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Beiträge zum Transnationalen Wirtschaftsrecht

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Current Developments under the
WTO Agreement on Subsidies and
Countervailing Measures
as an Example for the Functional Unity
of Domestic and International Trade Law

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**Current Developments under the WTO Agreement
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of Domestic and International Trade Law**

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Introduction

The theoretical construction of the relationship between domestic and international law has been discussed by legal scholars for over a hundred years. It is usually understood in terms of a monistic or a dualistic approach.¹ Even though the dogmatic outcome of the monistic/dualistic debate is certainly of high value, it is clear that neither a monistic nor a dualistic approach is convincing in explaining the complex factual and legal interrelationships between the domestic and international level of regulatory activities and mechanisms in an increasingly globalizing world. Moreover, it had already been argued 50 years ago, that the international economic system cannot be adequately constructed if one simply applies the single-dimensioned monistic or dualistic theories. As the international economic system has always been characterized by its high complexity, only a functional perspective on the problems and issues can be convincing.² Today, such a functional approach is applied in broader terms to the debate on the relationship between domestic and international law in general. In particular, *Daniel Thürer* has espoused the convincing perspective of the “old gap” between domestic and international law no longer existing and that one should therefore speak of a functional unity in the different regulatory levels of the overall international system.³

As will be demonstrated in this article, to speak of a functional unity of domestic and international law is especially true with regard to the world trading system. One of the main characteristics of the WTO legal system is that it actually intensively affects the domestic legal systems of WTO Members. Even though certain WTO Members still deny any direct effect of WTO law within their domestic legal systems,⁴ the influence that WTO law has on a broad range of domestic regulations concerning economic issues cannot be denied. In this article, the law of subsidies and countervailing measures will be taken as an example, demonstrating to proof of this functional unity. In fact, the law of subsidies and countervailing measures is a prime example of the interrelationship of domestic and international law and policy. On the one hand, subsidies are considered by many states as a legitimate policy instrument in order to pursue economic goals at the domestic level. On the other hand, the trade distorting effects and overall negative welfare effects of subsidies are well known.⁵ The WTO-Agreement on Subsidies and Countervailing Measures (SCM) is essentially a compromise between these two positions. This can be seen by looking at Art. III:8(b) and Art. XVI GATT 1994 and the differentiation between the different categories of prohibited, actionable and non-actionable subsidies in the SCM-Agreement.

The compromise between the possibility for governments to apply subsidies and the restrictions imposed by international trade law fits well into the general picture of

¹ See, e.g., *Jennings/Watts*, *Oppenheim's International Law*, 53 *et seq.*

² *Erler*, *Grundprobleme des Internationalen Wirtschaftsrechts*, 9 *et seq.*

³ *Thürer*, *SZIER* 1999, 220; see also *Tietje*, *Internationalisiertes Verwaltungshandeln*, 640 *et seq.*

⁴ For details see, e.g., *Matsushita/Schoenbaum/Mavroidis*, *The World Trade Organization*, 100 *et seq.*; *Prieß/Berrisch*, in: *Prieß/Berrisch* (eds.), *WTO-Handbuch*, C.II.1. para. 20 *et seq.*

⁵ For the negative effects of subsidies see, e.g., *Kenen*, *The International Economy*, 231 *et seq.*

the WTO legal system's overall structure. WTO law in general imposes restrictions on governments only insofar as it is necessary to ensure the functioning of the principles of non-discrimination and open markets⁶ in order to ensure optimal economic welfare. This, however, does not mean that WTO Members have an unlimited freedom under WTO law with regard to their trade and economic policies. Even economic activity pursued by WTO members within the ambit of their regulatory freedom under WTO law is subject to restrictions by WTO law. In other words, the regulatory freedoms granted by WTO law are not a *carte blanche* but are themselves subject to and bound by WTO law. It is this interrelation of regulatory freedoms and legal restrictions that makes the WTO legal order as much a fascinating topic for research as it is a frequent cause for trade disputes. This is especially true for the SCM Agreement as its whole systematic construction is based on the above described approach to simultaneously granting and restricting freedoms.

The tension between the possibility of governments using subsidies as a domestic policy instrument while keeping to the respective restrictions under WTO law has led to a whole series of trade disputes before the WTO. At least 18 completed cases under the Dispute Settlement System of the WTO were concerned with the issue of subsidies and countervailing duties; another 18 cases are currently pending before the WTO (as of 1 March 2004). Amongst the cases dealing primarily with the issue of subsidies, some of these had very sensitive and far-reaching political, economic and legal implications. In this regard, probably the most important cases were the ones between: Brazil and Canada concerning the ongoing trade dispute over subsidies for regional aircraft,⁷ the dispute between the EC and the USA concerning Foreign Sales Cooperation,⁸ and the problems caused by the so called Byrd Amendment of the USA.⁹ The 'Byrd Agreement' case, which was brought before the WTO by Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea, Thailand (and in a separate dispute by Canada and Mexico) against the USA was actually one of the largest dispute ever heard before the WTO (the other being the steel dispute¹⁰).

⁶ On these principles of WTO law see *Tietje*, Normative Grundstrukturen, 189 *et seq.* and 268 *et seq.*; *Berrisch*, in: Prieß/Berrisch (eds.), WTO-Handbuch, B.I.1. para. 13 *et seq.*; *Hilf*, Journal of International Economic Law 2001, 117 *et seq.*; *Lowenfeld*, International Economic Law, 28 *et seq.*

⁷ WTO, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, Reports of the Panel of 28 January 2002, WT/DS222/R; WTO, *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body of 2 August 1999, WT/DS70/AB/RW; WTO, *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Panel of 14. April 1999, WT/DS70; WTO, *Brazil - Export Financing Programme for Aircraft*, Report of the Appellate Body of 2 August 1999, WT/DS46/AB/R; for a comprehensive assessment see *Stehmann*, Journal of World Trade Law 33 (No. 6, 1999), 97 *et seq.*

⁸ WTO, *United States – Tax Treatment for "Foreign Sales Corporations"*, Report of the Panel of 20 August 2001, WT/DS108/RW; Report of the Appellate Body of 24 February 2000, WT/DS108/AB/R.

⁹ WTO, *United States – Continued Dumping and Subsidy Offset act of 2000*, Reports of the Panel of 16 September 2002, WT/DS217/AB/R and WT/DS234/AB/R; Report of the Appellate Body of 16 January 2003, WT/DS217/AB/R, WT/DS234/AB/R.

¹⁰ WTO, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, Reports of the Panel of 11 July 2003, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R.; Report of the Appellate Body of 10 November 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R.

The aim of this article is not to analyze all the subsidy trade disputes brought before the WTO, but rather to highlight some of the issues that were raised in the above mentioned disputes and by so doing, analyze them with regards to the overall question on the relation between domestic policy and law on the one hand and international trade law on the other. In our analysis, some comparisons to EC law – namely the law of state aid under Art. 87 *et seq.* EC-Treaty – will be made, even though it is not possible to draw a direct analogy between community law and WTO law. However, it might be interesting to see how similar economics issues are dealt with in EC law and WTO law respectively.

In the first section of the article, the notion of a subsidy under WTO and EC law will be analyzed (A.). This is followed by discussions concerning the general scope of application of the SCM Agreement (B.) and the relevance or irrelevance of domestic law with regard to the SCM Agreement (C.). In the fourth part of the article, more specific aspects of the legal consequences of an illegal subsidy under the SCM Agreement with regard to domestic law will be discussed (D.). This is followed by several short considerations on the alleged judicial activism of WTO Panels and the Appellate Body in subsidy cases (E.). Finally, some interesting developments concerning the relationship of trade law and international protection of investment as a new aspect of the overall debate on the interrelation of domestic and international law in general will be mentioned (F.).

A. The Notion of a Subsidy under WTO and EC Law

One of the important achievements of the negotiations during the Uruguay-Round was its inclusion of a, more or less, precise definition of what a subsidy means under WTO law. As stated in Art. 1.1. SCM Agreement, a subsidy under this Agreement¹¹ essentially requires 1) a financial contribution by a government or any public body within the territory of a Member, and 2) that a benefit is thereby conferred.¹² Without analyzing all the legal problems that are related to this definition,¹³ one interesting point should be noted: In the first Canadian regional aircraft case, the question arose as to whether the setting up of a financial scheme within the jurisdiction of a WTO Member that does not lead to a direct transfer of financial resources from the government to a private entity can qualify as a subsidy within the meaning of the Art. 1.1 definition. The relevance of this question is obvious: In the case of the notion of a

¹¹ WTO, *United States – Tax Treatment for “Foreign Sales Corporations”*, Report of the Appellate Body of 24 February 2000, WT/DS108/AB/R, para. 93: “Article 1.1 sets forth the general definition of the term ‘subsidy’ which applies ‘for the purpose of this Agreement’. This definition, therefore, applies wherever the word “subsidy” occurs throughout the SCM Agreement and conditions the application of the provisions of that Agreement regarding prohibited subsidies in Part II, actionable subsidies in Part III, non-actionable subsidies in Part IV and countervailing measures in Part V. ...”.

¹² See WTO, *Brazil – Export Financing Programme for Aircraft*, Report of the Appellate Body of 2 August 1999, WT/ WT/DS46/AB/R, para. 157: “We see the issues – and the respective definitions – of a ‘financial contribution’ and a ‘benefit’ as two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists, ...”.

¹³ For details see, e.g., *Pitschas*, in: Prieß/Berrisch (eds.), *WTO-Handbuch*, B.I.12 para. 59 *et seq.*; *Marc*, *The law of subsidies under the GATT/WTO System*, 199 *et seq.*; *Grave*, *Der Begriff der Subvention*, 136 *et seq.*

subsidy under WTO law depending on a direct financial contribution by the government, WTO Members could use certain mechanisms within their jurisdiction to financial support for producers etc. without having any direct impact on the state budget, and in so doing circumvent the restrictions on subsidies imposed by the SCM Agreement. In legal terms, the answer to the question on whether a direct effect on the budget of a WTO Member is necessary essential depends on the wording of Art. 1.1. SCM Agreement, and, in a broader sense, on the answer to the question of whether only a direct governmental intervention on the market is covered by the rationale of the SCM Agreement, i.e. whether only such a direct market intervention causes the negative effects that are meant to be prevented by the SCM Agreement.

The Appellate Body made clear that it is only relevant whether a benefit for a private party occurs, disregarding the fact as to whether a public interest is affected. This conclusion was reached, first, by analyzing the ordinary meaning of the wording of Art. 1.1. SCM Agreement:

“A ‘benefit’ does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a ‘benefit’ can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term ‘benefit’, therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the SCM Agreement should be on the recipient and not on the granting authority. The ordinary meaning of the word ‘confer’, as used in Article 1.1(b), bears this out. ‘Confer’ means, *inter alia*, ‘give’, ‘grant’ or ‘bestow’. The use of the past participle ‘conferred’ in the passive form, in conjunction with the word ‘thereby’, naturally calls for an inquiry into what was conferred on the recipient. Accordingly, we believe that Canada's argument that ‘cost to government’ is one way of conceiving of ‘benefit’ is at odds with the ordinary meaning of Article 1.1(b), which focuses on the recipient and not on the government providing the ‘financial contribution’.”¹⁴

Moreover, the Appellate Body also stressed that the aim and effect of Art. 1.1. SCM Agreement has to be noticed:

“We also believe that the word ‘benefit’, as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no ‘benefit’ to the recipient unless the ‘financial contribution’ makes the recipient ‘better off’ than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a ‘benefit’ has been ‘conferred’, because the trade-distorting potential of a ‘financial contribution’ can be identified by determining whether the recipient has received a ‘financial contribution’ on terms more favourable than those available to the recipient in the market.”¹⁵

Even though one might criticize that the Appellate Body discussed the problem of a budgetary significance under the heading of a “benefit” and not under the first re-

¹⁴ WTO, *Canada – Measures Affecting the Export of Civilian Aircraft*, Reports of the Appellate Body of 2 August 1999, WT/DS70/AB/R, para. 154.

¹⁵ *Ibid.*, para. 157.

quirement of a “financial contributions” in the sense of Art. 1.1. SCM Agreement,¹⁶ the overall result of the finding is convincing. Any other interpretation of Art. 1.1. SCM Agreement would give WTO Members the possibility to circumvent the disciplines of the Agreement by establishing regulatory frameworks by which market mechanisms are offset by private party behaviour.¹⁷ This is demonstrated by certain actions of the EEC in so called “steel war” at the beginning of the 1980s. The EEC at that time strongly argued that any subsidy under the GATT 1947 necessarily had to involve a charge on the public account in order to make a case against the USA which did not consider this being relevant with regard to countervailing measures that were applied against EC products.¹⁸

It is interesting to note, however, that a question similar to the one that was decided in the first Canadian Aircraft case recently came up before the European Court of Justice (ECJ). In the *PreussenElektra* case¹⁹ the Court had to decide whether a German law requiring private energy supply enterprises to purchase electricity from renewable energy sources at minimum prices constituted state aid in the sense of Art. 87 EC Treaty. The ECJ ruled that this was not the case even though such a regulation “confers a certain economic advantage on producers of that type of electricity, since it guarantees them, with no risk, higher profits than they would make in its absence”.²⁰ In order to support its holding, the Court referred to its previous case law – which nonetheless lacks clarity on this issue²¹ – and added that “[t]he distinction made in [Art. 87 EC Treaty] between ‘aid granted by a Member State’ and aid granted ‘through State resources’ does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State.”²²

The question whether the ECJ judgement in *PreussenElektra* is convincing shall not be further discussed in this article. What is important to notice, however, is that WTO law has a much broader scope of application with regard to subsidies. According to the mentioned ruling of the Appellate Body, the German regulatory scheme that was challenged in *PreussenElektra* would have been a subsidy under WTO law, even though it is – at least according to the ECJ – not a state aid under the EC Treaty. This result is quite surprising, especially if one takes into consideration that the “uniqueness of the legal character of the Community” is usually seen as a justification for more far-reaching restrictions on the EC member states than the ones imposed by WTO law on WTO Members.²³ Moreover, what is also surprising is that the EC commission argued before the ECJ in favour of a broad interpretation of the no-

¹⁶ See *Pitschas*, in: Prieß/Berrisch (eds.), *WTO-Handbuch*, B.I.12 para. 66.

¹⁷ For a detailed analyses see *Slotboom*, *Journal of World Trade* 36 (No. 3, 2002), 517 (531 *et seq.*).

¹⁸ *Slotboom*, *Journal of World Trade* 36 (No. 3, 2002), 517 (531 *et seq.*) with further references.

¹⁹ ECJ, Case C-379/98, *PreussenElektra v. Schleswag AG* of 13 March 2001, ECR 2001, I-2099.

²⁰ *Ibid.*, para. 54.

²¹ For details see *Slotboom*, *Journal of World Trade* 36 (No. 3, 2002), 517 (525 *et seq.*).

²² ECJ, Case C-379/98, *PreussenElektra v. Schleswag AG* of 13 March 2001, ECR 2001, I-2099 para. 58.

²³ For this standard argument, see, e.g., *Goh/Ziegler*, *Journal of International Economic Law* 6 (2003), 545 (557 *et seq.*).

tion of a state aid under Art. 87 EC Treaty in order to include also financial benefits that do not involve a charge on the public account, whereas it argued before the WTO exactly to the contrary.²⁴

B. The General Scope of Application of the SCM Agreement

A second interesting issue concerning current legal developments under the SCM Agreement and the interrelation of domestic and international law has been discussed in the Foreign Sales Corporations (FSC) case. The FSC case of course caused a lot of political discussions within the USA and with regard to transatlantic relations in general. However, in legal terms it is not as spectacular as the political discussion might indicate. The main legal points of the dispute, which dates back to 1972, as the USA for the first time introduces regulations for “Domestic International Sales Corporations (DISC)”, had been clarified already in a GATT Panel decision of 1976, even though it was never adopted.²⁵

However, one point of the FSC Appellate Body decision from 24 February 2000 is worth noting and important for the issue at hand: As it is well known, the FSC legislation in the US that was successfully challenged before the WTO by the EC concerned aspect of international taxation. The USA argued during the WTO proceedings that the whole case was an issue of international harmonization of national tax law which was not covered by WTO law but subject to discussions within other international forums. In order to support this argument, the USA referred to a footnote in the SCM Agreement that provides in part that specific provisions of the Agreement are “not intended to limit a Member from taking measures to avoid double taxation of foreign-source income earned by its enterprises or the enterprises of another Member”.²⁶ Therefore, in view of the USA the SCM Agreement or any other WTO law were not applicable to taxation law and thus not the FSC legislation.²⁷

The Appellate Body struck down the US-argument with the following words: “A Member of the WTO may choose any kind of tax system it wishes – so long as, in so choosing, that Member applies that system in a way that is consistent with its WTO obligations. Whatever kind of tax system a Member chooses, that Member will not be in compliance with its WTO obligations if it provides, through its tax system, subsidies contingent upon export performance that are not permitted under the covered agreements”.²⁸ This is a far-reaching conclusion, especially if one takes into consideration the sensibilities and highly emotional debates we know from efforts of harmonizing tax law under the EC Treaty.²⁹ Moreover, the quoted statement of the Appellate Body has very impressive similarities with a legal principle of EC law that causes EC member states constantly problems: In Community Law, member states argued over

²⁴ See also *Slotboom*, *Journal of World Trade* 36 (No. 3, 2002), 517 (534 *et seq.*).

²⁵ For details see extensively *Hudec*, *Enforcing International Trade Law*, 59 *et seq.*; see also *Qureshi/Grynberg*, *Journal of World Trade Law* 36 (No. 5, 2002), 979 (985).

²⁶ See footnote 59 to Annex I SCM Agreement.

²⁷ For details see *Qureshi/Grynberg*, *Journal of World Trade Law* 36 (No. 5, 2002), 979 (986).

²⁸ WTO, *United States – Tax Treatment of „Foreign Sales Corporations“*, Appellate Body Report of 24 February 2000, WT/DS108/AB/R, para. 179.

²⁹ See, e.g., *Stumpf*, in: Schwarze (ed.), *EU-Kommentar*, Art. 93 EVG para. 13.

and over again that certain issues are not (yet) covered by the EC Treaty and that thus EC law can not restrict the freedom of member states to enact any legislation they wish to in these areas. Recent examples in this regard are the *Centros* and the *Überseering* decisions of the ECJ. Both cases concerned regulations in member states in the area of international company law, more specifically the applicable law on the legal status of a private company. Once the respective regulations were challenged before the ECJ, member states argued that according to Art. 293 EC Treaty the harmonization of domestic regulations concerning the legal status of private companies is subject to negotiations between member states and is thus not within the scope of EC law and competences.³⁰

The ECJ explicitly rejected the arguments brought forward by member states in *Überseering* by stating that “it is important to point out that, although the conventions which may be entered into pursuant to Article 293 EC may, like the harmonising directives provided for in Article 44 EC, facilitate the attainment of freedom of establishment, the exercise of that freedom can none the less not be dependent upon the adoption of such conventions.”³¹

It is thus interesting to notice that the ECJ and the WTO Appellate Body argue in similar situations along the same lines: Both reject the arguments of members that certain areas of law are not covered by the respective supranational/international law and that they are thus free to regulate those areas by domestic legislation. And both the ECJ and the Appellate Body essentially use the same argument: Remaining competences of members can not limit the scope of application of fundamental obligations and rights under the respective supranational/international legal regime. This demonstrates that there is hardly any regulatory area within the domestic sphere that is not potentially affected by EC or WTO law. It has been very hard to accept this within the member states of the EC, namely in areas such as civil law³² – and it certainly will be just as hard for WTO Members to accept such a far-reaching consequence.³³

C. The Relevance or Irrelevance of Domestic Law with regard to the SCM Agreement

Another aspect of recent WTO jurisprudence that give interesting insides into the interrelation of international and domestic economic law concerns the question whether the obligation to withdraw a subsidy that is illegal under the SCM Agreement (Art. 4.7 SCM Agreement) might depend on existing legal obligations under domestic law. The relevance of this question is obvious if one takes into account that governments usually get into a contractual relationship with the recipients of subsidies or grant the subsidies on the bases of administrative law without having necessarily the

³⁰ See ECJ, Case C-212/97 of 9 March 1999 *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, ECR 1999, I-1459 para. 16 *et seq.*

³¹ See ECJ, Case C-208/00 of 5 November 2002, *Überseering*, ECR 2002, I-9919 para. 55.

³² See, e.g., the extensive discussion the *Centros* and the *Überseering* decisions caused among civil lawyers: among others *Behrens* IPrax 1999, 323 *et seq.*; *Sonnenberger/Großerichter* RIW 1999, 721 *et seq.*

³³ For more details with regard to tax law see extensively *Schön*, RIW 2004, 50 *et seq.*

possibility to withdraw the respective obligation unilaterally. Brazil for example made the argument before the WTO Appellate Body that it had a contractual obligation under domestic law to grant the subsidy at issue and that not granting the subsidy could lead to liability for damages for breach of contract.³⁴ Moreover, one has also to bear in mind that the recipient of a subsidy might get into contractual relations with other private parties in order to spend the money received. In such a case the recipient of the subsidy himself would be liable for damages for breach of contract if he or she would not be able to fulfil the contractual obligations because the subsidy would not be issued by the government.

As already mentioned, WTO Members are according to Art. 4.7. SCM Agreement under the obligation to “withdraw” an illegal subsidy. As this is an obligation under public international law, Art. 27 of the Vienna Convention on the Law of Treaties (VCLT) has to be taken into account. Art. 27 VCLT provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. It is in accordance with this general concept of public international law that the Appellate Body made the convincing statement that „[a] Member’s obligation ... to withdraw prohibited subsidies ‚without delay’ is unaffected by contractual obligations that the Member itself may have assumed under municipal law. Likewise, a Member’s obligation to withdraw prohibited export subsidies ... cannot be affected by contractual obligations which private parties may have assumed *inter se* in reliance on laws conferring prohibited export subsidies”.³⁵

Even though this holding by the Appellate Body is in accordance with general public international law and is thus not surprising, the consequences in domestic legal systems are far-reaching. Any WTO Member and any actual or potential recipient of a subsidy must be aware of the fact that the illegality of the subsidy under WTO law would actually interfere with respective rights and obligations relating to the subsidy under domestic law. It is thus always necessary to take a potential violation of WTO law into account while considering the application for and the granting of a subsidy within a domestic legal system.

D. Possible Retrospective Consequences of an Illegal Subsidy

An even more far-reaching consequence of an illegal subsidy under the SCM Agreement has been indicated in the decision of the Panel in the Australian Leather Case. The Panel in the implementation procedure (Art. 21.5 Dispute Settlement Understanding – DSU) had to decide on the meaning of Art. 4.7. SCM Agreement. This provision stipulates that “[i]f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay.” In the Australian Leather Case the question came up whether this

³⁴ WTO, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, Report of the Appellate Body of 21 July 2000, WT/DS46/AB/RW, para. 46.

³⁵ WTO, *United States – Tax Treatment for „Foreign Sales Corporations“*, *Recourse to Article 21.5 of the DSU by the European Communities*, Report of the Appellate Body of 14 January 2002, WT/DS108/AB/RW, para. 230; see also WTO, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, Report of the Appellate Body of 21 July 2000, WT/DS46/AB/RW, para. 46.

wording also includes an obligation for (retrospective) repayment of a prohibited subsidy. In discussing this question, the Panel first referred to the applicable means of treaty interpretation as codified in Art. 31 *et seq.* VCLT. While doing so, the Panel also stated that “[t]he applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility”.³⁶

The reference of the Panel to the *effet utile* principle is in itself very interesting if one takes into consideration that actually almost all important legal developments in EC law were based by the ECJ to a large extent on the *effet utile* principle.³⁷ Whether the *effet utile* principle will have a similar impact on WTO jurisprudence is certainly not clear yet. However, the willingness of Panels and the Appellate Body to give WTO law an effective meaning is evidence of the fact that the WTO legal order is as dynamic as any other international regime. Furthermore, applying the *effet utile* principle takes part in the overall process of constitutionalizing of the world trading system.³⁸

The Panel in the Australian Leather case continued its analysis of the meaning of Art. 4.7. SCM and came to the following conclusion: “Based on the ordinary meaning of the term ‘withdraw the subsidy’, read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to ‘withdraw the subsidy’ provided for in Article 4.7 of the SCM Agreement is not limited to prospective action only but may encompass repayment of the prohibited subsidy”.³⁹

The decision of the Panel has caused a very intensive and even heated discussion among WTO Members. Quite a few members disagreed with the decision in strong language.⁴⁰ Legal scholars also criticized the decision as being unfounded, contrary to basic principles of WTO law and domestic constitutional law, and thus – quoting from the respective meeting of the Dispute Settlement Body⁴¹ – being “a one-time aberration of no precedential value”.⁴² This conclusion seems to be exaggerated, namely if one takes a look at the different arguments that are up forward in order to support the critic:

³⁶ WTO, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, Report of the Panel of 21 January 2000, WT/DS126/RW, para. 6.24.

³⁷ For a comprehensive assessment see *Streinz*, in: Due/Lutter/Schwarze (eds.), *Festschrift für Ulrich Everling*, Vol. 2, 1491 *et seq.*; *von Bogdandy*, in: Grabitz/Hilf (eds.), *Das Recht der EU*, Art. 10 EVG para. 46.

³⁸ On constitutionalizing the world trading system see, e.g., *Petersmann*, *Constitutional Functions and Constitutional Problems of International Economic Law*, *passim*; *Tietje*, in: Prieß/Berrisch (eds.), *WTO-Handbuch*, A.II. para. 24 *et seq.* with further references; sceptical *Howse/Nicolaidis*, in: Porter/Sauvé et al. (eds.), *Efficiency, Equity, Legitimacy*, 227 *et seq.*

³⁹ WTO, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, Report of the Panel of 21 January 2000, WT/DS126/RW, para. 6.39.

⁴⁰ See the discussion in the Dispute Settlement Body on 11 February 2000, WTO Doc. WT/DSB/M/75 of 7 March 2000; for further details see *Goh/Ziegler*, *Journal of International Economic Law* 6 (2003), 545 *et seq.*

⁴¹ See the discussion in the Dispute Settlement Body on 11 February 2000, WTO Doc. WT/DSB/M/75 of 7 March 2000, at 8.

⁴² *Goh/Ziegler*, *Journal of International Economic Law* 6 (2003), 545 *et seq.*

A first aspect that has to be taken into account is that there are at least five Panel reports under the old GATT 1947 which recommended a retrospective remedy.⁴³ Simply arguing that these Panel reports “were exclusively anti-dumping or countervailing duties cases under the Tokio Round Subsidies Code” and that they therefore can not stand as a general precedence⁴⁴ is not convincing. In order to judge on the value of these decisions one must look at their overall rationale. This is essentially based on economic factors in conjunction with the general principle of law that no legal act can stem from an illegality (*ex injuria non oritur jus*).⁴⁵ These considerations do not only apply in anti-dumping cases or in cases under the “old” subsidy code, but in any case that concerns a trade distorting governmental measure that has financial implications for private parties. Namely anti-dumping and subsidy cases are similar in this regard. Both are concerned with a governmental market intervention by financial means. Thus, it is very well possible and even necessary to apply the same rationale as put forward in the anti-dumping decisions and in the subsidy cases under the Tokio codes to any anti-dumping and subsidy case under WTO law.

Another argument put forward against the Panel decision in the Australian leather case concerns the relationship between public international law and WTO law. It is argued that the possibility under general public international law to apply retrospective remedies can not be applied under WTO law because of the very special nature of the WTO legal system.⁴⁶ This argumentation is in conflict with the explicit jurisprudence of the Appellate Body according to which the ILC draft articles on state responsibility have to be taken into account while interpreting WTO law.⁴⁷ The ILC draft articles on state responsibility explicitly provide that a state being responsible for an international wrongful act is under an obligation to cease that act, if it is continuing (Art. 30 lit. a) ILC-Draft), and to make full reparation for the injury caused (Art. 31 para. 1 ILC-Draft).⁴⁸ The meaning of the notion of “reparation” in the sense of Art. 31 para. 1 ILC-Draft it is well established in public international law. Already the Permanent Court of International Justice made clear that „[t]he essential principle contained in the actual notion of an illegal act ... is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”.⁴⁹ Such a “wiping out of all consequences of the illegal act” in terms of Art. 4.7 SCM Agreement can only mean that there is an obligation to enforce a repayment of the prohibited subsidy.

⁴³ See Petersmann, *Journal of World Trade* 27 (No. 6, 1993), 5 *et seq.*; Mavroidis, *European Journal of International Law* 11 (2000), 763 (775).

⁴⁴ See the argument by Goh/Ziegler, *Journal of International Economic Law* 6 (2003), 545 (553).

⁴⁵ Mavroidis, *European Journal of International Law* 11 (2000), 763 (775 *et seq.*).

⁴⁶ Goh/Ziegler, *Journal of International Economic Law* 6 (2003), 545 (553 *et seq.*).

⁴⁷ WTO, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body of 15 February 2002, WT/DS202/AB/R, para. 259; WTO, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Report of the Appellate Body adopted 5 November 2001, WT/DS192/AB/R, para. 120.

⁴⁸ Reprinted in: Crawford, *The International Law Commission’s Articles on State Responsibility*, 196 *et seq.*

⁴⁹ *Factory at Chorzów*, Jurisdiction, P.C.I.J., Series A, No. 9, 21.

Furthermore, it is misleading to argue that the overall objective of the WTO legal system is to “preserve future trading opportunities rather than redress past injury”⁵⁰. Future trading opportunities and the necessity to redress past injury are interrelated in cases of an illegal subsidy. Once a subsidy is granted to the recipient, a fair competitive market situation is destroyed. This situation that is caused by a governmental intervention into the market lasts as long as the recipient of the subsidy has a financial advantage. It will not cease to exist until the money received is paid back to the government. Thus, fair and competitive market conditions can only be re-established by retroactive remedies under Art. 4.7. SCM Agreement. As demonstrated by *Mavroidis*, this conclusion is also in line with a proper interpretation of Art. 19 DSU.⁵¹

Finally, it is at least misleading to argue that retrospective remedies under the SCM Agreement are not possible because they would be in conflict with constitutional law provisions of WTO Members. First, this is also the case with regard to the already mentioned jurisprudence that domestic law does not effect obligations under the SCM Agreement.⁵² Under German constitutional law, for example, a person who received a positive administrative order that he or she will be granted a subsidy has under certain circumstances a constitutional right that the government will not revoke this order.⁵³ Thus, constitutional law issues are raised in any case of an illegal subsidy, disregard the question whether a prospective or a retrospective remedy under international law applies. These problems have to be solved by including a principle of good faith and legal certainty as a human right into the WTO legal order. If the recipient of a subsidy is in good faith that he or she has received a legal subsidy, basic considerations of human rights standards under the principle of good faith and legal certainty prevent the application of a retrospective remedy.⁵⁴ This is a further argument in favour of including human rights law into the WTO legal order.⁵⁵

In sum, the Panel decision in the Australian Automotive Leather case is economically and legally convincing.⁵⁶ It is moreover in line with the respective jurisprudence of the ECJ that is just as the decision of the Panel not based on explicit provisions of the underlying treaty⁵⁷ but a result of the consequent application of the *effet utile* principle. Possible negative consequences of this approach have to be solved by applying human rights standards within WTO law. However, it certainly is not a solution to give governments the possibility to grant illegal subsidies without consequences until they have stopped such a practice because of a decision of the Dispute Settlement Body that only applies prospectively.

⁵⁰ *Gohl/Ziegler*, *Journal of International Economic Law* 6 (2003), 545 (555).

⁵¹ *Movroidis*, *European Journal of International Law* 11 (2000), 763 (789 *et seq.*).

⁵² *See supra* note 34 and 35 and accompanying text.

⁵³ *Schulze-Fielitz*, in: Dreier (ed.), *Grundgesetz-Kommentar*, Vol. 2, Art. 20 GG (Rechtsstaat) para. 135 *et seq.*

⁵⁴ *See, e.g.*, ECJ, Case C-24/95, *Land Rheinland-Pfalz v. Alcan* of 20 March 1997, ECR 1997, I-1591, para. 24 *et seq.*; *Kadelbach*, *Allgemeines Verwaltungsrecht*, 470 *et seq.*

⁵⁵ *See in general, e.g.*, *Petersmann*, *Journal of International Economic Law* 3 (2000), 19 *et seq.*; *Petersmann*, in: von Bogdandy/Mavroidis/Meny (eds.), *European Integration and International Coordination*, 383 *et seq.*

⁵⁶ *Mavroidis*, *European Journal of International Law* 11 (2000), 763 (790).

⁵⁷ This is misunderstood by *Gohl/Ziegler*, *Journal of International Economic Law* 6 (2003), 545 (557).

E. Aspects of an Alleged Judicial Activism of WTO Panels and the Appellate Body in Subsidy Cases

The so far mentioned cases directly lead to the question of whether the rulings of the Dispute Settlement Body in subsidy cases are evidence of an illegitimate judicial activism in the WTO. This question was recently brought up after the ruling of a Panel and the Appellate Body concerning the so called US Byrd Amendment (the Continued Dumping and Subsidy Offset Act of 2000).⁵⁸ The case concerned a US legislation requiring US custom authorities to forward duties collected from an anti-dumping or countervailing order to affected domestic producers for their qualifying expenses. The Appellate Body held this mechanism to be “a non-permissible ‘specific action against a subsidy’, contrary to SCM Article 32.1” – and in the same sense a violation of the Anti-dumping Agreement.⁵⁹ This decision caused quite an intensive political debate in the USA. For example, the Member of the House of Representatives Levin (D) declared, *inter alia*, that it imposes on the United States “wholly new obligations” that “the United States never agreed to accept and which Congress never would have accepted”. The decision “unfortunately reflects a systematic bias in recent WTO decisions against U.S. use of rights it negotiated to respond to unfairly traded and injurious imports”. The decision should give reason to a renewed “vigorous campaign to respond to erroneous WTO decisions”.⁶⁰

One must strongly reject such a political rhetoric. The Panel and the Appellate Body in this case and in other cases carefully analyzed the wording and the object and purpose of the relevant provisions (in the Byrd Amendment case Art. 18.1. Anti-dumping Agreement and Art. 32.1. SCM Agreement). With regard to object and purpose the Appellate Body convincingly stated that the relevant “provisions fulfil a function of limiting the range of actions by a Member may take unilaterally to counter dumping and subsidization”.⁶¹ This statement certainly does not impose “wholly new obligations” or reflects a “systematic bias”. On the contrary, it is in line with the overall rationale of the SCM Agreement and the entire WTO legal order.

The severe critic the rulings in the Byrd Amendment case received in the USA is thus not based on legal arguments. Instead it is evidence of the fact that the importance of WTO law in relation to domestic law and policy is not yet seen everywhere. World trade law today is more than a power-oriented law regulating inter-state relations. It creates individual rights⁶² restricting government’s discretion in foreign trade policy. This aim of WTO law is part of all WTO agreements governments agreed to in 1994.

⁵⁸ WTO, *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body of 16 January 2003, WT/DS217/AB/R and WT/DS234/AB/R.

⁵⁹ *Ibid.*, para. 224 *et seq.*

⁶⁰ International Trade Reporter 20 (2002), 188 of 23 January 2003.

⁶¹ WTO, *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body of 16 January 2003, WT/DS217/AB/R and WT/DS234/AB/R, para. 252.

⁶² See Opinion of Advocate General Alber, Case C-93/02 P, *Biret International SA v. Council of the European Union* of 15 May 2003, para. 50 *et seq.*

F. Developments Concerning the Relationship of Trade Law and International Investment Protection

Finally, very interesting developments recently occurred with regard to the relationship of WTO law and international investment protection law. In order to understand the relevance of these developments one must bear in mind that international investment law is usually enforced by state-investor arbitration. Thus, an investor has usually under Bilateral Investment Treaties (BITs) or according to, e.g., the provisions of the Agreement on the International Centre for the Settlement of Investment Disputes (ICSID) the possibility to directly challenge actions by a government before an international tribunal. This is different with regard to WTO law; private parties have no standing in WTO dispute settlement, as the DSU provides exclusively for interstate dispute settlement. As, moreover, most WTO Members do not recognize any direct applicability of WTO law within their domestic legal systems, there is hardly any possibility for a private person to initiate legal proceedings based on WTO law. Thus, in international economic law investment protection arbitration is the only possibility for individuals to initiate legal proceedings against governments based on international law. If it was possible to link WTO and investment protection law, it would thus be possible for individuals to directly enforce WTO law.

There have already been several attempts in international arbitration proceedings to link WTO law and investment protection law.⁶³ In most of these cases investors tried to argue that a violation of WTO law by the government directly or indirectly constituted a breach of investment protection guarantees under bilateral or multilateral treaties. In the context of WTO subsidy law, it is interesting to notice that the Byrd-Amendment was not only challenged before the WTO by many states, but also by a private Canadian company in a NAFTA Chapter 11 arbitration proceeding that has been initiated by a respected Notice of Arbitration and Statement of Claim of 9 July 2002.⁶⁴ Claimant in the arbitration of *Canfor Corporation v. US Government* argued that by the mechanism of the Byrd-Amendment which is only to the benefit of US-companies, the fair and equitable treatment standard and the national treatment standard of investment protection under NAFTA was violated with regard to the competitive relationship of US companies and Cantor. Just as the other known investment arbitrations which are all currently in a procedural stage,⁶⁵ it will be very interesting to see whether any WTO law issues will be included in the final award of the arbitral tribunal.

Once some case law of arbitral awards develops with regard to WTO law, there will be given an important new possibility for individuals to enforce WTO law. Considering the more than 2000 bilateral investment protection treaties that exist today, any arbitral award referring to WTO law would be a very important precedence to challenge foreign trade law and policy of States and the EU with reference to invest-

⁶³ For an analysis on certain aspects see *Verhoosel*, *Journal of International Economic Law* 6 (2003), 493 *et seq.*

⁶⁴ Available under: <<http://www.state.gov/documents/organization/13203.pdf>> (visited on March 1, 2004).

⁶⁵ For details see *Verhoosel*, *Journal of International Economic Law* 6 (2003), 493 *et seq.*

ment protection. Such a development would further strengthen the constitutionalization of world trade law and international economic law in general.

Conclusions

The short overview on some important developments concerning the law of subsidies demonstrates the importance of the whole subject with regard to the functional unity of domestic law and international law. In the EC, the interpretation of the rules on state aid by the ECJ had the most significant influence on the concept of the relationship between domestic administrative law and EC law. We might see in the near future similar discussions with regard to world trade law. Moreover, especially the dispute on the Byrd-Amendment demonstrates that international economic relations can not only be seen through the eyes of WTO law, but are part of a broader concept of transnational economic law.⁶⁶

⁶⁶ On the concept of transnational economic law see *Tietje*, *Zeitschrift für Vergleichende Rechtswissenschaft* 101 (2002), 404 *et seq.*

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