

<b>1 ARTICLE 19 .....</b>	<b>1</b>
1.1 Text of Article 19 .....	1
1.2 Anti-Dumping Agreement .....	2
1.3 General .....	2
1.4 Article 19.1 .....	3
1.4.1 "through the effects of the subsidy" .....	3
1.5 Article 19.3 .....	3
1.5.1 Right to an expedited review .....	3
1.5.1.1 General .....	3
1.5.1.2 Aggregated investigations .....	4
1.5.2 "appropriate amounts" and possible double remedies .....	4
1.5.3 "residual duty" rates .....	8
1.5.4 Scope of an expedited review .....	9
1.6 Article 19.4 .....	10
1.6.1 General .....	10
1.6.2 The relevant product .....	10
1.6.3 "found to exist" - continued existence of benefit at the time of imposition .....	15

## **1 ARTICLE 19**

### **1.1 Text of Article 19**

#### **Article 19**

##### *Imposition and Collection of Countervailing Duties*

19.1 If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn.

19.2 The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that procedures should be established which would allow the authorities concerned to take due account of representations made by domestic interested parties<sup>50</sup> whose interests might be adversely affected by the imposition of a countervailing duty.

*(footnote original)*<sup>50</sup> For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.

19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have

renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

19.4 No countervailing duty shall be levied<sup>51</sup> on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

(footnote original)<sup>51</sup> As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

## **1.2 Anti-Dumping Agreement**

1. As the text of Article 19 of the SCM Agreement largely parallels the text of Article 9 of the Anti-Dumping Agreement, see also the Section on that Article of the Anti-Dumping Agreement.

## **1.3 General**

1. In *US – Countervailing and Anti-Dumping Measures (China)*, the complainant made a claim under Article 19, but failed to specify a particular paragraph of Article 19 in its panel request. The Appellate Body, in addressing whether China's panel request was consistent with the requirements of Article 6.2 of the DSU, described the various provisions of Article 19. The Appellate Body stated:

"We now turn to China's claim under Article 19 of the SCM Agreement, which is listed in the panel request without identification of a paragraph of that Article. We note that the Appellate Body has previously described Article 19.1 as a provision that 'allows for the imposition of countervailing duties when subsidized imports 'are causing injury''. Article 19.2 gives Members the discretion to determine whether or not a countervailing duty is to be imposed and, if so, whether it can be an amount less than the total amount of the subsidy. Further, this provision encourages Members' investigating authorities 'to link the actual amount of the countervailing duty to the injury to be removed'. Thus, Article 19.1 establishes when a countervailing duty may be imposed, while Article 19.2 grants Members the discretion for such imposition. Taking into account that the measure at issue in this dispute concerns the failure of the US authorities to investigate and avoid double remedies in investigations and reviews already initiated, as well as the resulting countervailing duties already imposed, we therefore consider that neither Article 19.1 nor Article 19.2 is relevant to China's complaint.

We now examine the remaining two paragraphs of Article 19 of the SCM Agreement, paragraphs 3 and 4. Article 19.3 states that countervailing duties shall be levied in the 'appropriate amounts in each case' and 'on a non-discriminatory basis'. Article 19.4 mandates that the imposition of countervailing duties must not be 'in excess of the amount of the subsidy found to exist'. Based on the language of Articles 19.3 and 19.4, we agree with the Panel that these two provisions are 'the potentially relevant obligations' to the extent that these are the only paragraphs of Article 19 that impose substantive obligations on the permissible amounts of countervailing duties. Since both paragraphs specifically address the quantitative limits on the imposition of countervailing duties, Articles 19.3 and 19.4 are 'closely related' provisions. The obligations contained in Articles 19.3 and 19.4 share an 'interlinked nature', as both provisions pertain to the final stage of countervailing duty proceedings, mandating the levy of countervailing duties 'in the appropriate amounts', 'on a non-discriminatory basis', and not 'in excess of the amount of the subsidy'. We note, however, that the Panel excluded Article 19.4 as a legal basis of China's complaint on account of the meaning the Panel ascribed to footnote 6 of the panel request, as is explained further below. While the United States appeals the Panel's finding that the panel request sufficiently identified China's claim under Article 19.3 of the SCM Agreement as being inconsistent with Article 6.2, the Panel's finding excluding Article 19.4 from its terms of reference has not been challenged on appeal. Thus, we shall limit our analysis

below to the issue of whether Article 19.3 of the SCM Agreement was identified with sufficient clarity in the panel request."<sup>1</sup>

2. The Appellate Body also elaborated in respect of Articles 19.3 and 19.4 that "the concern of these provisions is not limited to 'double remedies', but instead covers obligations broader in scope. On the one hand, Article 19.3 pertains to the amount of the duty to be levied ('in the appropriate amounts'), as well as to the manner in which it is imposed ('on a non-discriminatory basis'). On the other hand, Article 19.4 generally limits the maximum amount of the countervailing duty."<sup>2</sup>

3. In *US – Customs Bond Directive*, the Panel examined a claim that an enhanced bond requirement (EBR) for certain shrimp, imposed pursuant to the Amended Customs Bond Directive (Amended CBD) was inconsistent with Article 9 of the Anti-Dumping Agreement and Article 19 of the SCM Agreement. The Appellate Body upheld the Panel's finding that bonds provided under the Amended CBD are not anti-dumping duties or countervailing duties, fall outside the scope of Articles 9 of the Anti-Dumping Agreement and 19 of the SCM Agreement, and consequently are not inconsistent as such with Articles 9.1, 9.2, 9.3 and 9.3.1 of the Agreement nor with Articles 19.2, 19.3 and 19.4 of the SCM Agreement.<sup>3</sup> The Panel observed:

"A bond under the Amended CBD secures the payment of a duty. A bond, by itself, is not a duty as it does not entail any transfer of money from the importer to the government. Therefore, the EBR imposed pursuant to the Amended CBD cannot be characterized as a 'duty' within the meaning of Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement*."<sup>4</sup>

## **1.4 Article 19.1**

### **1.4.1 "through the effects of the subsidy"**

4. In *Japan – DRAMs (Korea)*, the Panel considered whether an assessment of causation of injury should relate to injury caused by the effects of "subsidization", or to injury caused by the effects of "subsidized imports". The Panel examined this issue in the context of claims under both Articles 15.5 and 19.1 of the SCM Agreement. After finding that Article 15.5 does not require that an investigating authority demonstrate that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 15.2 and 15.4, are "the effects of subsidies", the Panel saw no basis for interpreting the phrase "through the effects of the subsidy" in Article 19.1 differently from the phrase "through the effects of subsidies" in Article 15.5. Accordingly, the Panel also found that Article 19.1 does not require that an investigating authority demonstrate that the volume and price effects of the subsidized imports and the consequent impact on these imports on the domestic industry, as set forth in Articles 15.2 and 15.4, are "the effects of subsidies".<sup>5</sup> The Panel's approach was upheld by the Appellate Body.<sup>6</sup>

## **1.5 Article 19.3**

### **1.5.1 Right to an expedited review**

#### **1.5.1.1 General**

5. In *US – Softwood Lumber III*, the Panel recalled that under Article 19.3 an exporter whose products are subject to countervailing duties but who was not investigated in the original investigation for reasons other than refusal to cooperate with the investigating authorities is "entitled" to an expedited review to establish individual duty rates.<sup>7</sup>

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<sup>1</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.21-4.22.

<sup>2</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.25.

<sup>3</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 281.

<sup>4</sup> Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 280.

<sup>5</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.424.

<sup>6</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 277.

<sup>7</sup> Panel Report *US – Softwood Lumber III*, para. 7.136.

6. In *US – Supercalendered Paper*, the Panel considered that the purpose of an expedited review "should be aimed at putting, to the greatest extent possible, a non-investigated, cooperating exporter into the situation it would have been in, had it been investigated in the original investigation" and therefore considered that allowing "any new subsidy allegations in the expedited review would frustrate the purpose of Article 19.3".<sup>8</sup>

#### **1.5.1.2 Aggregated investigations**

7. The Panel in *US – Softwood Lumber III* found the US regulations at issue to be silent on the question whether US investigating authorities could conduct expedited reviews in aggregate investigations, and stated that the fact that no regulation existed regarding the case of aggregate investigations "does not imply" that the US was "required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied". Therefore, the Panel concluded that the laws and regulations that had been examined in that case did not mandate a violation of the requirement in Article 19.3 to conduct an expedited review. For this reason, the Panel also found that the United States was not required by law to violate Article 19.4 by levying countervailing duties in excess of the amount of the subsidy found:

"We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations does not imply that the USDOC is required by law to deny any requests for expedited review where an aggregate countervailing duty rate has been applied. In other words, the USDOC Regulations are simply silent on the issue.

We thus agree with the US that the fact that the USDOC has not elected to codify specific rules for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews. We therefore find that the fact that 19 C.F.R. § 351.214(k)(1) does not specifically address the possibility of expedited reviews in aggregate cases does not prohibit such reviews ... We consider that the fact that no regulation exists regarding the apparently rare case of aggregate investigations, does not imply that exporters are denied by law the right to an expedited review where an aggregate countervailing duty rate was applied. The US laws and regulations cited by Canada thus do not mandate a violation of the requirement under Article 19.3 SCM Agreement to conduct an expedited review in order that the authority promptly establish an individual countervailing duty rate for any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate. For this reason also, we do not find that the USDOC is required by law to violate Article 19.4 SCM Agreement in the softwood lumber case by inevitably levying countervailing duties in excess of the amount of the subsidy found.

In sum, we find that the above-cited US laws and regulations concerning expedited reviews do not mandate a violation of Article 19.3 SCM Agreement, or thereby, of Article 19.4 SCM Agreement, and thus reject Canada's claims in this respect."<sup>9</sup>

#### **1.5.2 "appropriate amounts" and possible double remedies**

8. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that the imposition of "double remedies", that is, the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of a non-market economy (NME) methodology and countervailing duties, is inconsistent with Article 19.3 of the SCM Agreement.<sup>10</sup> The Appellate Body stated that:

"[A] proper understanding of the 'appropriate amounts' of countervailing duties in Article 19.3 of the *SCM Agreement* cannot be achieved without due regard to relevant provisions of the *Anti-Dumping Agreement* and recognition of the way in which the two legal regimes that these agreements set out, and the remedies which they authorize Members to impose, operate. To us, the requirement that any amounts be

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<sup>8</sup> Panel Report, *US – Supercalendered Paper*, para. 7.290.

<sup>9</sup> Panel Report *US – Softwood Lumber III*, paras. 7.133 and 7.140-7.142.

<sup>10</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 541-542.

'appropriate' means, at a minimum, that investigating authorities may not, in fixing the appropriate amount of countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization. Each agreement sets out strict conditions that must be satisfied before the authorized remedy may be applied. The purpose of each authorized remedy may be distinct, but the form and effect of both remedies are the same. Both the *Anti-Dumping Agreement* and the *SCM Agreement* contain provisions requiring that the amounts of anti-dumping and countervailing duties be 'appropriate in each case', as reflected in Articles 9.2 and 19.3 respectively."<sup>11</sup>

9. In *US – Countervailing and Anti-Dumping Measures (China)*, involving the same complainant and respondent as in *US – Anti-Dumping and Countervailing Duties (China)*, the Panel addressed whether Article 19.3 "obliges an investigating authority to assess the existence of double remedies when concurrently imposing CVDs and anti-dumping duties calculated under an NME methodology and if so, whether such an obligation applies not only to administrative reviews, but also to original investigations, in the context of a retrospective system of duty assessment".<sup>12</sup> The United States argued that the Appellate Body's interpretation in *US – Anti-Dumping and Countervailing Duties (China)* did not relate to the phrase "in the appropriate amounts" within Article 19.3. The Panel rejected this argument:

"We consider that the United States' arguments in this case rebut a position that the Appellate Body did not actually take in DS379. According to the United States, '[t]he interpretation advanced by the Appellate Body ... does not relate the phrase 'in the appropriate amounts' at all to the non-discrimination obligations of Article 19.3'. However, it appears to us that the Appellate Body accepted that the meaning of the phrase 'in the appropriate amounts' is informed by, and linked to, the non-discrimination obligation in Article 19.3. The Appellate Body observed in this regard that the first sentence of Article 19.3 contains two elements: first, a requirement that CVDs be levied in the appropriate amounts in each case, and, second, a requirement that these duties be levied on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except for imports from sources that have renounced the relevant subsidies or from which undertakings have been accepted. The Appellate Body then explained that:

We consider that the two requirements in the first sentence of Article 19.3 inform each other. Thus, it would not be appropriate for an importing Member to levy countervailing duties on imports from sources that have renounced relevant subsidies, or on imports from sources whose price undertakings have been accepted. Similarly, because the requirement that the duty be levied in 'appropriate amounts' implies a certain tailoring of the amounts according to circumstances, this suggests that the requirement that the duty be imposed on a non-discriminatory basis on imports from all subsidized sources should not be read in an overly formalistic or rigid manner. The second sentence of Article 19.3 provides a specific example of circumstances in which it is permissible not to differentiate amongst individual exporters, as well as of when and how differentiated treatment in the establishment of a countervailing duty rate is required.

Thus, the Appellate Body did not read the phrase 'in the appropriate amounts' in isolation from the non-discrimination obligation in Article 19.3. Rather, the Appellate Body determined that these two obligations 'inform' one another. However, the Appellate Body's analysis of the phrase 'in the appropriate amounts' shows that it did not read this phrase as being linked *exclusively* to, or informed exclusively by, the non-discrimination obligation in Article 19.3. Put differently, it appears that both the United States and the Appellate Body considered that the phrase 'in the appropriate amounts' must be interpreted having regard to its context. The United States understood the relevant context to consist of the non-discrimination obligation in Article 19.3. The Appellate Body understood the relevant context to *include* the non-

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<sup>11</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 571.

<sup>12</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.310.

discrimination obligation in Article 19.3, but also *other* obligations in the SCM Agreement and Anti-Dumping Agreement. This is a significant difference, and so we are not suggesting that the Appellate Body's interpretation of Article 19.3 is essentially the same as the interpretation advocated by the United States. The critical point is that the Appellate Body did not suggest that the phrase 'in the appropriate amounts' is unconnected to the non-discrimination obligation in Article 19.3. Rather, it concluded that the phrase "in the appropriate amounts" is not unconnected to *other* obligations contained in the SCM Agreement, as well as the Anti-Dumping Agreement. Accordingly, we consider that the United States' argument intended to demonstrate that the phrase 'in the appropriate amounts' must be interpreted in a manner that links it to the non-discrimination obligation in Article 19.3 does not invalidate the Appellate Body's interpretation of that phrase."<sup>13</sup>

10. The Panel concluded that the United States had not presented any "'cogent reasons' to depart from the Appellate Body's prior interpretation that the imposition of double remedies is inconsistent with the obligation in Article 19.3 to levy CVDs 'in the appropriate amounts in each case'".<sup>14</sup>

11. The Panel in *US – Countervailing and Anti-Dumping Measures (China)* proceeded to examine whether, under Article 19.3, "an investigating authority is under an affirmative obligation to investigate the existence of double remedies."<sup>15</sup> The Panel recalled the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)* that Article 19.3 does impose such an "affirmative obligation" on investigating authorities, and noted that the United States "disagree[d]" with these findings by the Appellate Body.<sup>16</sup> The Panel noted that one "cogent reason" for a Panel to depart from an interpretation by the Appellate Body is if the Appellate Body's interpretation was based on a "factually incorrect premise".<sup>17</sup> In this respect, the Panel noted the United States' argument that "'the Appellate Body in DS379 presumed that domestic subsidies automatically lower export prices to some degree, but such a presumption is speculative', and ... 'it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy'".<sup>18</sup> The Panel proceeded to examine "(i) what the panel and Appellate Body actually said in DS379, (ii) whether the United States raises issues here that were not considered in DS379, and (iii) China's uncontested assertions regarding USDOC findings in the Section 129 redeterminations for the four investigations that were at issue in DS379."<sup>19</sup> Ultimately, the Panel concluded that the United States had failed to present any cogent reasons to depart from the Appellate Body's interpretation of Article 19.3.<sup>20</sup>

12. The Panel in *US – Countervailing and Anti-Dumping Measures (China)* also addressed the issue of whether the obligation in Article 19.3 applies only to administrative reviews, and not to original investigations. The Panel recalled that the Appellate Body had found, in *US – Anti-Dumping and Countervailing Duties (China)*, that the United States had "acted inconsistently with its obligations in Article 19.3 in the context of four sets of original investigations".<sup>21</sup> The Panel considered that if Article 19.3 only applied to administrative reviews it would frustrate the object and purpose of the SCM Agreement, and that the United States had not demonstrated that the application of Article 19.3 to original investigations was "unworkable":

"Were we to accept the United States argument, the obligation in Article 19.3 (and, by necessary implication, the obligation in Article 19.4) would be triggered only by a final legal assessment of the amount of a countervailing duty. Under the United States system, such an assessment is in principle not made unless and until an administrative review is carried out; however, if no administrative review is requested, then the cash deposit rate ultimately becomes the final rate. This would mean that an investigating authority operating in a retrospective system of duty assessment could conduct a countervailing duty investigation, determine the precise amount of the

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<sup>13</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.323-7.324.

<sup>14</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.326.

<sup>15</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.327.

<sup>16</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.327-7.328.

<sup>17</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.335.

<sup>18</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.335.

<sup>19</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.336.

<sup>20</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.341-7.342.

<sup>21</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.343.

subsidy rate (e.g. 25% *ad valorem*), and then proceed to impose a countervailing duty order in an amount that far exceeds the subsidy rate (e.g. 50% *ad valorem*). It could also impose the countervailing duty order on a discriminatory basis, given that the obligation in Article 19.3 to levy countervailing duty 'on a non-discriminatory basis on imports of such product from all sources found to be subsidized' also applies to the 'levy' of countervailing duties. These actions would not be inconsistent with the obligation in Article 19.3 (to levy a countervailing duty 'in the appropriate amounts in each case') or Article 19.4 (prohibiting countervailing duties from being levied 'in excess of the amount of the subsidy found to exist') under the United States interpretation of those provisions. The reason is that these obligations would not be triggered until such time as there was an administrative review leading to a final legal assessment, which may not take place for a considerable period of time after the imposition of the CVD order and the collection of cash deposits pursuant to that order, or may not take place at all in the absence of a request from an interested party. As noted, in the absence of an administrative review, the cash deposits collected would ultimately become the final countervailing duties levied. In our view, an interpretation of Article 19.3 that has the potential to produce the aforesaid consequences is at variance with the object and purpose of the SCM Agreement, which includes the imposition of effective disciplines on Members applying CVDs to imports, and in particular 'the requirement that the countervailing duty cannot exceed the amount of the subsidy'.

We have indicated that if there was evidence that an interpretation developed by the Appellate Body led to a result that was unworkable in practice, this could amount to a 'cogent reason' to depart from that interpretation. The United States has explained that, in the context of its retrospective system of duty assessment, original investigations and administrative reviews serve different functions. Therefore, we have considered whether the application of an obligation to investigate double remedies to original investigations would be unworkable in the context of the United States retrospective system of duty assessment. In this connection, we find it relevant that Section 2 of PL 112-99 explicitly obliges USDOC to take steps to investigate double remedies not only in the context of administrative reviews, but also in the context of original investigations. Specifically, Section 2(a) obliges USDOC to take into account the potential for the simultaneous imposition of anti-dumping and countervailing duties to result in overlapping remedies and to reduce the anti-dumping duty to the extent of overlap, provided certain conditions are met. Section 2(b)(1) then states that this obligation applies to 'all investigations and reviews' initiated on or after 13 March 2012. Section 2(b)(2) further provides that it also applies to 'all determinations' issued under Section 129(c) of the Uruguay Round Agreements Act, without distinguishing between different types of determinations. Section 2 is a measure apparently taken by the United States to comply with the recommendations and rulings of the DSB in DS379 as they relate to the issue of double remedies. Of course, the fact that the United States enacted this legislation does not suggest that it necessarily agrees with all aspects of the Appellate Body's interpretation of Article 19.3 in DS379. However, the fact that the United States enacted legislation that obliges USDOC to take steps to investigate double remedies not only in the context of administrative reviews, but also in the context of original investigations, suggests to us that the application of an obligation to investigate double remedies to original investigations is not unworkable in the context of the United States retrospective system of duty assessment."<sup>22</sup>

13. In response to the argument that the relevant companies "had the opportunity to present USDOC with evidence and arguments demonstrating the existence of overlapping remedies", the Panel in *US – Countervailing and Anti-Dumping Measures (China)* accepted that such may have been the case, but considered that even so, this was not sufficient to discharge the "'affirmative obligation' under Article 19.3 to 'investigate' the issue of double remedies".<sup>23</sup> The Panel elaborated that:

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<sup>22</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 7.349-7.350.

<sup>23</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.391.



"The reason is that the manner in which USDOC 'addressed' the issue of double remedies in the determinations at issue was by taking the position that the burden was on Chinese respondents to provide positive evidence demonstrating the existence of double remedies. As we have found, this was inconsistent with the obligation on USDOC, under Article 19.3, to conduct 'a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record'." <sup>24</sup>

14. In *US – Carbon Steel (India) (Article 21.5 - India)* the Panel disagreed with India's argument that the USDOC had acted inconsistently with Article 19.3 by disregarding CVD rates previously agreed in domestic court proceedings, in determining the "appropriate amounts" of countervailing duties.<sup>25</sup> The Panel also rejected India's argument that the USDOC had failed to provide a reasoned and adequate explanation for its decision to disregard such previously agreed rates. In so finding, the Panel pointed out that while there may be factual situations where it would be appropriate to compare new CVD rates with previously calculated rates, there was no such requirement in the Section 129 Determination at issue.<sup>26</sup>

### 1.5.3 "residual duty" rates

15. In *China – Autos (US)*, the Panel addressed the issue of an anti-dumping and countervailing duty rate determined by the investigating authority, "which could be applied to exporters or foreign producers that either were not known to the IA (for whatever reason) or did not exist at the time of the investigation, in the event that such enterprises commence exporting the product subject to the investigation to the investigating country at a later date while a measure is in force."<sup>27</sup> The Panel used the term "residual duty" rate to refer to this type of duty rate.<sup>28</sup> The Panel noted that the parties did not contest that such a residual duty rate is, in principle, permitted under the SCM and Anti-Dumping Agreements.<sup>29</sup> The Panel agreed with this understanding of the parties, and further explained why, in its view, such residual duty rates are, in principle, permitted:

"We agree with the general understanding of the parties that residual duty rates are permitted in AD and CVD cases. In our view, Article 9.5 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement, which require that IAs undertake a review for the purpose of determining individual margins of dumping or subsidy rates for any exporters or foreign producers in the exporting country in question that did not export the subject product to the investigating country during the POI, strongly support the conclusion that residual duties are generally allowed under both Agreements. While no duties may be levied until such reviews are carried out, these provisions allow the authorities in the investigating country to request guarantees to ensure that, if the review results in a determination of dumping or subsidization with respect to the new exporter, duties can be levied retroactively to the date of initiation of the review. In the absence of residual duties, the importing country would have no basis on which to establish a level for such guarantees, and thus, the provisions of the Agreements in this regard would be *inutile*.

We also consider that residual duties serve an important policy objective, namely, ensuring the effectiveness of anti-dumping and countervailing measures which the WTO rules allow its Members to impose provided they determine through the appropriate investigative process that the conditions set forth in the Anti-Dumping or the SCM Agreements are satisfied. We note that imposing residual duties may allow an IA to preclude the circumvention of AD and CVD rates imposed following an investigation. This is because, in the absence of residual duties, exporters that refrained from making themselves known to the IA during an investigation, as well as those that started exporting the subject product to the investigating country following

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<sup>24</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.391.

<sup>25</sup> Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, paras. 7.428-7.429.

<sup>26</sup> Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, paras. 7.430-7.432.

<sup>27</sup> Panel Report, *China – Autos (US)*, para. 7.97.

<sup>28</sup> Although the parties referred to such a duty rate as an "all others" rate, to avoid confusion (given that this term is also used to refer to a distinct concept), the Panel used the term "residual duty" rate.

<sup>29</sup> Panel Report, *China – Autos (US)*, para. 7.98.



the imposition of duties, could access the market of that country free of AD or CVD duties, thus undermining their effectiveness. Moreover, existing exporters may consider that there is no incentive for them to try to cooperate with the investigating authorities of the importing country, if residual duties were not permitted under the Agreements. Obviously, such a result would frustrate the objective of anti-dumping and countervailing measures, to offset the injurious effects of dumped and subsidized imports on the domestic industry in the importing country."<sup>30</sup>

16. The Panel in *US – Supercalendered Paper* confirmed the all-others rate approach undertaken by the USDOC in determining that the "countervailing duty rates established for investigated exporters will generally be 'appropriate', in the sense of fitting or suitable, for non-investigated exporters, since the subsidization available to investigated exporters generally constitutes a reasonable proxy for the amount of subsidization that may have been available to non-investigated exporters", as they may have benefited from "access to a similar amount of subsidization, albeit through different subsidy programmes".<sup>31</sup>

17. The Panel in *US – Supercalendered Paper* further clarified that this approach would not always be appropriate, particularly when the rate is calculated on the basis of facts available, as "the non-investigated exporters or producers are similarly treated as being non-cooperative, even though there has been no finding of non-cooperation in their regard, and even though they may have been willing to participate fully in the investigation"<sup>32</sup>. Hence the Panel considered "that the appropriate amount of subsidization determined in respect of investigated exporters may serve as the ceiling for applying countervailing duties on non-investigated exporters".<sup>33</sup>

#### **1.5.4 Scope of an expedited review**

18. The Panel in *US – Supercalendered Paper* found that the purpose of an expedited review under Article 19.3 is to put the new exporter into the situation it would have been in had it participated in the original investigation, and that therefore the scope of such a review should be limited to that of the original investigation:

"We thus agree with Canada's position that, based on the text of Article 19.3 of the SCM Agreement, the purpose of an expedited review is 'to look back at the original investigation and see what the countervailing duty rate would have been for an exporter had they been investigated'. In other words, an expedited review should be aimed at putting, to the greatest extent possible, a non-investigated, cooperating exporter into the situation it would have been in, had it been investigated in the original investigation, on the basis of the measures covered by that investigation. Allowing the inclusion of any new subsidy allegations in the expedited review would frustrate the purpose of Article 19.3 as discussed above.

While the United States is correct to point out that the first sentence of Article 19.3 of the SCM Agreement refers to a countervailing duty imposed in respect of any 'product', the Panel does not consider this to imply that any and all new subsidy allegations relating to the product under investigation can be added to the scope of an expedited review. Rather, as explained above, the Panel considers that the purpose of an expedited review determines its scope: the purpose is to put non-investigated, cooperating exporters into the situation they would have been in, had they been investigated in the original investigation, and therefore the scope of the review should be limited to the measures covered by that investigation."<sup>34</sup>

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<sup>30</sup> Panel Report, *China – Autos (US)*, paras. 7.99-7.100.

<sup>31</sup> Panel Report, *US – Supercalendered Paper*, para. 7.263.

<sup>32</sup> Panel Report, *US – Supercalendered Paper*, para. 7.266.

<sup>33</sup> Panel Report, *US – Supercalendered Paper*, para. 7.271.

<sup>34</sup> Panel Report, *US – Supercalendered Paper*, paras. 7.290-7.291.

## 1.6 Article 19.4

### 1.6.1 General

19. Referring to the ordinary meaning of Article 19.4, the Panel in *US – Lead and Bismuth II* stated that "no countervailing duty may be imposed on an imported product if no (countervailable) subsidy is found to exist with respect to that imported product, since in such cases the amount of subsidy found to exist with respect to the imported product would be zero. Thus, like Article 19.1, Article 19.4 ... establishes a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy."<sup>35</sup>

20. The Panel in *US – Lead and Bismuth II* concluded that "consistent with the fundamental premise underlying Articles 19.1, 19.4, and 21.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, and consistent with the object and purpose of countervailing duties envisaged by Part V of the SCM Agreement, we consider that a countervailing duty may only be imposed on an imported product if it is demonstrated that a (countervailable) subsidy was bestowed directly or indirectly on the manufacture, production or export of that merchandise."<sup>36</sup>

21. In *China – Broiler Products*, the complainant argued that the investigating authority had improperly calculated the amount of subsidization per unit, by including a subsidy that benefited the production of non-subject merchandise. The Panel relied on the relevant case law in respect of both Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, and explained that the investigating authority "was obligated to accurately determine the per unit subsidy amount and not impose countervailing duties exceeding that amount".<sup>37</sup> The Panel further elaborated that the investigating authority was under an obligation to ensure that it calculated the subsidy correctly:

"Under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, MOFCOM has an obligation to ascertain the precise amount of subsidy attributed to the imported products under investigation. This requires more effort on the part of an investigating authority than simply accepting data and using it. We find contextual support for our understanding in Article 10 of the SCM Agreement which requires Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with the provisions of Article VI and the terms of the SCM Agreement. Furthermore, the Appellate Body has clarified in *US – Wheat Gluten*, that authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – 'must actively seek out pertinent information' and may not remain 'passive in the face of possible shortcomings in the evidence submitted.' Thus, MOFCOM needed to ensure that it had calculated the correct subsidy amount, rather than simply accept the information submitted by respondents, particularly as the respondents had alerted MOFCOM that they may have misunderstood the question and provided incorrect data."<sup>38</sup>

22. The Panel in *US – Supercalendered Paper* stated, in relation to determining the amount of subsidization, that "[t]here may be circumstances where it is reasonable for an investigating authority to proceed as if the totality of subsidized inputs produced by an entity are used in the production of a finished product, without necessarily proving that this is the case. However, this will not be the case in circumstances where record evidence indicates that only a very small amount of the subsidized input produced by an entity is in fact used in the production of the finished product".<sup>39</sup>

### 1.6.2 The relevant product

23. In *US – Washing Machines*, the investigating authority had determined that the relevant tax credit subsidies were not "tied to any particular product", and consequently had "allocated these subsidies across all products, by dividing the total amount" of the subsidy by the "value of

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<sup>35</sup> Panel Report, *US – Lead and Bismuth II*, para. 6.52.

<sup>36</sup> Panel Report, *US – Lead and Bismuth II*, para. 6.57.

<sup>37</sup> Panel Report, *China – Broiler Products*, para. 7.258.

<sup>38</sup> Panel Report, *China – Broiler Products*, para. 7.261.

<sup>39</sup> Panel Report, *US – Supercalendered Paper*, para. 7.237.

sales ... for all products".<sup>40</sup> Before the Panel, the complainant argued that "because the tax credits [we]re provided as a result of R&D activities undertaken by Samsung, and because the tax credits would have the effect of retroactively reducing the cost of those R&D activities, [the producer] could tie the tax credits to the underlying R&D activities, and the products in respect of which they were undertaken".<sup>41</sup> Consequently, in the complainant's view, the investigating authority should have calculated the amount of R&D undertaken by the relevant division within the company, and should have "allocated only the tax credits claimed in respect of that R&D to the relevant products."<sup>42</sup> The Panel rejected this argument, on the basis that the complainant mischaracterized the nature of the subsidy:

"Korea's claim is based on an erroneous characterisation of the nature of the subsidy at issue. Korea contends that RSTA Article 10(1)(3) provides for R&D subsidies, because the resultant tax credits retroactively reduce the cost of the R&D activities that gave rise to those tax credits. We disagree with Korea's characterisation. The relevant subsidies in the present case are the tax credits. These tax credit subsidies are not R&D subsidies. The fact that these tax credit subsidies were provided as a result of eligible R&D activity does not mean that those subsidies are tied to that R&D activity, or the products in respect of which that R&D activity was undertaken. The tax credit subsidies are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities. Tax credits constitute subsidies because government revenue is foregone or not collected. The benefit is the amount of revenue that is foregone or not collected. That revenue foregone or not collected is equivalent to cash that Samsung can keep in its account, rather than spending on its tax bill. Korea's argument that the relevant tax credit subsidies are tied to Digital Appliance products (and therefore LRWs) overlooks the fact that the cash acquired by Samsung as a result of the tax credit subsidy may be spent by Samsung on any product. Samsung acknowledged this in its questionnaire responses, stating that 'the tax return did not specify the merchandise for which this reduction was to be provided'. This is further confirmed by Korea's statement that '[t]he cash that is saved by paying less in taxes than otherwise would be the case *can then be spent on any activities that the taxpaying company elects*'. Thus, Samsung was not required to spend the proportion of benefit generated by Digital Appliance R&D expenditures on the future production of Digital Appliance products. It could have spent none of it on those products. Or it could have spent all of it on those products. It is Samsung's discretion regarding the use of the cash resulting from the tax credit subsidy that justifies the USDOC's treatment of that subsidy as untied, and therefore the allocation of that subsidy across the sales value of all products.

Korea argues that the 'effect' of the tax credit is to spur the particular investment that results in the earning of the credit. Korea also contends that the 'effect' of the availability of the tax credit should be distinguished from a company's use of the 'proceeds of the tax credit'. We are not persuaded by Korea's arguments, since they continue to reflect an erroneous characterisation of the subsidy at issue. It is the 'proceeds of the tax credit' – rather than the underlying R&D activity – that constitute the subsidy. That subsidy is only provided at the time that the tax credit is provided, i.e. at the time that revenue is foregone or not collected. Since the benefit of that subsidy may be used in any way that the recipient company sees fit, the USDOC was not required to find that the subsidy was tied to the products in respect of which the underlying R&D activities were undertaken. The fact that Samsung may be able to identify the R&D activities undertaken in respect of Digital Appliance products is irrelevant, since there is no necessary correlation between those R&D expenditures and the amount of tax credit cash (if any) used by Samsung for the production of Digital Appliance products."<sup>43</sup>

24. On appeal, however, the Appellate Body reversed the Panel's finding. The Appellate Body began its analysis by setting forth the relevant legal standard under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. The Appellate Body explained that:

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<sup>40</sup> Panel Report, *US – Washing Machines*, para. 7.301.

<sup>41</sup> Panel Report, *US – Washing Machines*, para. 7.302.

<sup>42</sup> Panel Report, *US – Washing Machines*, para. 7.302.

<sup>43</sup> Panel Report, *US – Washing Machines*, paras. 7.303-7.304.

"Under both provisions, Members must not levy countervailing duties in an amount greater than the amount of the subsidy found to exist. Thus, in order to determine the proper amount of a countervailing duty, an investigating authority must first 'ascertain the precise amount of [the] subsidy' to be offset. Article 19.4 further requires that the amount of the subsidy be calculated 'in terms of subsidization per unit of the subsidized and exported product'. The term 'per unit' indicates that an investigating authority is permitted to calculate the rate of subsidization 'on an aggregate basis', i.e. by dividing the total amount of the subsidy by the total sales value of the product to which the subsidy is attributable. The Appellate Body, however, has cautioned that, in an aggregate investigation, the correct calculation of a countervailing duty rate requires '*matching* the elements taken into account in the numerator with the elements taken into account in the denominator'. In turn, the product to which the subsidy is attributable for purposes of calculating per unit subsidization is defined in Article VI:3 as the product for whose 'manufacture, production or export' a subsidy has been 'granted, directly or indirectly' in 'the country of origin or exportation'.

The per unit subsidization rate of the subsidized product constitutes the benchmark against which to establish the proper amount of the related countervailing duty. As the Appellate Body has noted, the subsidies that justify the imposition of a countervailing duty are those pertaining to 'the imported products *under investigation*'. Thus, Article 19.4 and Article VI:3 establish the rule that investigating authorities must, in principle, ascertain as accurately as possible the amount of subsidization bestowed on the investigated products. It is only with respect to those products that a countervailing duty may be imposed, and only within the limits of the amount of subsidization that those products received. This rule finds further support in Article 10 of the SCM Agreement, according to which 'Members shall take all necessary steps to ensure that the imposition of a countervailing duty' on any imported product 'is in accordance with the provisions of Article VI of [the] GATT 1994 and the terms of [the SCM] Agreement'. The wording of Article 10 – and especially the phrase 'take all necessary steps to ensure' – indicates that the obligation to establish precisely the amount of subsidization requires a proactive attitude on the part of the investigating authority. Indeed, the Appellate Body has held that authorities charged with conducting an investigation 'must actively seek out pertinent information', and may not remain 'passive in the face of possible shortcomings in the evidence submitted'."<sup>44</sup>

25. The Appellate Body nonetheless acknowledged that the SCM Agreement does not dictate particular methodologies, and investigating authorities have discretion to choose the most appropriate methodology for determining the amount of subsidization. In particular, the Appellate Body pointed out that "no provision in the SCM Agreement expressly sets forth a specific method for assessing whether a given subsidy is, or is not, tied to a specific product."<sup>45</sup> The Appellate Body elaborated that such a determination will depend on the circumstances of each case, and must be based on the design, structure and operation of the measure granting the subsidy, and take into account all relevant facts surrounding the granting of the subsidy:

"The relevant definitions of the verb 'tie' include: 'join closely or firmly; to connect, attach, unite'; 'limit or restrict as to ... conditions'. Further, paragraph 3 of Annex IV to the SCM Agreement – now lapsed – provided that, '[w]here the subsidy is tied to the production or sale of a given product', the value of the product shall be calculated as the total value of the recipient firm's sales of that product. In light of the above, we consider that a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the product concerned. An assessment of whether this connection or conditional relationship exists will inevitably depend on the specific circumstances of each case. In conducting such an assessment, an investigating authority must examine the design, structure, and operation of the measure granting the subsidy at issue and take into account all the relevant facts surrounding the granting of that subsidy. In certain cases, an assessment of such factors may reveal that a subsidy is indeed connected to, or conditioned upon, the production or sale of a specific product. A proper assessment of

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<sup>44</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.267-5.268.

<sup>45</sup> Appellate Body Report, *US – Washing Machines*, para. 5.269.

the existence of a product-specific tie is not necessarily based on whether the subsidy *actually* results in increased production or sale of the product in question, but rather on whether the subsidy operates in a manner that can be *expected* to foster or incentivize the production or sale of the product concerned."<sup>46</sup>

26. Applying this standard, the Appellate Body considered that the Panel's analysis fell "short of a proper examination of the design, structure and operation ... as well as other relevant facts surrounding the bestowal of tax credits".<sup>47</sup> Furthermore, the Appellate Body clarified that the "fact that the recipient obtains the proceeds of a subsidy before, at the same time as, or after conducting the eligible activities is not, in and of itself, dispositive of whether that subsidy is tied to a particular product", meaning that "a subsidy may be tied to the production or sale of a given product even if the recipient obtains the proceeds of that subsidy after the eligible activity has taken place."<sup>48</sup> Furthermore, the Appellate Body considered that the "fact that a financial contribution, once collected by the recipient, may be spent on activities different from those for which it was bestowed is not, in and of itself, sufficient to exclude the existence of a product-specific tie", and "a subsidy that does not restrict the recipient's use of the proceeds of the financial contribution may, nonetheless, be found to be tied to a particular product if it induces the recipient to engage in activities connected to that product."<sup>49</sup>

27. A separate issue arising in *US – Washing Machines* concerned whether the investigating authority had acted inconsistently with Article 19.4 of the SCM Agreement by attributing the tax credits received by the producer to the producer's domestic production only, or rather the producer's worldwide production. The Panel considered that the "benefit" arising as a result of the tax credits was not tied to the activities giving rise to those credits, since the producer was "free to dispose of the tax credit cash as it [saw] fit."<sup>50</sup> The Panel also addressed an argument by the complainant "that the USDOC was not entitled to rely on any presumption that those subsidies only benefit ... domestic production operations".<sup>51</sup> The Panel considered that:

"WTO panels and the Appellate Body have already endorsed the use of presumptions where they are reasonable and rebuttable. In *US – Lead and Bismuth II*, for example, the Appellate Body accepted that investigating authorities are entitled to rebuttably presume, in administrative reviews, that a benefit continues to flow from an untied, non-recurring financial contribution. In *US – Countervailing Measures on Certain EC Products*, the panel found that "it is a normal and accepted practice ... for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry". In the *Washers* countervailing investigation, the recipients of the tax credit subsidies (i.e. Samsung and its Korean affiliates) only produced in the territory of the subsidizing Member. The USDOC was therefore entitled to presume that the tax credit subsidies only benefited Samsung's domestic production operations. Furthermore, the presumption applied by the USDOC was rebuttable. The USDOC's regulations provide in this regard: "If it is demonstrated that the subsidy was tied to more than domestic production, the [USDOC] will attribute the subsidy to multinational production". In these circumstances, we consider that the rebuttable presumption applied by the USDOC is not inconsistent with Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1993. We also consider that the USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption. As discussed above, the fact that the underlying R&D activities may have been beneficial to the production operations of Samsung's overseas subsidiaries does not mean that the benefit conferred by the tax credit subsidies also passed through to those overseas operations."<sup>52</sup>

28. For these reasons, the Panel rejected the claim that the investigating authority had acted inconsistently when calculating the value of the per unit subsidy. On appeal, the Appellate Body reversed this finding by the Panel. The Appellate Body recalled that the "'subsidized products' for

<sup>46</sup> Appellate Body Report, *US – Washing Machines*, para. 5.270.

<sup>47</sup> Appellate Body Report, *US – Washing Machines*, para. 5.271.

<sup>48</sup> Appellate Body Report, *US – Washing Machines*, para. 5.272.

<sup>49</sup> Appellate Body Report, *US – Washing Machines*, para. 5.273.

<sup>50</sup> Panel Report, *US – Washing Machines*, para. 7.318.

<sup>51</sup> Panel Report, *US – Washing Machines*, para. 7.319.

<sup>52</sup> Panel Report, *US – Washing Machines*, para. 7.319.

purposes of calculating per unit subsidization are limited to those manufactured, produced, or exported by the recipient."<sup>53</sup> However, the Appellate Body nonetheless considered that, for purposes of calculating per unit subsidization, the covered agreements do not require that the subsidized products must be limited to those products produced within the jurisdiction of the subsidizing Member:

"[T]he above-mentioned provisions do not indicate that, for purposes of calculating per unit subsidization, the subsidized products should be limited to those produced by the recipient of a subsidy within the jurisdiction of the subsidizing Member. We do not see any express limitation to this effect in the SCM Agreement. Thus, we consider that a subsidy may, indeed, be bestowed on the recipient's production outside the jurisdiction of the subsidizing Member. For instance, if the recipient is a multinational corporation with facilities located in multiple countries, the subsidized products may, depending on the circumstances of the case, include that corporation's production in those multiple countries.

In calculating the amount of *ad valorem* subsidization, an investigating authority has the task of identifying the specific products for whose 'manufacture, production or export' a given subsidy has been 'granted'. This examination should be conducted on a case-by-case basis, based on the arguments and evidence submitted by interested parties and the specific facts surrounding the bestowal of that subsidy. Those facts may include the text, design, structure, and operation of the measure under which the subsidy is granted, as well as the structure and location of the recipient's production operations. In carrying out its assessment, the investigating authority should provide the interested parties with a meaningful opportunity to submit evidence. Sometimes, an assessment of these factors may reveal that a subsidy is bestowed solely on the recipient's production within the jurisdiction of the granting authority. At other times, however, such an assessment may lead the authority to conclude that the subsidy at issue is bestowed also on the recipient's production in countries other than the subsidizing Member."<sup>54</sup>

29. In the Appellate Body's view, therefore, the investigating authority was obliged to identify the products in respect of which the tax credits were granted, and in so doing, the investigating authority "was required to consider all the relevant facts surrounding the bestowal of those tax credits, including: (i) the text, design, structure, and operation of the [measure]; and (ii) the structure and location of [the producer's] production operations."<sup>55</sup> Applying this legal standard, the Appellate Body rejected the Panel's reasoning in respect of the "benefit" of the subsidy. The Appellate Body stated that:

"The participants do not dispute that the 'benefit' deriving from the bestowal of the subsidy under Article 10(1)(3) of the RSTA consists of the proceeds of the tax credits. Nor do they disagree that Samsung, a company established within the jurisdiction of Korea, is the 'recipient' of that benefit by virtue of its R&D activities in Korea. However, as we observed in section 5.2.1.1 above, the identification of the recipient of the benefit is part of the analysis as to whether a subsidy exists pursuant to Article 1 of the SCM Agreement. This analysis is distinct from, and should not prejudice, the calculation of the amount of subsidy that has been bestowed upon the products produced by the recipient, so as to determine properly the amount of countervailing duty to be imposed on such products in accordance with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Thus, the fact that Samsung is the recipient of the 'benefit' deriving from the bestowal of subsidies under Article 10(1)(3) of the RSTA does not, in and of itself, preclude a finding that those subsidies may be allocated to the production of Samsung's overseas subsidiaries. By overly focusing on the fact that Samsung was the beneficiary of the RSTA Article 10(1)(3) tax credits, the Panel appears to have conflated the concept of 'recipient of the subsidy' under Article 1 of the SCM Agreement with the concept of

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<sup>53</sup> Appellate Body Report, *US – Washing Machines*, para. 5.296.

<sup>54</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.297-5.298.

<sup>55</sup> Appellate Body Report, *US – Washing Machines*, para. 5.299.

'subsidized product' for purposes of calculating per unit subsidization under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994."<sup>56</sup>

30. The Appellate Body also considered that, regarding the "presumption that government subsidies benefit domestic production", as used by the investigating authority and endorsed by the Panel, the investigating authority relied on an overly strict standard for rebutting that presumption. The Appellate Body indicated that the investigating authority was required to review the arguments and evidence submitted by the producer, insofar as they related to the design, structure and operation of the measure, as well as the structure and location of the producer's operations.<sup>57</sup> The Appellate Body reasoned:

"Instead, in its determination, the USDOC relied mainly on a 'presumption that government subsidies benefit domestic production'. While that presumption could, in principle, be rebutted, the USDOC determined that the only way to do so was for Samsung to show that the Government of Korea 'explicitly stated that the subsidy was being provided for more than domestic production' in the application and/or approval documents'. The USDOC determined that Samsung had not made that showing, as 'there is no indication in the statutory provisions' or in 'the tax returns themselves' that 'a company could claim a tax credit on ... a facility located outside of Korea'.

The expressed intent of a subsidizing authority, as evinced by the face of the measure granting the subsidy, cannot be the sole factor relevant to the allocation of that subsidy to the products produced by the recipient in the context of calculating per unit subsidization. Although neither Article 10(1)(3) of the RSTA nor the related tax returns show the Government of Korea's express intent to subsidize overseas production, this does not exhaust the scope of the relevant arguments and evidence submitted by the interested parties concerning the bestowal of the subsidy, which the USDOC was required to examine. By focusing solely on the face of the statutory provisions and of the tax returns submitted by Samsung, the USDOC failed to 'evaluate[] all of the relevant evidence' and to provide 'reasoned and adequate' explanations for its determination."<sup>58</sup>

31. On this basis, the Appellate Body reversed the finding of the Panel, and found instead that:

"[T]he USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung under Article 10(1)(3) of the RSTA and thereby presumptively attributing those tax credits to Samsung's domestic production."<sup>59</sup>

### **1.6.3 "found to exist" - continued existence of benefit at the time of imposition**

32. In *Japan – DRAMs (Korea)*, the Panel found that countervailing duties may only be imposed to offset present subsidization. In that case, Japan's investigating authority had found that a benefit was conferred by a subsidy provided in 2001, had allocated the benefit conferred by the 2001 subsidy over a period of five years only, and had imposed a countervailing duty in 2006 (i.e., after the relevant period of benefit allocation had expired). The Panel explained that the obligation to demonstrate present subsidization at the time of duty imposition was not inconsistent with the practice of investigating authorities establishing the existence of subsidization on the basis of past periods of investigation:

"The obligation to establish present subsidization does not mean that investigating authorities are prevented from establishing the existence of subsidization (and injury and causing) by reference to data taken from a past period of investigation. To the contrary, given the need for investigating authorities to issue questionnaires, collect

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<sup>56</sup> Appellate Body Report, *US – Washing Machines*, para. 5.300.

<sup>57</sup> Appellate Body Report, *US – Washing Machines*, para. 5.301.

<sup>58</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.302-5.303.

<sup>59</sup> Appellate Body Report, *US – Washing Machines*, para. 5.301.



reliable and verifiable data, process and verify that data, and safeguard the due process rights of interested parties, investigating authorities have no choice but to establish the existence of subsidization (and injury) on the basis of past periods of investigation. Thus, countervailing duties may be imposed on the basis of the investigating authority's review of a past period of investigation. We are not suggesting that an investigating authority is somehow required to conduct a new investigation at the time of imposition, in order to confirm the continued existence of the subsidization found to exist during the period of investigation. That would defeat the very purpose of using periods of investigation in the first place.

However, the use of a past period of investigation does not negate the need for an investigating authority to be satisfied that there is present subsidization. Rather, the historical data from the period of investigation 'is being used to draw conclusions about the current situation,' '[b]ecause the conditions to impose [a duty] are to be assessed with respect to the current situation'. In this sense, the situation during the period of investigation is used as a proxy for the situation pertaining 'current[ly]', at the time of imposition. In the case of non-recurring subsidies, if the review of the period of investigation indicates that the subsidy will no longer exist at the time of imposition, the existence of subsidization during the period of investigation will not suffice to demonstrate 'current' subsidization at the time of imposition.

In the present case, the JIA used a past period of investigation to establish the existence of subsidization. That period of investigation covered the year 2003. The JIA's determination of subsidization in 2003 was made based on an allocation of the benefit conferred by certain of the non-recurring subsidies provided by the October 2001 restructuring from 2001 to 2005. If the JIA had imposed countervailing duties in 2004, or 2005, its determination in respect of the period of investigation would have established that there was 'current[ly]' subsidization in either of those two years, as benefit from those subsidies was still being conferred in those years. This is because, in investigating the period of investigation, the JIA had allocated the benefit of 2001 subsidies over the period 2001 to 2005. Once the JIA sought to impose countervailing duties in 2006, however, its finding of subsidization in respect of those subsidies for the period of investigation no longer demonstrated that there was 'current[ly]' subsidization. This is because one important element of the JIA's determination in respect of the period of investigation was that certain of the 2001 subsidies needed to be allocated, and would no longer confer any benefit in 2006."<sup>60</sup>

33. The findings of the Panel were upheld by the Appellate Body. The Appellate Body made the following finding regarding Article 19.4:

"By its terms, Article 19.4 refers to a subsidy 'found to exist'. We see no requirement in Article 19.4 for an investigating authority to conduct a new investigation or to 'update' the determination at the time of imposition of a countervailing duty in order to confirm the continued existence of the subsidy. However, in the case of a non-recurring subsidy, a countervailing duty cannot be imposed if the investigating authority has made a finding in the course of its investigation as to the duration of the subsidy and, according to that finding, the subsidy is no longer in existence at the time that the Member makes a final determination to impose a countervailing duty. This is because, in such a situation, the countervailing duty, if imposed, would be in excess of the amount of subsidy found to exist, contrary to the provisions of Article 19.4."<sup>61</sup>

Current as of: December 2024

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<sup>60</sup> Panel Report, *Japan – DRAMs (Korea)*, paras. 7.356-7.358.

<sup>61</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 210.