

WTO Law on Subsidies & Countervailing Measures

Semester: Spring semester- FS 2020

Root Number: 446636

ECTS: 3

Lecturer: Luca Rubini & James Flett

Dates: 3 - 7 February 2020

Room: Silva Casa Auditorium, World Trade Institute, Hallerstrasse 6, Bern

Audience:

- Master of Advanced Studies of International Law and Economics (MILE) Students – Optional
- Joint LL.M. / Diploma of Advanced Studies Trade and Investment Law (TRAIL+) Students - World Trade Institute / Faculty of Law, Unibe - Optional
- Certificate of Advanced Studies / Diploma of Advanced Studies in International Law and Economics (CAS ILE & DAS ILE) Students - World Trade Institute, Unibe – Optional
- MILE à la Carte

Course Description

This course will examine the provisions of the WTO Agreement on Subsidies and Countervailing Measures, their relationship with other WTO agreements, and the manner in which they have been interpreted and applied, particularly by the Appellate Body. The course will be divided into seven main parts: (i) introduction to the design and architecture of the SCM Agreement, including the constituent elements of a subsidy and the different types of subsidy; (ii) the constituent elements of a subsidy (financial contribution, benefit, specificity); (iii) prohibited subsidies

(export contingent subsidies and import substitution subsidies); (iv) actionable subsidies (a subsidy as a genuine and substantial cause of adverse effects to trading partners (material injury, price and volume effects); (v) countervailing duties; (vi) the relationship between the SCM Agreement and other WTO agreements (including the GATT 1994 and the Anti-Dumping Agreement); and (vii) possible reforms of WTO subsidies law. Legal and practical questions will be raised during the course, and where appropriate examples of dispute settlement cases will be discussed.

Lecturers

Luca Rubini

Dr Luca Rubini is Reader (Associate Professor) and Deputy-Director of the Institute of European Law at the University of Birmingham, Law School. Luca served as legal secretary to Advocate General Francis Jacobs at the European Court of Justice in Luxembourg. He has held various visiting positions at the European University Institute, the Institute of International Economic Law (Georgetown University), the World Trade Institute, Bocconi University. He is faculty member of the MILE and of the Graduate School of Economics and International Relations (ASERI), Milan, and Fellow to the Centre of European Law, King's College London. Dr Rubini has law degrees from the Catholic University in Milan (JD) and King's College London (MA and PhD) and is admitted to practice in Italy and England and Wales. Luca Rubini's main expertise lies in the regulation of public subsidies. His current research interests revolve around the regulation of subsidies to promote clean energy. Among his recent publications: *The Definition of Subsidy and State Aid – WTO and EC Law in a Comparative Perspective* (OUP, 2009) and *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Elgar, 2010).

James Flett

James Flett is deputy to the Director of the Trade Policy and WTO Team of the European Commission Legal Service. He has twenty-eight years' experience practicing international law, particularly international trade law. He has represented the European Commission before the European Court of Justice in more than 100 cases and the European Union before the WTO in more than 200 proceedings. Mr. Flett graduated from the London School of Economics and Political Science, and has a Master's degree in European law from the College of Europe, Bruges. He is a qualified solicitor. Before joining the Commission Legal Service in 1995, when the WTO was founded, Mr. Flett spent several years working for two international law firms in London and Brussels. He is a frequent speaker at conferences and universities and has published widely on international trade law. He teaches WTO Law at Leuven University and has also taught WTO Dispute Settlement Law at Barcelona University (IELPO).

Learning Objectives

- Students are expected to read, study and assimilate the basics: the relevant provisions of the GATT 1994 and the SCM Agreement and the content of The Law and Policy of the World Trade Organization, Text, Cases and Materials, Fourth Edition, Peter Van den Bossche and Werner Zdouc, Chapter 12, Subsidies, preferably before the course begins, and to demonstrate this in response to direct questions from the lecturers during class.
- To acquire an overview of the subject, an awareness of the design and architecture of the relevant legal provisions, and of the case law, and an awareness of the issues, so that they know where to look for answers to specific problems.
- To focus on specific conceptual problems that have arisen, and how they have been resolved in practice in the case law. Thus to develop an understanding of and facility with the principles and analytical tools and methods that are habitually used in this field: a skillset that they can then use themselves to deal with problems yet to be resolved.
- To develop the capacity for independent critical thinking about past case law, that is, the ability to agree or disagree with how the Appellate Body has resolved particular issues, and support their point of view with well-structured and logical analysis.
- To imagine how WTO subsidies law may develop in the future, both on the basis of the existing agreements, and on the basis of possible legislative changes, and to be able to argue in favour or against particular propositions based on a well-structured and logical analysis.

Exams and Grades

- Students' knowledge will be assessed on the basis of an open book, take home exam which needs to be completed on an individual basis. The exam will consist of two case studies.
- Take home assignment made available on Thursday 6 February 2020, 16:00 and to be submitted before Friday 7 February 2020, 20:00
- One case study from Luca Rubini, carries 50% weight in the final course grade
- One case study from James Flett, carries 50% weight in the final course grade

Course Overview

Date	Day	Time	Lecturer/s	Topic
3 Feb.	Monday	9:00-12:00	Luca Rubini	
4 Feb.	Tuesday	9:00 12:00	Luca Rubini	
		14:00 16:00	Luca Rubini	
5 Feb.	Wednesday	9:00 12:00	James Flett	Actionable subsidies
		14:00 16:00	James Flett	Actionable subsidies
6 Feb.	Thursday	9:00 12:00	James Flett	Countervailing duties Green subsidies
		14:00 16:00	James Flett	SCM and other agreements Reform of WTO subsidies law
7 Feb.	Friday		Take-home assessment	

MONDAY, FEBRUARY 3, 2020

Lecturer: Luca Rubini

Topics

Morning

- Subsidies and their control: law and economics
- The GATT/WTO disciplines on subsidies: an overview
- The legal and policy issue of the definition
- Art 1 of the WTO ASCM
- Financial contribution and income or price support

Afternoon

- Attribution, government, public and private bodies
- Public bodies and the SOE issue

Readings

Rubini, *The definition of subsidy and State aid* (2009, Oxford University Press), chapter 2

Rubini, 'WTO Subsidy Laws: the International Regulation of State Aid', in Herwig Hoffman and Claire Micheau (eds) *State Aid Law of the European Union* (Oxford University Press, 2016), 471-509

Mavroidis, *Trade in Goods* (Oxford University Press, 2012) chapters 8 and 11 (part 2 on the 'Agreement on Agriculture')

Browse through the following panel reports, concentrating on the Art 1 SCM issues and findings:

- Panel Report, *US – Measures Treating Export Restraints as Subsidies* (DS 194)
- Various Panel and Appellate Body Reports in *US – Tax Treatment for "Foreign Sales Corporations"* (DS 108) and *US – Tax Treatment for "Foreign Sales Corporations", Article 21.5* (DS 108), especially the section on the interpretation of the 'otherwise due' language
- Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Measures on Certain Products from China* (DS379), especially paras. 276-356 (concept of 'public body')
- Panel Report, *China – GOES* (DS414) especially the section on the interpretation of the 'price support' terminology
- Panel, *US – Large Civil Aircraft* (DS353) especially paras. 7.429-7.480 (on the meaning of 'general infrastructure')

Optional readings

Cartland, M, G Depayre and J Woznowski (2012), "Is Something Going Wrong in the WTO Dispute Settlement?", *Journal of World Trade* 46(5): 979

Sykes, 'The Questionable Case for Subsidies Regulation: A Comparative Perspective' (2010) *Journal of Legal Analysis*, pages 473-523

Wu, "The 'China, Inc.' Challenge to Global Trade Governance" (2016) *Harvard International Law Journal* 57: 1001-1063.

TUESDAY, FEBRUARY 4, 2020

Lecturer: Luca Rubini

Topics

Morning

- The benefit and its issues
- Case-study: *Canada – Renewable Energy/FIT*
- Specificity (de jure; de facto; objective requirements; regional specificity)

Afternoon

- Introduction to category of subsidies: 'prohibited', 'actionable' and 'non-actionable' subsidies
- Prohibited subsidies: the contingency test
- Remedies

Reading

Rubini, 'WTO Subsidy Laws: the International Regulation of State Aid', in Herwig Hoffman and Claire Micheau (eds) *State Aid Law of the European Union* (Oxford University Press, 2016), 471-509

Mavroidis, *Trade in Goods* (Oxford University Press, 2012) chapter 8

Browse through the following panel reports, concentrating on the Art 1 SCM issues and findings:

- Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* (DS 70), especially paras. 157-158 (on the 'benefit'); read also paras. with examples of the application of the principle
- Appellate Body Report, *Canada – Measures Affecting the Renewable Energy Generation Sector / Measures Relating to the Feed-In Tariff Program* (DS 412 and 426)
- Panel Report, *US – Cotton* (DS267) especially paras. 7.1136-7.1155 (on 'specificity')
- Panel Report, *US – Softwood Lumber IV* (DS257) especially paras. 7.114-7.125 (idem)

- Panel Report, *US – Aircraft* (DS353) especially paras. 7.429-7.480 (on the meaning of 'general infrastructure')
- Appellate Body Report, *EC and certain Member States – Measures Affecting Trade in Large Civil Aircraft* (DS 316), especially paras 1036-1056 (on the notion of 'export contingency')
- Appellate Body Report, *US – Conditional Tax Incentives for Large Civil Aircraft* (DS 487) (on contingency test)
- Appellate Body Report, *EC and certain Member States – Measures Affecting Trade in Large Civil Aircraft, Article 21.5* (DS 316) (on contingency test)
- Panel Report, *Australia – Leather (Article 21.5 of the DSU)* (DS126)

Optional reading

Cosbey and Mavroidis, 'A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO; (2014) *Journal of International Economic Law* 11-47

Crivelli and Rubini, 'Flying High in a Plane' Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/RW), RSC Working Paper, 2020

Grane, 'Remedies Under WTO Law' (2001) *Journal of International Economic Law* 755-772

"Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union", 31 May 2018

Rubini, "The Age of Innocence. The evolution of the case-law of the WTO dispute settlement. Subsidies as case-study", in M Elsig, B Hoekman, and J Pauwelyn (eds) *Assessing the World Trade Organization. Fit for Purpose?*, Cambridge University Press, 2017, pp. 276-317.

Rubini, "The never-ending story. The puzzle of subsidies" in Meredith Crowley (ed) *Trade war: The Clash of Economic Systems Endangering Global Prosperity* (CEPR, London, 2019), 85-90

Rubini, 'The Good, the Bad and the Ugly. Lessons on Legal Methodology from the Recent WTO litigation on Renewable Energy Subsidies' (2014) *Journal of World Trade*, 895-938

Rubini, 'The Wide and the Narrow Gate. Benchmarking in the SCM Agreement after the *Canada – Renewable Energy/FIT Ruling*' (2015) *World Trade Review*, 211-237

WEDNESDAY, FEBRUARY 5, 2020

Lecturer: James Flett

Topics

1. Actionable subsidies
 - 1.1 Subsidies causing injury
 - 1.1.1 Like product
 - 1.1.2 Domestic industry
 - 1.1.3 Injury
 - 1.1.4 Causation
 - 1.2 Subsidies causing nullification or impairment
 - 1.3 Subsidies causing serious prejudice
 - 1.3.1 The relevant geographic market
 - 1.3.2 The relevant product market
 - 1.3.3 The reference period
 - 1.3.4 Price undercutting, depression and suppression
 - 1.3.5 Displacement or impedance of imports or exports
 - 1.3.6 Lost sales
 - 1.3.7 Causation and non-attribution
 - 1.3.8 Non-subsidized like product
 - 1.3.9 Threat of serious prejudice
 - 1.4 Other matters
 - 1.4.1 Temporal application of Article 5 of the SCM Agreement
 - 1.4.2 Pass-through of subsidies
 - 1.4.3 Aggregation and Cumulation
 - 1.4.4 Annex V of the SCM Agreement

Compulsory Reading Material

SCM Agreement, particularly Articles 5 and 6.

The Law and Policy of the World Trade Organization, Text, Cases and Materials, Fourth Edition, Peter Van den Bossche and Werner Zdouc, Chapter 12, Subsidies. The whole chapter, but at a minimum Part 5.

Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R:

Paras. 650-690 (temporal scope of Article 5 of the SCM Agreement)

Paras. 698-715 (the life of a subsidy and intervening events)

Paras. 1105-1138 (serious prejudice, relevant product market)

Paras. 1229-1241 (causation)

Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS316/AB/RW:

Paras. 5.351-5.383 (Article 7.8 of the SCM Agreement)

Paras. 5.419-5.455 (non-subsidised like product)

Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R:

Paras. 480-549 (procedures under Annex V of the SCM Agreement)

Paras. 1275-1349 (collective assessment of subsidies and their effects)

Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)*, WT/DS353/AB/RW:

Paras. 5.463-5.526 (analysis of the tied tax subsidies)

Optional Reading Material

WTO Analytical Index (to research case law pertaining to particular agreements and provisions related to subsidies):

https://www.wto.org/english/res_e/publications_e/ai17_e/ai17_e.htm

For general research purposes:

www.tradelawguide.com ; www.worldtradelaw.net

Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures, Balancing Policy Space and Legal Constraints*, Cambridge University Press (2014) (as a general reference source).

Luca Rubini, *The Definition of Subsidy and State Aid*, Oxford University Press (2009) (as a source for reflections on some of the underlying concepts in subsidies law).

For further research, see the list of Further Readings at the end of Chapter 12 (Subsidies) of *The Law and Policy of the World Trade Organization, Text, Cases and Materials, Fourth Edition*, Peter Van den Bossche and Werner Zdouc, and the Bibliography at the end of *WTO Disciplines on Subsidies and Countervailing Measures*, Dominic Coppens.

THURSDAY, FEBRUARY 6, 2020

Lecturer: James Flett

Topics

2. Countervailing duties
 - 2.1 Conditions for the imposition of countervailing duties
 - 2.2 Conduct of countervailing duty investigations
3. Relationship between the SCM Agreement and other covered agreements
 - 3.1 The GATT 1994
 - 3.2 The Agreement on Agriculture
 - 3.3 The Anti-Dumping Agreement
4. The problem of green subsidies
5. Possible reforms of the SCM Agreement

Compulsory Reading Material

SCM Agreement, particularly Part V (including Article 10) and Article 32.1.
The GATT 1994, Articles III, VI and XVI.

Agreement on Agriculture, Articles 1, 2, 6-10, 13 and 21.

Anti-Dumping Agreement, Article 2.

The Law and Policy of the World Trade Organization, Text, Cases and Materials, Fourth Edition, Peter Van den Bossche and Werner Zdouc, Chapter 12, Subsidies. The whole chapter, but at a minimum part 6.

Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, paras 82-120 (use by investigating authorities of an out-of-country benefit benchmark).

Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, paras. 541-545, 550-572, and 582-583 ("double remedies").

Bartels, Lorand. 'The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System'. *Journal of World Trade* 50, no. 1 (2016): 7–20.

Optional Reading Material

See the previous list.

FRIDAY, FEBRUARY 7, 2020

Take-home assessment