reasons, the USDOC considered such indirect subsidies whereby the Government of Korea entrusted or directed the provision of loans as a single program “direction of credit” in determining whether specificity existed. By doing so, the USDOC did not necessarily find the existence of specificity for every program, which reduced the

¹⁴⁵ See also The EC issued COUNCIL REGULATION (EC) No 1480/2003 of 11 August 2003 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain electronic microcircuits known as DRAMs (dynamic random access memories) originating in the Republic of Korea.

¹⁴⁶ *Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122, (23 June 2003). See *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea* (“*Memorandum for the Final Determination on DRAMS from Korea*”), available from: <http://ia.ita.doc.gov/frn/0306frn/index.html#SKOREA>, [Accessed 27 August 2007]

¹⁴⁷ See *Memorandum for the Final Determination on DRAMS from Korea*, page 48-49.

¹⁴⁸ Two other programs refer to Syndicated Loan and KEIC (“Korea Export Insurance Corporation”) Guarantee for Export Credits. See *Memorandum for the Final Determination on DRAMS from Korea*, page 52.

¹⁴⁹ See *Memorandum for the Final Determination on DRAMS from Korea*, page 49.

¹⁵⁰ See *Memorandum for the Final Determination on DRAMS from Korea*, page 52.

authorities' administrative burden.

On the other hand, it could also be possible that when two or more subsidy programs which have been separately considered to be specific are then deemed to be a single program, the single subsidy program would be determined to be non-specific. For instance, one subsidy program granted to non-metal product industries within a country is deemed to be specific while another subsidy program provided to metal product industries within the same country is also viewed to be specific. Where there is linkage between the two subsidy programs, they would both be considered as a single program under the US countervailing duty laws. This single program is generally available to all industries within one country, i.e. both non-metal product industries and metal product industries and would be determined to be non-specific as a whole.

3.1.4 Non-specificity of Certain Domestic Subsidies

Similar to Article 2.1(b) of the ASCM, Section 771(5A) (D) (ii) of the Act provides a general situation of non-specificity. Apart from that, Section 351.502 (d) through (f) of the Final Rule, adds three additional situations where non-specificity will also be found by the USDOC.¹⁵¹ The first situation is agriculture subsidies. That is, a domestic subsidy will not be considered to be specific merely because it is limited to the agricultural sector. In fact, under the previous practice, the USDOC would find an agricultural subsidy to be countervailable only if it is specific within the agricultural sector.¹⁵² Secondly, subsidies limited to certain small or small- and medium-sized firms will not be viewed to be specific either on a *de jure* or a *de facto* basis. Disaster relief is the third additional situation. Disaster relief will not be regarded to be specific if it is generally available to anyone in the affected area. Nonetheless, before finding a subsidy non-specific, the USDOC has to be convinced that the subsidy at issue is *bona fide* disaster relief.¹⁵³

The above three non-specificity situations are not mentioned particularly in Article 2 of the ASCM. The first situation, agricultural subsidies, might be considered to be specific rather than non-specific under the ASCM. The other two situations would possibly meet the

¹⁵¹ See *supra* footnote 55, 129 and 133.

¹⁵² *Countervailing Duties, Final Rule - 19 CFR Part 351*, International Trade Administration, the US Department of Commerce, 63 FR 65357, Nov 25, 1998.

¹⁵³ *Countervailing Duties, Final Rule - 19 CFR Part 351*, International Trade Administration, the US Department of Commerce, 63 FR 65358, Nov 25, 1998.

condition set forth under Article 2.1(c) of the ASCM and footnote 2 thereto.¹⁵⁴

In practice, as discussed in the previous chapter, the establishment of the existence of non-specificity is always tied to rebuttal of non-existence of specificity.¹⁵⁵ In *Stainless Steel Bar from Italy*¹⁵⁶, the petitioners assert that Bolzano¹⁵⁷ received several times the average benefit per company under Law 44/92 and thus clearly received a disproportionate amount of subsidy. Therefore, this meets the factor for *de facto* specificity under the Act. In response, the respondent argued that the petitioners do not refute the fact that benefits are granted on a non-discriminatory, non-specific basis to applicants who meet the requirements under Law 44/92. In addition, the petitioners admitted the fact that companies from many sectors receive benefits under this program.

In this regard, the USDOC did not consider the subsidy to be given predominantly or disproportionately to the steel industry. Based on the information provided by the Province of Bolzano (“GOB”), from 1995 to 1998, nine industries (engineering, electronics, food processing, chemical, plastics, textiles, furniture, lumber and construction) received larger shares of benefits than the 3.12 percent which the steel industry received. Moreover, the USDOC disagreed with the petitioners’ claim that the responding company, Valbruna¹⁵⁸, received a disproportionate share of the subsidy under Law 44/92 in relation to other enterprises. The petitioner simply divided the total amount of subsidy paid from 1995 to 1998 by the number of recipient firms and then received an average amount of subsidization per company. However, at verification, the USDOC noted that the amounts paid to the various recipients varied widely, with some companies receiving very large amounts and others small amounts. Accordingly, the USDOC considered that the simplistic calculation by the petitioners could not support the petitioners’ assertion and thereby found that the benefits

¹⁵⁴ See *supra* footnote 55.

¹⁵⁵ However, it is noted that there is nowhere in Section 771(5A) of the Act and Section 351.502(b) of the Final Rule to be shown that any determination of specificity within the US jurisdiction is required to be clearly substantiated on the basis of positive evidence, as required in Article 2.4 of the ASCM. Also see *supra* footnote 129 and 133.

¹⁵⁶ *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 FR 3163, (23 January 2002). See *Issues and Decision Memorandum: Final Determination in the Countervailing Duty Investigation of Stainless Steel Bar from Italy*, available from: <http://ia.ita.doc.gov/frn/summary/italy/italy-fr.htm>, [Accessed 29 August 2007]

¹⁵⁷ See *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Stainless Steel Bar from Italy*, 66 FR 30414, (6 June 2001). Acciaierie Valbruna S.r.l. (“Valbruna”)/Acciaierie Bolzano S.r.l. (“Bolzano”) is one of the responding companies in the case.

¹⁵⁸ *Ibid.* It is referred to Bolzano.

provided by the GOB under Law 44/92 were not specific.

Another example concerns one of the three additional situations of non-specificity within the US jurisdiction. In *Softwood Lumber from Canada*¹⁵⁹, in finding that the specificity determinations were based upon an industry analysis, not a product analysis as suggested by the respondents, the USDOC pointed out that the situation in the current case differed from that in *Live Swine from Canada*¹⁶⁰ the subject matter of which belonged to the agriculture sector. The analysis of specificity in an agricultural case is not instructive to the specificity analysis conducted in non-agricultural cases because the USDOC has an exception for specificity in investigations involving agricultural products. Pursuant to Section 351.502(d) of the Final Rule, a program will not be regarded as specific under Section 771(5A)(D) of the Act simply because the subsidy is limited to the agricultural sector.¹⁶¹ However, the agriculture sector in the United States has currently contributed to only around 0.9 per cent of US GDP.¹⁶² Instead, the forest sector in Canada represents about 3 per cent of Canada GDP.¹⁶³ It does not seem to be legitimate that an agriculture subsidy provided by a granting authority is deemed to be non-specific within the US jurisdiction while other subsidy programs granted to other sectors are specific.

3.2 Relevant Provisions and Practice of the Specificity Test in the EU Jurisdiction

Within the EU Jurisdiction, Regulation (EC) No 2026/97 (“the Basic Anti-subsidy Regulation”)¹⁶⁴, as amended by Regulation (EC) No 1973/2002 and Regulation (EC) No 461/2004¹⁶⁵, is a translation of the ASCM under the WTO. Article 3 of the Basic Anti-subsidy

¹⁵⁹ See *supra* footnote 135.

¹⁶⁰ See *supra* footnote 135, *Memorandum for the Final Results on Softwood Lumber*. Also see *Live Swine from Canada*, 61 FR 30366 (29 May 1996)

¹⁶¹ See *Memorandum for the Final Results on Softwood Lumber*, footnote 12.

¹⁶² Wikipedia, 2007. *Economy of the United States*. Available from: http://en.wikipedia.org/wiki/Economy_of_the_United_States [Accessed 25 September 2007]

¹⁶³ Canada's Innovation Strategy and Practice of Innovation, 2007. *Submission—Forest Sector Renewal*. Available from: <http://www.innovationstrategy.gc.ca/gol/innovation/site.nsf/en/in02323.html> [Accessed 25 September 2007]

¹⁶⁴ COUNCIL REGULATION (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community (“the Basic Anti-subsidy Regulation”), OJ L 288, 21.10.1997, p. 1.

¹⁶⁵ See COUNCIL REGULATION (EC) No 1973/2002 of 5 November 2002 amending Regulation (EC) No 2026/97 on the protection against subsidised imports from countries not members of the European Community (“Regulation (EC) No 1973/2002”), OJ L 305, 7.11.2002, p. 4, and COUNCIL REGULATION (EC) No 461/2004 of 8 March 2004 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community (“Regulation (EC) No 461/2004”), OJ L77 13.3.2004, p. 12.

Regulation provides for countervailable subsidies involving a specificity test.¹⁶⁶ In terms of the language in the provisions, Article 3 of the Basic Anti-subsidy Regulation seems to be a combination of Article 2 of the ASCM on the specificity test and Article 3 of the ASCM on prohibited subsidies. In other words, Article 3 of the Basic Anti-subsidy Regulation has not been developed based on, or substantially different from, Article 2 of the ASCM.

On the other hand, application of Article 3 of the Basic Anti-subsidy Regulation probably could provide some experience and information to help understand Article 2 of the ASCM.

¹⁶⁶ Article 3 the Basic Anti-subsidy Regulation reads as follows:

“Article 3 Countervailable subsidies

1. Subsidies shall be subject to countervailing measures only if they are specific, as defined in paragraphs 2, 3 and 4.

2. In order to determine whether a subsidy is specific to an enterprise or industry or group of enterprises or industries (hereinafter referred to as ‘certain enterprises’) within the jurisdiction of the granting authority, the following principles shall apply:

(a) where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific;

(b) where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to.

For the purpose of this Article, objective criteria or conditions mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

The criteria or conditions must be clearly set out by law, regulation, or other official document, so as to be capable of verification;

(c) if, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises; predominant use by certain enterprises; the granting of disproportionately large amounts of subsidy to certain enterprises; and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In this regard, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall, in particular, be considered.

In applying the first subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

3. A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. The setting or changing 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 Regulation.

4. Notwithstanding paragraphs 2 and 3, the following subsidies shall be deemed to be specific:

(a) 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.

Subsidies shall be considered to be contingent in fact upon export performance when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is accorded to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

5. Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.”

3.2.1 De Jure Specificity and De Facto Specificity

It seems from the EU Commission determinations that, after finding that a subsidy is specific, it would not further analyze to discover if the subsidy is of *de jure* or *de facto* specificity in detail. It is noted, in the EU cases, that, where a subsidy is considered to be specific, merely the Article based on which the subsidy is considered to be specific would be invoked without any clear and elaborate reasoning demonstrating which type of specificity it belongs to.

In addition, the EU Commission sometimes consider a subsidy to be specific simply based on Article 3(2)(b) of the Basic Anti-subsidy Regulation on non-specificity rather than Article 3(2) (a) on *de jure* specificity or Article 3(2) (c) on *de facto* specificity. For example, in *Stainless Steel Small Wires from Korea*¹⁶⁷, a scheme taken under Article 9 of the TERCL was concluded to be specific under Article 3(2)(b) of the Basic Anti-subsidy Regulation (discussed *infra*).¹⁶⁸ Furthermore, it is also noted that in some of the EU cases, one scheme at issue is even considered to be specific under both Article 3(2) (a) and (c) of the Basic Anti-subsidy Regulation, as for example in octroi refund in *PET Film from India*¹⁶⁹ (discussed *infra*). It was possibly distinguishing from the normal understanding that a countervailable subsidy is either *de jure* or *de facto* specific.

3.2.2 Specificity and General Non-specificity

Basically, the arguments on *de facto* specificity and on general non-specificity are often entwined. Since, within the EU jurisdiction, as discussed above, *de jure* and *de facto* specificity are not obviously distinct, arguments on specificity, either *de jure* or *de facto* can

¹⁶⁷ COUNCIL REGULATION (EC) No 1601/1999 of 12 July 1999 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on stainless steel wires with a diameter of less than 1 mm originating in India and terminating the proceeding concerning imports of stainless steel wires with a diameter of less than 1 mm originating in the Republic of Korea (“Termination on Stainless Steel Small Wires from Korea”), OJ L 189, 22.7.1999, p. 26 and COMMISSION REGULATION (EC) No 619/1999 of 23 March 1999 imposing a provisional countervailing duty on imports of stainless steel wire having a diameter of less than 1 mm originating in India and the Republic of Korea (“Provisional Determination on Stainless Steel Small Wires from Korea ”), OJ L 79, 24.3.1999, p. 60.

¹⁶⁸ See *supra* footnote 166.

¹⁶⁹ See COUNCIL REGULATION (EC) No 2597/1999 of 6 December 1999 imposing a definitive countervailing duty on imports of polyethylene terephthalate (PET) film originating in India and collecting definitively the provisional, duty imposed (“Definitive Determination on PET Film”), OJ L316, 10.12.1999, p. 1. Also see COMMISSION REGULATION (EC) No 1810/1999 of 17 August 1999 imposing a provisional countervailing duty on imports of polyethylene terephthalate (PET) film originating in India (“Provisional Determination on PET Film”), OJ L219, 19.8.1999, p. 14.

be arguments woven into general non-specificity in EU practice.

The key words or phrases frequently appearing in the determinations of general non-specificity by the EU Commission are “neutral” and “horizontal in application” both of which are used in Article 3(2) (b) of the Basic Anti-subsidy Regulation and footnote 2 to Article 2.1(b) of the ASCM on general non-specificity. Generally speaking, if a subsidy is found not to be neutral or horizontal in application, it is found to be of *de jure* or *de facto* specificity; otherwise, it is found to be non-specific.

In *Stainless Steel Small Wires from Korea*¹⁷⁰, the Government of Korea (“GOK”) claimed that certain Articles of the Tax Exemption and Reduction Control Law (TERCL) in Korea are available to a significantly wide variety of industries and they are not specific. It stressed that the concept of ‘manufacturing industry’ is a very broadly defined one and, in practice, includes tens of thousands of sub-category industries.¹⁷¹ However, the EU Commission considered that the provisions of these Articles were coustervailable since they were specific under the Basic Anti-subsidy Regulation.¹⁷²

Specifically, as for Article 8 of the TERCL on reserve for technology development, the EU Commission found that this scheme was not neutral, as required by Article 3(2)(b) of the Basic Anti-subsidy Regulation, since its technology-intensive enterprises receive higher rates of benefit than normal enterprises. Such differentiation shows that the criteria were not neutral and excluded a large number of firms for whom such technological development was not necessary.¹⁷³ Consequently, the EU Commission concluded that the scheme under Article 8 of the TERCL was specific.

In addition to the GOK's general claim regarding the non-specificity of the provisions of Article 9 of the TERCL on tax credit for technology and manpower development expenses, the GOK claimed that the criterion of technology and manpower development was an objective and neutral criterion within the meaning of Article 2(1)(b) of the ASCM. The EU Commission was of the view that the scheme under this Article of the TERCL was not horizontal in nature because clearly companies in certain industrial sectors would be more technologically-oriented than those in other sectors and would therefore be more likely to take

¹⁷⁰ See *supra* footnote 167, *Termination on Stainless Steel Small Wires from Korea and Provisional Determination on Stainless Steel Small Wires from Korea*

¹⁷¹ *Ibid*, *Termination on Stainless Steel Small Wires from Korea*, para. 66.

¹⁷² See *supra* footnote 167, *Termination on Stainless Steel Small Wires from Korea*, para. 65.

¹⁷³ *Ibid*, para. 75.

advantage of this provision. Besides, the GOK, by enacting this provision of TERCL, had conferred a disproportionate benefit to companies in certain industrial sectors.¹⁷⁴ Therefore, this scheme was considered to be specific under Article 3(2)(b) of the Basic Anti-subsidy Regulation.¹⁷⁵

Concerning the scheme under Article 23 on reserve for overseas investment loss, the GOK claimed that this is available to a wide variety of industries. In this respect, the EU Commission found that the provisions of this Article were limited to those Korean companies which invested abroad. The GOK also argued that the criterion of overseas investment was an objective and neutral criterion within the meaning of Article 2(1)(b) of the ASCM. On the contrary, the EU Commission considered that this scheme was not objective, since it was known in advance that companies which did not invest abroad would be ineligible for the benefit. This criterion was therefore neither neutral nor horizontal in application. The GOK, by enacting this provision of TERCL, had conferred a benefit on a limited number of enterprises with overseas interests.¹⁷⁶ Hence, it concluded that this scheme was specific under Article 3(2)(a) and (b) of the Basic Anti-subsidy Regulation.¹⁷⁷

It can be inferred from the above instances that the borderline between specificity and non-specificity, from an EU perspective, is whether subsidization is “neutral” and “in horizontal application”.

3.2.3 Regional Specificity and Non-specificity

Identical to Article 2 of the ASCM, Article 3(3) of the Basic Anti-subsidy Regulation set forth disciplines of regional specificity and non-specificity. There are three instances here by which the disciplines can be induced.

First, in *PET Film from India*¹⁷⁸, the EU Commission found that the States of Gujarat in India grant incentives to eligible industrial enterprises in the form of exemption from the payment of electricity duty in order to encourage the industrial development of economically backward areas within this State.¹⁷⁹ After examining the evidence at hand, the EU

¹⁷⁴ See *supra* footnote 170, *Termination on Stainless Steel Small Wires from Korea*, para. 76.

¹⁷⁵ *Ibid*, para. 77.

¹⁷⁶ *Ibid*, para. 80-81.

¹⁷⁷ *Ibid*, para. 80 and 82.

¹⁷⁸ See *supra* footnote 169, *Definitive Determination on PET Film and Provisional Determination on PET Film*.

¹⁷⁹ See *supra* footnote 169, *Provisional Determination on PET Film*, para. 11 and 80. The exemption scheme in

Commission concluded that this scheme is indeed available to all new industrial enterprises within the state on an equal basis and during a period of five years.¹⁸⁰ Additionally, it is horizontal in application, since it is available to enterprises in the whole state, and based on objective criteria, that is, the electricity duty exemption is applied to all industrial enterprises which are newly established.¹⁸¹ Thus, the EU Commission concluded that the regional scheme meets the criteria of Article 3(2)(b) of the Basic Anti-subsidy Regulation and it is not specific. In sum, if a subsidy is given to all enterprises within the jurisdiction of the granting regional authority, such a subsidy is not specific.

Secondly, also in *PET Film from India*, the EU Commission found that the State of Maharashtra grants incentives to eligible industrial enterprises in the form of a refund of octroi. The total amount that may be refunded is restricted to 100 per cent of the fixed capital investment. However, eligible companies located within different designated geographical areas within the jurisdiction of the State of Maharashtra can take advantage of this refund during different period.¹⁸² Accordingly, The EU Commission concluded that the scheme is not horizontal in application, since some areas of the regional entity concerned are ineligible at certain periods. As a result, an enterprise in an eligible region will be eligible to receive refund, while an identical enterprise in a non-eligible region at the same time will not. Therefore, in the view of the EU Commission, this regional scheme is specific in accordance with Article 3(2) (a) and (c) of the Basic Anti-subsidy Regulation.¹⁸³ It is concluded from this example that, if a subsidy is granted to certain enterprises within some but not all geographical regions within the jurisdiction of the regional government, this subsidy is specific.

Last, in *PET from Thailand*¹⁸⁴, the EU Commission found that the Investment Promotion

the State of Gujarat is based on Section 3(2)(vii)(a) and (b) of the Bombay Electricity Duty Act 1958, as adapted by the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960.

¹⁸⁰ See *supra* footnote 169, *Definitive Determination on PET Film*, para. 65.

¹⁸¹ *Ibid*, para. 67.

¹⁸² See *supra* footnote 169, *Provisional Determination on PET Film*, para. 70, 71, 88 and 90.

¹⁸³ See *supra* footnote 169, *Definitive Determination on PET Film*, para. 71.

¹⁸⁴ See *COUNCIL REGULATION (EC) No 2603/2000 of 27 November 2000 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in India, Malaysia and Thailand and terminating the anti-subsidy proceeding concerning imports of certain polyethylene terephthalate originating in Indonesia, the Republic of Korea and Taiwan ("Definitive Determination on PET")*, OJ L 301, 30.11.2000, p. 1 and *COMMISSION REGULATION (EC) No 1741/2000 of 3 August 2000 imposing a provisional countervailing duty on imports of polyethylene terephthalate (PET) originating in India, Malaysia, Taiwan and Thailand ("Provisional Determination on PET")*, OJ L 199, 5.8.2000, p. 6.

Act (“IPA”) B.E. 2520 of 1977 and its amendment B.E. 2534 of 1991 provided incentives to promote development of the Thai economy, by granting the exemption of import duties and other taxes with respect to qualifying projects. A national authority, the Board of Investment (“BOI”), administrates the IPA.¹⁸⁵ In 1993, the BOI divided the entire country into three zones with the classification based on the level of economic development; zone 1 being the most developed and zone 3 being the least developed.¹⁸⁶ It was found that in different zones, approved companies receive benefits of different levels. Eligible firms located in zones 2 and 3 are entitled to more generous incentives than those located in zone 1. Accordingly, the EU Commission concluded that all subsidies granted in zones 2 and 3 by the BOI are by definition regionally specific in accordance with Articles 3(2) (a) of the Basic Anti-subsidy Regulation.¹⁸⁷ This case demonstrates that if a national authority grants subsidies of different levels to different regions within the country-wide territory, the subsidies granted with more benefits within some areas are specific.

CHAPTER IV IS THE SPECIFICITY TEST IN THE ASCM LEGITIMATE?

In the foregoing chapters, the history and background of establishment of the specificity test and the provisions and practice thereof under the WTO and certain WTO Members’ jurisdiction has been introduced. This chapter analyzes the legitimacy of the specificity test from both an economic and legal perspective.

4.1 Is the Rationale of the Specificity Test in the ASCM Legitimate?

Tracing the origin and legislative history of the specificity test in the ASCM, as the first chapter introduced, the economic rationale behind this test is that a subsidy specific to an enterprise or industry or group of enterprises or industries is trade-distorting. This subsection reviews its rationale.

¹⁸⁵ *Ibid*, *Provisional Determination on PET*, para. 183.

¹⁸⁶ See *supra* footnote 184, *Provisional Determination on PET*, para. 186.

¹⁸⁷ See *supra* footnote 184, *Provisional Determination on PET*, para. 192 and *Definitive Determination on PET*, para. 44.

4.1.1 Is a Subsidy Only Impacting on Domestic Market Necessary to Be Countervailable in the Importing Country?

4.1.1.1 Trade Distortion of Subsidies in Perfect Competition Markets

From the economic point of view, there are two types of subsidies, i.e. export subsidies and domestic subsidies (or production subsidies). Export subsidies are contingent upon exports only. Domestic or production subsidies are granted for the benefit of products irrespective of whether its market destination is foreign or not.¹⁸⁸

The world price effects and world output effects of subsidies are important in the evaluation of trade distortion of subsidies. However, the impact of domestic subsidies and that of export subsidies on trade distortion are slightly different.

If a perfect market is assumed to be closed to international trade, domestic subsidies on enterprises (See Diagram 1) have the effect of expanding domestic output (from Q_0 to Q_1), reducing the domestic price paid by consumers (from P_0 to P_1) and creating an overall welfare loss, since resources will be allocated inefficiently.¹⁸⁹ If international trade is introduced into this market, matters become complicated. For instance, in the case where the country is assumed to be so small that the domestic price is fixed by the world price and cannot change, the domestic subsidy granted to an import competing industry within such a small country would not affect world prices. (See Diagram 2) Consequently, the domestic output would be expanded (from $0Q_0$ to $0Q_1$) at the expense of imports (from Q_0Q_2 to Q_1Q_2).¹⁹⁰

Diagram 1. Closed Economy: Domestic Subsidies

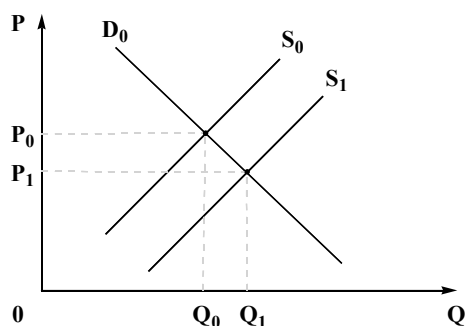
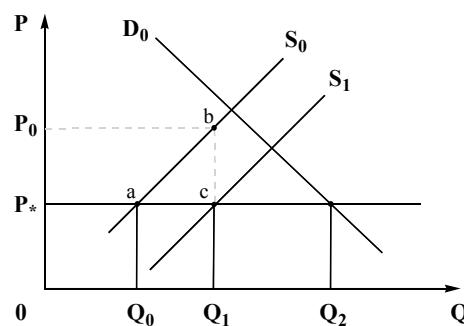


Diagram 2. Open Economy: Domestic Subsidies

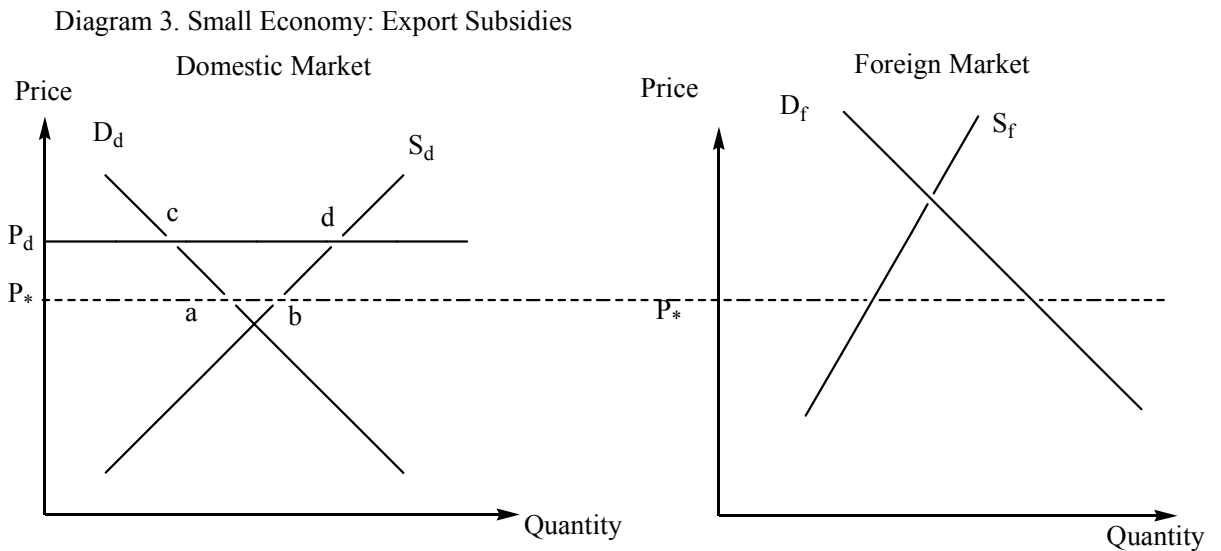


¹⁸⁸ See JACKSON, John H. (ed.). 1997. *The World Trading System: Law and Policy of International Economic Relations (2nd)*. Cambridge MA, London: MIT Press, p. 279-280.

¹⁸⁹ See World Trade Organization. 2006. *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO*, Geneva: World Trade Organization, p. 56.

¹⁹⁰ *Ibid.*

Likewise, assume the subsidizing country is small. If a domestic subsidy is granted to an exporting industry within this small country, the domestic output and exports may be increased, which is similar to the result from an export subsidy to an industry. (See Diagram 3) The latter differs a little from the former in that domestic prices rise (from P_* to P_d) in the event of export subsidies if re-imports are prevented.¹⁹¹



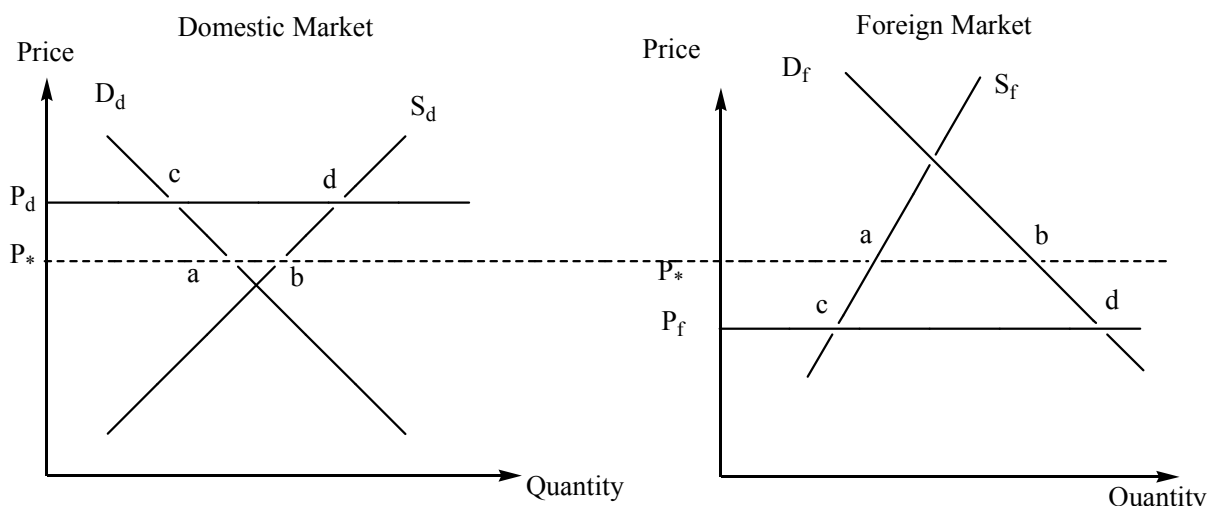
In the above two cases, the subsidizing countries are assumed to be too small to affect world prices. In contrast, world prices will be reduced in the domestic subsidies and export subsidies scenario when a subsidizing country is large.¹⁹² (See Diagram 4) In any case, whether a subsidizing country is small or large, export subsidies lead to higher domestic prices.¹⁹³

¹⁹¹ *Ibid*, p. 57.

¹⁹² *Ibid*, p. 58.

¹⁹³ *Ibid*, p. 57 and 58.

Diagram 4. Large Economy: Export Subsidies



In sum, among several scenarios of the two types of subsidies in a perfect market, the domestic subsidies granted to an import competing industry within a small country will not affect the world price, but the domestic output will be enlarged instead of imports.

4.1.1.2 Conflict between Jurisdiction of the Investigating Authority and Countervailibility of the Subsidy Only Impacting on Domestic Market

As with the above analysis, it is under certain conditions that certain subsidies can only affect the domestic market. That is, the domestic price and domestic output will increase; the quantity of imports will decrease by virtue of increasing domestic output; and the world price will not change.

On the other hand, a countervailing duty measure might be taken by an importing country's government, when it considers that the imports from a foreign country are subsidized and the subsidy is determined to be specific within the meaning of Article 2 of the ASCM. However, it is important to note that the subject matter of the countervailing duty measure, the importing products from the exporting country, may be not affected by the domestic subsidy given by the granting authority (i.e. the government of the exporting country) in the light of the above situation, even though the like products consumed in the territory of the exporting country are impacted by the domestic subsidy.

In this case, it seems that the authority of the importing country has no jurisdiction to take a countervailing duty measure against such imports. This is because the effects of the

domestic subsidy merely take place within the jurisdiction of the exporting country rather than that of the importing country.

Therefore, the specificity test in the ASCM does not take into account such a case, so that an individual Member still has power under the ASCM to take countervailing duty measures against an importing product which the domestic subsidy, granted by the exporting country, does not have an effect on. This does not seem legitimate.

4.1.2 Is It Legitimate that Certain Subsidies for Correcting Market Failures and other State Objectives are countervailable?

4.1.2.1 Justification of Certain Subsidies in Some Market Failure Circumstances

In reality, most markets are imperfect. In other words, a range of market failures¹⁹⁴ correspond more to the reality. An efficient subsidy would correct a market failure in some circumstances, bringing social and private costs and benefits into alignment.¹⁹⁵ Two common examples of market failures – economics of scale and externalities – are considered to support the case for subsidy intervention.

4.1.2.1.1 Economies of Scale

Many modern industries are economies of scale, so that production is more efficient when the scale becomes larger. There are two kinds of economies of scale: internal economies of scale and external economies of scale.¹⁹⁶

Consider one example of market failures due to internal economies of scale. In such industries as the aircraft industry, pharmaceutical industry and semiconductor industry, firms must incur a significant fixed cost in order to enter an industry. Such costs may stem from investment in R&D or expensive and specialized capital equipment. The firms then produce with a constant marginal cost and the decision on whether to produce and how much to produce relies on demand. In the initial stages, consumers are unwilling to pay a price that is

¹⁹⁴ In market failure situations, there is difference between the actual price and the socially optimal price.

¹⁹⁵ See World Trade Organization. 2006. *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO*, Geneva: World Trade Organization, p. 55. There is an optimal policy intervention, including subsidies, that addresses the distortion most directly and does not create additional distortion.

¹⁹⁶ See KRUGMAN, Paul R. and OBSTFELD, Maurice (2003). *International Economics: Theory and Policy* (6th Edition, Addison Wesley World Student Series), p. 122. Internal economies of scale exist when the cost per product depends on the size of an individual firm not necessarily on that of the industry.

high enough for a firm to recover its initial investment. It is difficult for firms in developing countries to receive financing support from the banks in developing countries in the light of high risk. Consequently, no investment and no production would take place with a lack of government subsidization. However, production is desirable from the perspective of society.

4.1.2.1.2 Externalities

The typical market failure is externalities, including positive and negative externalities.¹⁹⁷ Positive externalities occur when the producer and the consumer of an output do not fully take account of the benefits which are related to producing and consuming the output. In this circumstance, the socially optimal amount would be more than the quantity consumed.¹⁹⁸ For example, when a firm is deciding whether it should invest in development of energy-saving technologies, it will consider that it cannot appropriate the social benefit in return for the cost of research and thereby will under-invest in such research.

Negative externalities exist when the producer and consumer do not bear the full cost of their action so as to over-invest in the activity or over-consume in relation to the socially optimal level. In this case, the quantity consumed would be more than the socially optimal amount.¹⁹⁹ For example, a company will continue to produce polluting products as long as it is not made to pay for this and until the increasing revenue from selling its products is more than the increasing cost of production.²⁰⁰

In the absence of government intervention, a wedge exists between the actual price in a market and socially optimal price. A subsidy intervention could be used in the scenario of positive externalities to increase the production and consumption of under-produced goods, although the role for subsidies is limited.²⁰¹

4.1.2.2 Possible Justification of Certain Subsidies for Some State Objectives

In reality, governments claim some objectives to pursue with subsidies, such as infant

¹⁹⁷ See MANKIWI, N. Gregory (2004). *Principles of Economics (3rd Edition)*, Australia, Canada, Singapore, Spain, United Kingdom and United States: Thomson South-Western, p. 11. Externality is the effect of one person's action on the well-being of a bystander.

¹⁹⁸ See World Trade Organization. 2006. *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO*, Geneva: World Trade Organization, p. 61.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

industry promotion, innovation and support for national champions, regional development, adjustment support for declining industries and universal service obligation.

Whatever the objectives governments pursue, there are a range of policy instruments to achieve it, including subsidization. The optimal instrument for achieving a specific state objective depends on a particular situation and needs to be determined on a case-by case basis. Subsidies have many advantages compared with other policy instruments. They are relatively transparent in that recipients and amounts of subsidies are reported in the government's budget. Since they impact directly on price signals, subsidies might have less undesirable side-effects than other policy interventions when the government attempts to change market signals, for example in the case of knowledge spillovers.²⁰²

However, subsidies also have disadvantages. It is because of the direct impact on price signals that recipients lobby to prolong subsidization. In other words, the government could possibly use subsidies inappropriately. One way of lessening the risk is to set up objective criteria for eligibility of subsidies.²⁰³

4.1.2.3 Conflict between the Specificity Test and Some Justifiable Subsidies

From the point of economic theory, the first-best policy is always to deal with the source of the problem directly; otherwise it will lead to unnecessary costs to society.²⁰⁴ In practice, it is difficult to avoid any policy instrument, including subsidies, from having any unintended negative side-effects. As for subsidy instruments, economic theory has also shown that undesirable side-effects can be minimized when the governments target subsidies as precisely as possible in terms of recipients in order to correct given market failures.²⁰⁵ That is, if a subsidy is more closely targeted in terms of intended beneficiaries, its relative price effect will be more concentrated. If subsidy recipients are defined more broadly, the subsidy will probably impact in a more “spread out” or shallow manner.

However, there seems to be a conflict between the aforesaid rationale of the targeted subsidies and the specificity test in the ASCM. Article 1.2 and 2 of the ASCM designs a discipline that a subsidy specific, *de jure* or *de facto*, to an enterprise or industry or a group of

²⁰² *Ibid*, p. 107.

²⁰³ *Ibid*, p. 107.

²⁰⁴ *Ibid*, p. 100.

²⁰⁵ *Ibid*, p. 107 and 198.

enterprises or industries is countervailable within the jurisdiction of the granting authority. Accordingly, it could be argued that more targeted subsidies are likely to be determined “specific” under the ASCM leaving more to be complained about under the ASCM or relevant national rules of the WTO individual Member. It should be noted that certain subsidies with some objectives are saved by former Article 8.1(b) and 8.2 of the ASCM, namely R&D subsidy, environmental subsidy and regional development subsidy. However, Article 8 has expired since 2000 according to Article 31 of the ASCM.²⁰⁶

²⁰⁶ See the ASCM, in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p239-241. Article 8.1(b) and 8.2 states:

“Article 8 Identification of Non Actionable Subsidies

8.1 The following subsidies shall be considered as non actionable :

...

(b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non actionable:

(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:

the assistance covers not more than 75 per cent of the costs of industrial research or 50 per cent of the costs of pre competitive development activity , ; and provided that such assistance is limited exclusively to:

(i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);

(ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;

(iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought in research, technical knowledge, patents, etc.;

(iv) additional overhead costs incurred directly as a result of the research activity;

(v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.

(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development and non specific (within the meaning of Article 2) within eligible regions provided that:

(i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria , indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;

unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

(i) is a one time non recurring measure; and

(ii) is limited to 20 per cent of the cost of adaptation; and

(iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and

4.2 Problems with Some Provisions of the Specificity Test in the ASCM

After discussing the rationale of the specificity test, some problems with certain provisions of the specificity test in the ASCM will be considered in this subsection.

4.2.1 *Is the Determination of the Breadth or Scope of “Certain Enterprises” Too Elastic?*

As Article 1.2 of the ASCM provided, only when subsidies are "specific" within the meaning of Article 2 thereof, are such subsidies subject to the disciplines of the ASCM. According to the chapeau to Article 2.1 of the ASCM, the “specific” refers to being specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority, regardless of *de jure* or *de facto* specificity. Concretely, a subsidy is specific in law where a government expressly limits it to certain enterprises. A subsidy still can be determined to be specific to certain enterprises based on evidence of the factors listed in Article 2.1(c) of the ASCM, subject to consideration of the diversification of economic activities in the jurisdiction and the length of time the subsidy program has been in operation.²⁰⁷

However, there is not a clear definition of “industry” and “group of...industries”. As a result, in application, the investigating authorities have discretion to determine the scope of an industry or a group of industries.

In the *US – Softwood Lumber IV*, the USDOC considered that the Canadian stumpage program is specific to the “limited group of wood products industries”. The USDOC identified it as “pulp and paper mills and the saw mills and re-manufacturers which produce the subject merchandise”.²⁰⁸ Canada argued that the meaning of “industry” must be examined on a product-specific basis in the context of the ASCM. According to Canada, Article 16.1 of

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- (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
 - (v) is available to all firms which can adopt the new equipment and/or production processes.”

Also see the ASCM, in *The Legal Text: The Results of the Uruguay Round of Multilateral Trade Negotiations*, at p264. Article 31 states:

“Article 31 Provisional Application

The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.”

²⁰⁷ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.49.

²⁰⁸ See Report of the Panel, *US – Softwood Lumber IV*, para. 4.51. See also *supra* footnote 135, *Memorandum for the Final Results on Softwood Lumber*.

the ASCM provides that the term “domestic industry” “shall ... be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ...”²⁰⁹ The logical inference by the investigating authority was therefore that, the parallel foreign industry was the target to be examined in determining whether a subsidy at issue is specific to it. In Canada’s view, an “industry” should be interpreted to refer to “enterprises engaged in the manufacture of similar products”²¹⁰.

In addition, Canada submitted that voluminous questionnaire responses and expert studies on factual issues relevant to specificity demonstrated that there were 23 separate classes of industries, producing over 200 products which used stumpage programs. These studies also showed that softwood lumber was not the dominant end use. Many producers of subject merchandise also make products not subject to the investigation, and other stumpage users include, *inter alia*, producers of pulp and paper products, hardwood products, shakes and shingles, kitchen cabinets, furniture, and sporting gear.²¹¹ In Canada’s view, this is hardly a “limited number of industries”.²¹²

In response, the US rebutted that Article 2.1 does not require an analysis of the number of products made by the users of the subsidy, and does not require that a subsidy be limited to the producers of the subject merchandise, or that a “group of industries” must share common characteristics.²¹³ The plain language of Article 2 of the ASCM indicates that the specificity test is concerned with enterprises and industries but not with products.²¹⁴

Indeed, the US countervailing duty law also reflected this thought. As the foregoing chapter introduced, Section 351.502(b) of the Final Rule clarified that in determining a group of enterprises or industries, the USDOC “is not required to determine whether there are shared characteristics among the enterprises or industries that are eligible for, or actually receive, a subsidy”²¹⁵.

In this regard, the Panel was of the view that “like product” in Article 16 of the ASCM does not provide a useful context for the understanding of the term “industry” in general,

²⁰⁹ *Ibid*, para. 4.50. See Article 16.1 of the ASCM.

²¹⁰ *Ibid*.

²¹¹ *Ibid*, para. 4.52.

²¹² *Ibid*, para. 7.117.

²¹³ *Ibid*, para. 4.164.

²¹⁴ *Ibid*, para. 7.111.

²¹⁵ See *supra* footnote 133.

since the purpose of the definition of domestic industry in the ASCM is different. Moreover, The Panel noted that both Canada and the US seem to agree that industries, as usual, are referred to by the type of products they produced rather than by specific goods or end-products. The Panel mentioned that Canada did not challenge that a subsidy limited to a single large industry (such as "steel", "autos", "textiles", "telecommunications", or the like) could be found specific, even if the producers make a variety of products.²¹⁶ Further, in the Panel's view, the "wood products industries" constitutes at most only a limited group of industries under any definition of the term "limited", namely the pulp industry, the paper industry, the lumber industry and the lumber remanufacturing industry.²¹⁷ Finally, as for 23 industries and 200 products which Canada claimed, the Panel did not think determinative the fact that these industries maybe produce a lot of different end-products. In its view, specificity under Article 2 of the ASCM is to be determined at the enterprise or industry level, not on the product-specific basis.²¹⁸ This issue was not discussed in the Appellate Body proceedings.

4.2.1.1 Does the Last Sentence of Article 2.1(c) of the ASCM Need to Be Taken Into Account when Determining De Jure Specificity?

One problem which arises is when a nation only has several industries within its jurisdiction and the government subsidizes a major part of these industries accounting directly for a dominating share of the nation's GDP. Is the subsidy granted by the national government expressly to these industries specific in law within the meaning of Article 2.1(a) of the ASCM? Does the relevant competent authority need to examine the extent of diversification of economic activities within the jurisprudence of the granting authority under Article 2.1(c) of the ASCM? It is noted that the last sentence of Article 2.1(c) will be examined provided that the subsidy at issue is not specific in law under Article 2.1(a) of the ASCM and seems to meet the conditions under Article 2.1(b). Does this imply that the last sentence of Article 2.1(c) of the ASCM is not necessarily examined where the subsidy has been determined to be inconsistent with Article 2.1(a) of the ASCM?

²¹⁶ See Report of the Panel, *US – Softwood Lumber IV*, para. 7.120.

²¹⁷ *Ibid*, para. 7.121.

²¹⁸ *Ibid*, para. 7.121.

4.2.1.2 Is a Subsidy Available to the Entire Agricultural Sector Specifically under Article 2 of the ASCM?

Following on from the above problem, the question arises whether a subsidy which is available to the entire agricultural sector is specific because there are a lot of sub sectors of agriculture (such as crops, livestock, etc.) and would the agricultural sector be broad enough to be considered non-specific?²¹⁹ In the *US – Upland Cotton*²²⁰, the US contended that crop insurance subsidies are available to the whole United States agricultural sector and therefore it is too broad and diverse to constitute a single “enterprise or industry or group of enterprises or industries”.²²¹ However, the Panel found that crop insurance subsidies are available for most crops but not to other agricultural commodities, such as livestock, thus they are “not generally available in respect of the entire agricultural sector in all areas”.²²² Further, the Panel stated that they are “not *even* generally available to the industry which can be categorized as the agricultural industry”²²³. In this case, the WTO Panel only dealt with the specificity associated with sub sectors under the agricultural sector, but did not address the question posed at the beginning of this paragraph, that is, whether the subsidy is specific under Article 2 of the ASCM if it is available to the entire agricultural industry.

Nevertheless, it is noted that, the USDOC once, in *Fresh Asparagus from Mexico*²²⁴, found that irrigation facilities in the northwest of Mexico granted by the Mexico government were generally available to the entire agricultural sector and low cost water was provided by the Mexico government to the entire agricultural sector at uniform rates within a district. Therefore, the USDOC determined that such programs granted by Mexico are not countervailable.

²¹⁹ See JACKSON, John H. (ed.). 1997. *The World Trading System: Law and Policy of International Economic Relations (2nd)*. Cambridge MA, London: MIT Press, p. 298.

²²⁰ See Report of the Panel, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (“US – Upland Cotton”)*, WT/DS257/R, 29 August 2003.

²²¹ *Ibid*, para. 7.1126.

²²² *Ibid*, para. 7.1150.

²²³ *Ibid*, para. 7.1150. (Emphasis added)

²²⁴ *Final Negative Countervailing Duty Determination: Fresh Asparagus From Mexico*, 48 Fed. Reg. 21618 (13 May 1983), Petitioner’s Comment 2 and Comment 3.

4.2.1.3 Does Specificity under Article 2 of the ASCM Refer to the Recipients or the Beneficiaries of Subsidies?

The third pertinent problem is whether “certain enterprises” within the meaning of Article 2 of the ASCM refers to the recipients or the beneficiaries of subsidies. The direct recipients are not necessarily the only beneficiaries of subsidies. This issue arose in the *US – Softwood Lumber IV*. In this case, it was found that the stumpage programs of Canadian provinces at the heart of the case provide standing timber to timber harvesters.²²⁵ The USDOC defined the product subject to the countervailing investigation at issue as “certain softwood lumber”, which includes “primary” lumber and “remanufactured” lumber.²²⁶ The former is the input of the latter. After standing timber is harvested and processed into softwood lumber, then lumber is processed into remanufactured lumber products. The timber harvesters are not necessarily, or not necessarily related to, re-manufacturers of the lumber. Accordingly, the Appellate Body stated that, if a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product may not be the same. In this case, the producer of the input product is the direct recipient of the benefit. When the input is processed, the producer of the processed product is an indirect recipient of the benefit, i.e. beneficiary of the benefit, as long as it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product.²²⁷

Consequently, whether the definition of “certain enterprises” under Article 2 of the ASCM contains indirect recipients or not, might influence the determination of specificity. If the benefit flowing from the input subsidy is passed through a number of different processed products, the subsidy might be less specific in the case that specificity refers to beneficiaries of subsidies rather than in the case of direct recipients. Besides, it is also difficult to establish that the benefit flowing from the input subsidy has been passed through, at least in part, to the processed product, which is subject to the investigation. It implies that the specificity test could not address such a complicated situation.

In a word, the provision of the chapeau to Article 2.1 of the ASCM does not provide a

²²⁵ See Report of the Appellate Body, *US – Softwood Lumber IV*, WT/DS257/AB/R, 19 January 2004, para. 124.

²²⁶ *Ibid*, para. 124.

²²⁷ *Ibid*, para. 143.

technical definition and detailed implication about how broadly or narrowly we are to classify an “industry” or about whether specificity refers to recipients or beneficiaries of subsidies. The Panel in the *US – Upland Cotton* stated that “whether a subsidy is specific can only be assessed on a case-by-case basis”.²²⁸ Does this imply that the determination of the breadth or scope of an industry or group of industries is too elastic?

4.2.2 Should the Criteria Be Accumulative Rather than Non-accumulative in determining the De facto specificity?

As discussed above, in the *US – Softwood Lumber IV*, the Panel concluded that the USDOC was not obligated to examine all four factors illuminated in Article 2.1(c) of the ASCM. In other words, the action of USDOC - that it did not examine the third and fourth factor - is not inconsistent with the ASCM.

According to the Panel’s logic, if there was no obligation to examine all four factors for determination of *de facto* specificity, a subsidy can be considered to be specific to certain enterprises merely because it meets the fourth factor. What was the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy? In this respect, it is noted that the USDOC stated in its legal document that “based on [their] experience in administering the [countervailing duty law], some measure of administrative discretion exists in the operation of almost every alleged subsidy program”.²²⁹ If specificity is found simply based on the exercise of this type of discretion, the other *de facto* specificity factor would be rendered invalid in fact, since every subsidy in the world could eventually be considered specific merely on the basis of the fourth factor.²³⁰

Additionally, even if the first two factors (i.e. use of a subsidy by a limited number of certain enterprises and predominant use by certain enterprises) are fulfilled, can a subsidy be considered to be specific in fact without evaluation of whether disproportionately large amounts of subsidy were granted to certain enterprises? It is possible that the eligible enterprises which have applied for the subsidy are not granted a disproportionately large amount of the subsidy program, even though these enterprises are considered to be limited

²²⁸ See Report of the Panel, *US – Upland Cotton*, para. 7.1142.

²²⁹ See *supra* footnote 133. *Countervailing Duties, Final Rule - 19 CFR Part 351*, International Trade Administration, the US Department of Commerce, 63 FR 65347, November 25, 1998.

²³⁰ *Ibid.*

users. There may still be large amounts of subsidy remaining for future eligible applicants. It is likely that some eligible enterprises do not apply for the subsidy program for some reasons, such as higher costs of application, lack of information about the subsidy, etc.

Therefore, it would seem more legitimate that each of the first three criteria must be shown to prove the existence of *de facto* specificity.

4.2.3 Does the Intention of the Subsidizing Government Need to Be Taken into Account in Determining the Specificity?

The above question reveals another question concerning whether the intention of the subsidizing government needs to be taken into account in determining the specificity. In the design of a subsidy program, a granting government intends to make the subsidy generally available, and at least, to establish objective criteria of the eligibility for the subsidy. In administering the program, the granting authority does not expect that only a small number of enterprises would be interested in the program, apply for it, and become eligible for it. In such a situation, do the motives of the authority that provide subsidies need to be considered in determining whether the subsidy is of *de facto* specificity?

CONCLUSION

In sum, the provisions of Article 2 of the ASCM on specificity test of a subsidy are not perfect, not only in terms of rationale but also in the light of provisions *per se*.

The current specificity test focuses on whether a subsidy is specific, in law or in fact, to certain enterprises. The rationale behind this is that the subsidies which are not generally available to enterprises would create trade distortion. If the imports benefit from the subsidy which is specific within the meaning of Article 2 of the ASCM, the authority of the importing country could consider the subsidy to be countervailable and probably impose countervailing duties on the imports, whether the subsidy creates the distorting effects only within the jurisprudence of the granting authority or distorts the economies of other societies as well. However, it seems illegitimate that the importing authority imposes the countervailing duties on the imports which are not affected by such a subsidy.

Besides, some subsidies are justified by virtue of certain objectives. For example, certain

subsidies would correct various market failures, such as the three situations set forth under former Article 8 of the ASCM (discussed *supra*), i.e. R&D subsidy, environmental subsidy and regional development subsidy. But the economic theory suggests that the more specific to an industry the subsidy is, the more efficient it is and the easier it is considered to be countervailable under the WTO rules. It thus seems that there exists a conflict.

Apart from the illegitimacy of its rationale, there are some problems with the provisions of Article 2 of the ASCM, as such. First, there is no specific definition of “certain enterprises” in Article 2. As a result, the investigating authority has discretion to define it in determining whether a subsidy is specific or not. If the scope of the “certain enterprises” is defined too broadly, does the extent of diversification of the economic activities within the jurisdiction of the granting authority need to be taken into account in determining the *de jure* specificity? If a subsidy is targeted to an entire agricultural sector, is it still specific within the meaning Article 2 of the ASCM? Moreover, the term “certain enterprises” in Article 2 of the ASCM is not explicitly referred to as recipients or beneficiaries of a subsidy. In practice, the direct recipients of the subsidy are not necessarily the beneficiaries of the subsidy.

Second, the Panel in certain WTO cases has stated that there is not any obligation for the investigating authority to examine all four factors for determining the *de facto* specificity. Can it be inferred that if the fourth factor, namely the discretion factor, is fulfilled, the subsidy can be considered to be specific? The US regulation has demonstrated that specificity is simply found based on the exercise of this type of discretion, since some measure of administrative discretion exists in the operation of almost every alleged subsidy program.

Third, the specificity of a subsidy is not what the intention of the granting government is. The granting government could possibly establish objective and automatic criteria of eligibility for the subsidy; nevertheless the applicants for this subsidy might still be limited. The reasons might vary. It is possible that some potential applicants are not interested in this subsidy program compared with the costs. Also, the potential applicants probably lack information about the program. These reasons might consequently lead to limited users of the subsidy which will therefore be considered specific. However, these reasons are not related to the intention of the government.

For the above considerations, it seems that Article 2 of the ASCM on the specificity test is not legitimate.

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