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STRENGTHENING THE GLOBAL TRADE SYSTEM

Rethinking Countervailing Duties

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Rethinking International Subsidies Disciplines

Think Piece

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ABSTRACT

The Agreement on Subsidies and Countervailing Measures (ASCM), adopted by the newly created World Trade Organization (WTO) during the Uruguay Round, was a breakthrough in disciplining the use of subsidies. It established disciplines prohibiting the subsidies that the members agreed were the most trade distorting and established both multilateral and unilateral remedies when a member's interests were harmed by another's provision of a subsidy. This paper focuses on countervailing duties, the more frequently used unilateral measure, to determine if there are changes that should be made in light of the changing trade landscape. It also looks briefly at other subsidy discipline options.

Although there have been complaints about WTO countervailing duty rules, such proceedings are rarely addressed in other trade agreements, leaving their regulation to the WTO. Some regional and bilateral trade agreements contain limitations on the use of export subsidies, but the vast majority do not address the use of countervailing duties. Since the WTO went into effect, there has been the growth of services trade globally. Countervailing duties (and the ASCM) address only trade in goods. Similarly, the growth of global supply chains has strained the ability of countervailing duty laws to address the full impact of subsidies. Finally, the increasing importance of state-owned enterprises in global trade has led to disputes over the use of these laws.

Examining the concerns over countervailing duties and other subsidy disciplines, it is apparent that the political pressure to retain unilateral countervailing duties as a form of subsidies discipline will continue to exist. In light of these concerns, the paper suggests a range of areas—from measuring subsidization and its benefits to procedural changes and revisions to dispute settlement—that could be considered for reform to effectively regulate the use of this unilateral measure.

CONTENTS

LIST OF ABBREVIATIONS

ASCM	Agreement on Subsidies and Countervailing Measures
DSU	Dispute Settlement Understanding
EU	European Union
GATS	General Agreement on Trade in Services
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
R&D	research and development
SACU	Southern Africa Customs Union
TPP	Trans-Pacific Partnership
US	United States
WTO	World Trade Organization

INTRODUCTION

When it was originally agreed, the World Trade Organization (WTO) Agreement sought to provide universal disciplines over the use of subsidies. The Agreement on Subsidies and Countervailing Measures (ASCM) was a breakthrough in disciplining the use of subsidies, including, for the first time, defining what was meant by the term "subsidy."[1] It also established disciplines prohibiting the subsidies that the members agreed were the most trade distorting—subsidies contingent upon exportation (or anticipated exportation) and those that required the use of domestic goods over imported goods—and established both multilateral and unilateral remedies when a member's interests were harmed by another's provision of a subsidy. This paper focuses on the more frequently used unilateral measure—countervailing duties—in light of 20 years' experience.

Everyone loves to hate countervailing duty laws. Complaints range from claims that the laws overreach or that they are ineffective to claims that they do not allow the capture of all subsidies or that they capture actions that are not subsidies. Others claim the laws make it too easy to take protectionist action; they make it too hard for companies harmed by subsidized competition to obtain relief. The laws are too expensive for companies to defend themselves or they are too expensive to employ when an industry is injured. Complaints are numerous, and praise is limited. Additionally, a general sentiment exists that subsidies can reflect legitimate government action to overcome market failures, and there is a lack of agreement on what constitutes a subsidy and its effect on the marketplace. As a result, countervailing duty procedures reflect a mishmash of ideas, satisfying no one.

The goal of this paper is to take a fresh look at countervailing duties, unconstrained by the current rules, to determine if there are changes that should be made in light of the changing trade landscape. It will, however, also look briefly at other subsidy discipline options.

OVERVIEW

Countervailing measures, unilateral measures to offset the effect of subsidies, are used by only a handful of WTO members. Of the 160 WTO members, only 16 had reported imposing countervailing measures between 1 January 1995 and 30 June 2014 (WTO 2014).[2] Those 16 countries report implementing 193 measures in that time, but even among these members, use was concentrated. The United States (US) reports implementing 79 countervailing measures, trailed by the European Union (EU) with 34, Canada with 24, and Mexico with 10 (WTO 2014). The group of exporting countries targeted, while more diverse, is still limited, with only 35 members' exporters subject to at least one countervailing measure in that time. Among exporting members, the concentration of the measures is even greater than for the users. China is subject to 53 countervailing measures (including 27 by the US and 15 by Canada), trailed by India with 34 measures (13 by the EU), and the EU with 12 measures (WTO 2014).

Despite the limited number of countries using countervailing duty proceedings and the limited number of countries targeted by them, those proceedings have led to numerous disputes. Of the 103 requests for consultations concerning alleged violations of the ASCM between 1995 and 2013 (of which only 58 have proceeded beyond consultations), 37 concerned countervailing duty proceedings (of which 22 have gone beyond consultations).[3]

Although there have been complaints about WTO countervailing duty rules, such proceedings are rarely addressed in other trade agreements, leaving their regulation to the WTO. The EU has eliminated the use of countervailing duties among its member nations, and replaced it with its own state-aid rules. The North American Free Trade Agreement (NAFTA) did not eliminate the use of countervailing duties among members, but instead established an option for a bilateral appeal of an individual member's decision and limited member states' ability to amend their individual countervailing duty laws. The Southern Africa Customs Union (SACU) requires that if a member brings a countervailing duty case against imports from another member, it must notify the SACU secretariat, but there are no other restrictions on the use of

1 While the definition of what constitutes a subsidy should be considered afresh, that is beyond the scope of this paper. This paper accepts the current WTO definition of a subsidy.

2 It should be noted that delays in reporting are a frequent source of complaint. So these statistics may not include all countervailing duty actions.

3 Of these, 18 have gone through the panel process (or are currently before a panel).

countervailing duties. These arrangements are the exception. Some regional and bilateral trade agreements contain limitations on the use of export subsidies, but the vast majority do not address the use of unilateral measures, such as countervailing duties, at all. The Trans-Pacific Partnership (TPP) negotiations are seeking to address disciplines on the support provided to state-owned enterprises, but even this effort is limited and still under negotiation. There have been attempts to negotiate sector-specific subsidy disciplines, for example, shipbuilding subsidies under the auspices of the Organisation for Economic Co-operation and Development (OECD) and fisheries subsidies under the auspices of the WTO, but none have resulted in a final, enforceable agreement. Similarly, although the WTO's General Agreement on Trade in Services (GATS) provides for developing subsidies disciplines and some original thinking was done on the subject several years ago, no such discipline has been agreed. Thus, the ASCM and the multilateral and unilateral (countervailing duty) procedures established therein are the main source of subsidy discipline globally.

Nevertheless, since the WTO went into effect, there have been changes in how subsidy discipline in general is considered, which can have an impact on countervailing duties. One area is the growth of services trade globally. Countervailing duties (and the ASCM) address only trade in goods. Similarly, the growth of global supply chains has strained the ability of countervailing duty laws to address the full impact of subsidies. Finally, the increasing importance of state-owned enterprises in global trade has led to disputes over the use of these laws. Several of these issues can perhaps be better addressed by an examination of the ASCM as a whole,[4] but there are possible changes to countervailing duty proceedings that should be considered.

In the requests for consultation that have been filed on countervailing duty actions, there have been several general categories of issues raised. There are procedural issues, which seem to highlight concerns about the use of countervailing duty laws for protectionist purposes. The most common procedural issues raised are whether the investigating authority had sufficient evidence to initiate an investigation; the use of adverse facts (both whether it was appropriate to do so and the "facts" selected); the time taken from initiation of an investigation to its completion; whether the administering authority required adequate public summaries of confidential information or provided an adequate explanation of its reasoning; and the standard of review applied when conducting a five-year review to determine whether to continue the duties.

Other disputes question whether an action constituted a financial contribution, most notably what is meant by a public body, and the entrustment and direction standard for financial contributions by private entities. How benefits are measured has been controversial, including whether the company being investigated is the one that benefitted, both the pass-through issue on subsidized inputs and when the company changes owner, and the use of benchmarks from outside the country.[5] Specificity determinations are controversial—the question being how broadly must a subsidy be disseminated before it is no longer specific.

CONCERNS OVER COUNTERVAILING DUTY AND OTHER SUBSIDY DISCIPLINES

COUNTERVAILING DUTY LAWS ENCOURAGE PROTECTIONISM

Countervailing duty proceedings tend to encourage protectionist leanings. The constituency to which the administering authorities are responding is the domestic industry that claims to be injured by imports. In general, different government agencies (or different departments within the same agency) will address the concerns of the country's exporters. Therefore, over time, even assuming the administering authority of a country's countervailing duty proceedings begins as relatively neutral, a protectionist bias tends to creep into its considerations.

NOT ALL COUNTRIES CAN EFFECTIVELY USE COUNTERVAILING DUTY LAWS

Countervailing duty proceedings can act as a constraint on the use of subsidies by companies that are dependent on the export market of a country that actively enforces countervailing duty laws. In practice, however, only countries with large domestic markets can make effective use of such laws. A country whose manufacturers export 90 percent of

4 For example, the expansion of subsidy disciplines to encompass trade in services as well as trade in goods would require a change to the ASCM, and the rise of state-owned enterprises and the forms of support they receive may require a re-examination of the subsidy definition found in the ASCM.

5 Article 14 indicates that the benchmark should be based on market conditions in the country being investigated—for example, Article 14(b) (use of a commercial loan that the firm could actually obtain in the market) and Article 14(d) (which specifies that it is to be based on the prevailing market conditions in the country of provision). But WTO dispute panels have permitted the use of benchmarks from outside the country of provision, essentially reading these requirements out of the agreement.

their production cannot give those manufacturers effective relief from foreign subsidies by protecting the home market because most of the impact is felt in their export markets. While this large market/small market bias can make an argument for leaving all subsidy discipline to the multilateral proceedings of the WTO, this, too, is fraught with political difficulties.

MULTILATERAL DISCIPLINES IN THE ASCM ARE INADEQUATE

While export subsidy prohibition in the ASCM has reduced the use of export subsidies, it has not eliminated it. The prohibition on the use of subsidies contingent on the use of domestic over imported goods has had less effect. It has been interpreted narrowly, allowing domestic content requirements as long as they can be met by labor or services. Moreover, it is too easy to make the use of domestic inputs an implicit rather than explicit requirement for receipt of assistance. With respect to the multilateral dispute provisions in the ASCM, many countries provide assistance to their most politically sensitive industries. This may explain their reluctance to bring such disputes before the WTO—fear of charges of hypocrisy or, more likely, fear of counter claims being brought against their own subsidies. As noted previously, this paper does not address the issue of what constitutes a subsidy, but perhaps the issue should be reconsidered in light of 20 years' experience with the current definition.[6]

WTO DISPUTE SETTLEMENT IS INADEQUATE TO ADDRESS CONCERNS

The process in the WTO Dispute Settlement Understanding (DSU) is long and slow and the resolution of such disputes (even if a prohibited subsidy is found to exist) may not result in direct relief for injured manufacturers. Relief, if it comes, is prospective and does not attempt to undo the harm already caused. Therefore, it does not necessarily afford the political relief needed by the government bringing the complaint. Moreover, there are many more general, widely reported concerns about the overall effectiveness of the DSU. These problems with subsidy enforcement through the DSU may be why, despite complaints of extensive use of subsidies by many countries, so few complaints have been processed through the system.

Thus, the political pressure to retain unilateral countervailing duties as a form of subsidies discipline will likely continue to exist. In light of these concerns, some areas could be considered for reform or changes.

SUGGESTIONS FOR REFORM

NET SUBSIDIZATION

One complaint frequently raised in countervailing duty proceedings is that the industry in the importing country receives as many or more subsidies than the imports complained about do. In a multilateral proceeding before the WTO, the exporting country can raise the issue of the importing country's subsidies, as long as it can show harm (in any market).[7] In the countervailing duty context, if the importing country has a large domestic market, it may well be that the complaining industry does not export to the targeted country. Therefore, although the complaining industry may itself be benefitting from distortive subsidies, there is no effective counter-remedy.

A way to address this would be to allow countervailing duties to offset only the net subsidies received. In other words, a country could impose countervailing duties only to the extent that the level of subsidization of imports exceeds the subsidization of a domestic like product. Such an approach would also tend to make the investigating authorities more aware of competing claims, and perhaps lead to a more impartial analysis—they will be required to apply the same analytic standards to both domestic and foreign like products.

NON-ACTIONABLE SUBSIDIES

When the ASCM was originally agreed, it established a three-tier system for subsidies—there were those that were so distortive that they were prohibited; those that were deemed either sufficiently tied to the public good or non-distortive so as to be non-actionable; and all others that were actionable if they caused harm. However, the designation of certain subsidies as non-actionable was allowed to lapse for a variety of reasons. Given the likely protectionist leanings of administering authorities in countervailing duty actions, one possibility would be to re-establish the use of non-actionable subsidies, at least for countervailing duty purposes. There are several subsidies that should be considered for such a restriction.

6 Leading scholars, however, have argued that this is not productive (Sykes 2010).

7 See, for example, competing Airbus/Boeing claims; and the Canadian/Brazilian airline disputes.

Most are agreed that research and development (R&D) is an area where some incentive is useful to overall development because it can be so expensive that a company cannot expect to recover its costs in full. As a result, companies invest less in R&D than is desirable. Therefore, some types of R&D subsidies might be designated non-actionable. The current Article 8 of the ASCM on R&D provision is flawed, allowing the support of R&D that would occur even without subsidies. Therefore, in designing a carve-out, it should be carefully crafted to avoid subsidizing R&D that would otherwise occur. Also, the R&D that is allowed should be a public good—any carve-out should require that the results of the R&D be publicly available to any who seek to use it.

Many countries, especially developing ones, experience extreme disparities in the cost of investment in different regions, and extreme variations in income and employment opportunities in these areas. Therefore, some form of carve-out for regional development subsidies should be established. One way to limit potential abuses is to limit the carve-out to the poorest developing countries (with a graduation process built in) or to establish that a regional subsidy is non-actionable if the providing government demonstrates that it does no more than offset the cost disparity among regions. The difficulty lies in how such costs are to be measured, but there are numerous metrics that measure the cost of doing business in countries that could be adapted to this concept, establishing a baseline for measurement (Article 8 of the ASCM contains an objective baseline for determining when regional subsidies will be considered non-actionable).

In recent years, the world has experienced natural disasters of such magnitude that recovery from them requires extraordinary investment.[8] There could be a carve-out for measures that allow industries or economies to recover from such massive disasters. Any such carve-out would require specific rules to determine which disasters qualify for such treatment and when the recovery period ends. It would need to be narrowly crafted to permit subsidies to restore what was destroyed, not to expand production or modernize it. Such recovery subsidies should also be time limited, since once a subsidy is begun it is notoriously difficult to end, even if the original reason for the subsidy has ceased to apply.

In the face of climate change, the need for a carve-out for environmental subsidies is even greater now than when it was first developed in the ASCM. As with R&D, environmental measures can have large externalities, such that subsidies could be effective in encouraging environmental investment without distorting trade. Any such provision, however, would need to be carefully crafted. One possibility would be to permit subsidies that arise from specific actions agreed on by virtually all members—perhaps pursuant to a broadly multilateral climate change agreement.

DE MINIMIS SUBSIDIZATION

There comes a point at which any subsidy is too small to have a negative impact on another country's interests (or, at least, the negative impact is outweighed by the distortive impact of the countervailing duties themselves). Currently, the ASCM establishes a *de minimis* subsidy rate for investigations of 2 percent (of relevant sales) for developing countries and 1 percent (of relevant sales) for developed countries. However, that *de minimis* provision applies only to the initial investigation and not to any review of the level of subsidization. Countries should be required to terminate any countervailing duties as soon as the level of subsidization drops below the *de minimis* level, even if the investigation is concluded and definitive duties are in place. Moreover, countries should consider raising the *de minimis* level.

MEASURING THE BENEFIT

Additional costs

There are several concerns that have been raised with how the benefit of a subsidy is measured in countervailing duty procedures. The first is that many subsidies merely offset costs and burdens placed on companies. For example, a company receives a grant but must keep X number of people employed. Even though it could more efficiently produce the good with X minus Y employees, the benefit from the grant is offset by the cost of additional employees. Similarly, a government may seek to encourage companies to locate in a remote region and may provide a grant to do so. However, locating in a remote region may well increase the company's costs. To the extent that the grant merely offsets the costs of locating in that region, the company has not benefited (it could have stayed where it was). Thus, a new agreement might, in determining the level of subsidization for purposes of countervailing duties, require the administering authorities to countervail only the net benefit after adjusting for the costs incurred to qualify for the subsidy.

Benchmarks

One justification frequently noted for actions against subsidies is that they distort the distribution of resources or the competitive advantage within the exporting country (Sykes 2003). Logically, therefore, in determining whether a company benefits from subsidies that reduce its costs when compared to what its costs would be in the commercial market, the measure of the commercial market should be the market in the exporting country. The language in the ASCM's Article 14 reflects this goal.[9] Nevertheless, Panel

8 For example, the 2011 earthquake and tsunami in Japan, the 2004 tsunami, Hurricane Katrina, Superstore Sandy, and the earthquakes in Haiti and Chile.

and Appellate Body interpretations have found that if there is too much government interference in the relevant market, the administering authority can look outside the relevant country for benchmarks. If, however, the domestic market is "distorted" by government intervention, that is, the commercial market in which the allegedly subsidized company operates, it should not justify a resort to external benchmarks.

INJURY

Causation

Currently, the ASCM states, "It must be determined that the subsidized imports are, through the effects of the subsidies, causing injury within the meaning of this Agreement." There is, however, a footnote (number 47) that itemizes the factors to be considered, making it clear that the analysis is identical to the impact of the subsidized imports on prices and the condition of domestic producers of like product. By looking at causation of subsidized imports rather than linking the causation specifically to the effect of subsidies, the language presumes that all subsidies have an effect that passes in its entirety straight through to the goods produced. But this is economically inaccurate. Not all subsidies affect production equally. Some may be entirely offset by costs imposed by the government offering the subsidy or they may not lower the producer's cost of production (or lead to a decrease in selling price) (Sykes 2003). If the idea is that the existence of the subsidy has "tilted the playing field" to the advantage of imports and disadvantage of domestic producers (thus, requiring offsetting countervailing duties to "level the playing field"), then the analysis should consider whether the subsidy has in fact done this. This can be done by requiring an analysis of whether the subsidized imports, through the effect of the subsidies themselves (not through the existence of the imports), are causing or threatening to cause material injury.

Non-attribution

The ASCM requires that administering authorities examine the known factors that may also be causing injury and ensure that the injury caused by those factors is not attributed to subsidized imports (Article 15.5). Nevertheless, several Panel and Appellate Body decisions have established that no numerical separation is required, and that a discussion of the other factors is sufficient. There is no requirement that the amount of injury caused by subsidized imports versus these other known factors be quantified. Thus, this requirement leads to a superficial analysis. Nevertheless, if imports cause 5 percent of a domestic industry's injury while other factors, such as a recession or a factory explosion or whatever, cause the remaining 95 percent, the imposition of countervailing duties is going to provide very little benefit to the industry, while increasing costs for all involved. Therefore, the non-attribution requirement should be strengthened.

GLOBAL SUPPLY CHAINS

Cross-border subsidies

Under the ASCM as it is now, the presumption is that governments and public bodies do not subsidize outside their national boundaries.[10] With the increasing globalization of supply chains, this is incorrect. The Airbus case raised this issue to some extent, but all the relevant countries were within the EU and the issue was not directly raised. Also, the dispute did not involve the imposition of countervailing duties. Despite the codification of this principle, the US has made some tentative steps toward addressing the concern by implementing a rule for what it calls international consortia. The ASCM, in Annex I, recognizes that export financing to a foreign buyer (at least, if the financing does not comply with OECD rules) can constitute a subsidy. However, the analysis presumes that it is the exporter that is subsidized because the export financing encourages the foreign buyer to purchase the exporter's goods. It can also be viewed as a subsidy from the exporting country to the purchaser in the importing country because that company is able to obtain the goods at a lower cost than it otherwise could. In the days of global supply chains, the countervailing duty rules should be changed to clearly reflect the possibility that subsidies can be provided across borders.

Upstream subsidies

Similarly, as noted on export credit financing, a manufacturer in one country may benefit extensively from purchasing subsidized inputs in a second country. That benefit may be passed through and result in subsidizing the manufacturer's output. Upstream subsidy rules are vague and not directly addressed in the ASCM. With increasing globalization, specific rules on how to measure and determine whether there has been upstream subsidization should be developed.

PROCEDURAL CHANGES

Adverse facts

Most of the claims of procedural irregularities in countervailing duty actions can be adequately addressed by the proper application of current rules, such as the duration of an investigation and the requirement of an adequate basis

9 For example, ASCM, Article 14(a) talks about the usual investment practice of private investors in the territory of that member; 14(d) specifies that the adequacy of remuneration shall be determined in relation to the prevailing market conditions in the country of provision or purchase.

10 See, for example, the language on geographic specificity in ASCM, Article 2.2. The US, the most frequent user of countervailing duty law, has codified this presumption in its implementing regulations (with some exceptions).

for initiation. Nevertheless, there are certain more subjective items that have caused considerable dissension and that are open to abuse. One of these is the use of adverse facts available. The ASCM's Article 12.7 permits administering authorities to base their determinations on facts available, as opposed to facts provided by the responding parties, when the exporting member or an interested party refuses access or otherwise does not provide the requisite information, or if such a party significantly impedes the investigation. No guidance, however, is provided as to what constitutes facts available or how their accuracy is to be established. While there must be consequences for non-cooperation to ensure cooperation with the process, the rules for when adverse facts can be used, and the evidentiary standard for them, should be tightened.

Public interest

Some argue that at times the use of actionable subsidies may result in such a public good that it outweighs the negative consequences, and that the use of such subsidies should be encouraged. One possible change to address this concern would be to mandate that the administering authorities must make an explicit finding that imposing countervailing duties would not be contrary to the public interest. The difficulty with such a provision would be to establish clear criteria on how to determine the relevant public interest in such a way that the provision is neither ineffective (a frequent complaint about the WTO Antidumping Agreement's public interest provision) nor creates a loophole that would eliminate effective subsidies discipline. Moreover, the concept of public interest in allowing such subsidies may be more suitable in the multilateral discipline context than the countervailing duty context (for example, if the subsidy provides for a universal public good).

Retroactive duties

The ASCM allows members to use either a prospective or retroactive duty system. Only the US, the most frequent user of countervailing duties, applies a retroactive duty system. As a result, importers and potential purchasers may not know the ultimate cost of their purchases (including the duty) until years after importation. This uncertainty has a chilling effect on trade that goes beyond the imposition of offsetting countervailing duties (Griswold 1999). A prospective system may be less exacting in determining the amount of subsidization on any particular entry (the US justification for its retroactive decision is that it determines the exact amount of subsidy received by an entry and offsets that whereas a prospective system bases the duty on what the subsidy used to be), but does not have the same chilling effect. Therefore, a new countervailing duty system should eliminate the use of retroactive duty systems.

Termination

The ASCM provides that a "countervailing duty shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury" (Article 21.1). Moreover, it specifically provides that the definitive duty shall be terminated no later than five years from its imposition, unless the authorities determine upon review that expiration of the duty would be likely to lead to continuation or recurrence of subsidization and injury (Article 21.3). Nevertheless, a large number of such definitive duties remain in place far longer than five years, based on a finding that subsidization and injury are likely to continue or recur. The standard for such findings is too low. The rule should be that all definitive duties shall terminate no later than five years after imposition. A new investigation should be required before duties can be imposed for a longer period.

REVISIONS TO DISPUTE SETTLEMENT

Retroactive implementation

If an exporting country takes another member's imposition of countervailing duties (or of provisional measures) to WTO dispute settlement, it can be years before any relief is obtained, even assuming it wins. Implementation is not required until the end of a "reasonable period of time" and that period can extend more than a year, further delaying any relief from countervailing duties imposed in violation of the ASCM. This acts as a disincentive for many to go through the expense of bringing such complaints. One approach to addressing the impact of lengthy dispute settlement procedures is to make implementation retroactive to the date of the initial request for consultations.

Repayment of harmful subsidies

Currently, under the ASCM, if a subsidy is found to have caused harm outside the countervailing duty context, the offending member is instructed to "take appropriate steps to remove the adverse effects or … withdraw the subsidy." Neither of these actions requires the repayment of the subsidy received. Thus any benefit that increased production or lowered production costs for the recipient are likely to continue. One option is to make repayment obligatory in such situations.

Panelists

The DSU does not require that the panel members have specific expertise in the subject area being addressed. Moreover, the panelists are frequently drawn from the ranks of members' governments, or recently departed government officials. This can create a bias toward government actions. Perhaps the panel could be expanded to require more non-governmental panelists, and the members should consider whether panelists must have knowledge of the subject area. At a minimum, in a dispute involving subsidies or countervailing duties, the panels could be required to consult the Permanent Group of Experts (established in the ASCM, Article 24.3) for guidance.

REFERENCES

Griswold, Daniel. 1999. "Counting the Cost of Steel Protection." Washington, DC: Cato Institute, http://www.cato.org/publications/congressional-testimony/counting-cost-steel-protection.

Sykes, Alan O. 2003. "The Economics of WTO Rules on Subsidies and Countervailing Measures." John M. Olin Law and Economics Working Paper No. 186, University of Chicago Law School.

Sykes, Alan O. 2010. "The Questionable Case for Subsidies Regulation: A Comparative Perspective." *Journal of Legal Analysis*, 2, pp. 473–523.

WTO. 2014. "Countervailing Measures: Reporting Member vs. Exporter 01/01/1995-30/6/2014." https://www.wto.org/english/tratop_e/scm_e/CV_MeasuresRepMemVsExpCty.pdf.

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