



THE MEANING AND ROLE OF THE ‘PASS- THROUGH ANALYSIS’ IN SUBSIDY AND COUNTERVAILING INVESTIGATIONS

by

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DECLARATION

I, Darshen Naidoo, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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The endeavour of research outside the comfort of familiarity is a frightening one, more especially if time is scarce and responsibilities are many. However, to make up for this plight, it is often those who we have around us – our support – that lightens the burden of such mind-weighty tasks.

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THE MEANING AND ROLE OF THE ‘PASS-THROUGH ANALYSIS’ IN SUBSIDY AND COUNTERVAILING INVESTIGATIONS

ABSTRACT

This research examines the complex issue of subsidies granted to input resources used in the production of goods traded internationally. The focus is on the "pass-through analysis," which determines whether subsidies benefitting input resources should be considered in countervailing measures imposed by importing countries. The study investigates the legal framework governing this analysis, its challenges, and the ambiguity surrounding its interpretation by the WTO Dispute Resolution Body. The research aims to shed light on this vague concept and provide recommendations for clarification. The study begins by exploring the fundamental concepts of subsidies, their benefits, and preconditions, before delving into the intricacies of countervailing investigations. The findings will contribute to a deeper understanding of the pass-through analysis and its implications for international trade law, ultimately informing policy decisions and promoting fair trade practices.

I INTRODUCTION

‘Subsidies should never be a permanent feature of any market. They should be introduced only to address market failure and they should be withdrawn gradually as those distortions in the market are addressed.’¹

These words are of Barry Gardiner, a Member of Parliament in the United Kingdom, which was said on 06 September 2012 during a parliamentary debate in the House of Commons in respect of energy supply. Gardiner’s wise words speak to the temporary nature that subsidies should align with. In the absence of such non-permanence, there are unwanted consequences that may arise for a domestic economy.² From a global trade perspective, a core negative impact

¹ UK Parliament ‘Energy Supply Volume 549: debated on Thursday 6 September 2012’ available at <https://hansard.parliament.uk/Commons/2012-09-06/debates/12090630000001/EnergySupply>, accessed on 14 May 2023.

² See Marian Rizov, Jan Pokrivcak and Pavel Ciaian ‘CAP Subsidies and Productivity of the EU Farms’ (2013) 64 *Journal of Agricultural Economics* 537 at 538, where (in the context of agriculture) it stated that subsidies can have a beneficial effect on farm production but attracts a negative impact in relation to farm productivity. For a converse argument see Robert Gulotty ‘WTO Subsidy Disciplines’ (2022) 21 *World Trade Review* 330 at 331, wherein it is stated that governments assert that while some subsidies present issues, they possess a form of legitimacy absent in 'border instruments' like tariffs or quotas. It is explained that subsidies, resembling negative taxes economically, can efficiently target vital social and political objectives. The example that is given is that subsidies address regional disparities, foster innovation, and facilitate social advancement. Therefore, it is explained that trade agreements, such as the GATT/WTO system, aim to strike a balance between curbing subsidies and respecting states' autonomy. Thus, it is stated that this entails making commitments to decrease or eradicate export subsidies and minimise the impact of producer subsidies on trade flows.

of a subsidy is that it can be used by one state actor to benefit its own business actors, to the detriment of other state actors that import those business actors' subsidised goods.³

Much before a good is traded from an exporter to an importer, it would have gone through various stages of production, stages which convert input resources into final products (i.e., the good ready for trade). Situations exist where the business overseeing such conversion receives no subsidies to carry out the process, and it may seem plausible that the final product therefore should not face any countervailing measure due to an absence of a direct subsidy on the production process. However, what if the input resources, such as the materials used, were subsidised? These subsidised input resources surely affect the cost of the final good produced, so can a Member of the World Trade Organisation (WTO) then justify their measure countering the subsidisation of an imported good on the basis that the imported good used materials in its production that itself benefitted from subsidies that passed through to the final product being imported? This is the question that underlies the objective of this research piece.

This paper does not concern the subsidies that are granted directly to the production of the output good, but rather only to the input resources utilised.⁴ On one hand, if the subsidies granted to input resources are completely disregarded, WTO Members are limited in their imposition of countervailing measures, as they would only be legally allowed to focus on the subsidies provided to the production process of the good. However, on the other hand, if international trade law permits importing countries to consider the subsidies granted to the input resources used to produce the output good in the determination of countervailing measures, then the overall costs of the output product increase in the importing Member's territory.⁵ Investigating the legal process which analyses the movement of a subsidy's benefit through a production process from input resources to the output good is the objective of this paper.

In pursuit of this objective, the significance of the 'pass-through analysis', its challenges, ambiguity, and interpretation by the WTO Dispute Resolution Body is provided. Thereafter, recommendations are given with the aim of shedding light on the vague concept of the pass-through analysis in countervailing investigations. However, to begin with, the details of these investigations are provided. This requires concepts such as subsidies, its 'benefit' element, and its preconditions to first be understood.

³ Agus Supriyo and Satria Unggul Wicaksana Prakasa 'Subsidies and Countervailing Measures: Challenges in International Trade Law' (2021) 7 *Jurnal Komunikasi Hukum* 10 at 17.

⁴ It is submitted that there is no analysis needed regarding the subsidies granted directly to the production of an output good, or a good ready for trade. It is already evident that such a good has benefitted from the subsidy, and thus countervailing measures can be easily applied.

⁵ This then has a negative effect on the exporter of such goods as it tightens profit margins.

II UNDERSTANDING SUBSIDIES AND COUNTERVAILING INVESTIGATIONS

(a) Granting of a subsidy by a WTO member

As a preliminary step, it is important to consider what exactly constitutes a subsidy in WTO law. This is because in the pass-through analysis, it is the so-called ‘movement’ of the subsidy’s benefit that is being examined. It should be noted here that WTO law in this context includes, *inter alia*, the Agreement on Subsidies and Countervailing Measures (‘SCM Agreement’), which contains legal provisions regarding subsidies as well as the rules that govern countervailing measures.⁶ In common parlance, a subsidy is generally regarded as some sort of support often received from the government.⁷ However, as will be seen, the SCM Agreement encompasses a more technical and precise definition of a subsidy.

Article 1.1 of the SCM Agreement outlines the definitional requirements of a subsidy which encompasses two main components. Firstly, the subsidy must be a financial contribution by government and secondly, such contribution must confer a benefit.⁸ These two elements are the legs with which a subsidy stands, and in the absence of either one, a subsidy is non-existent. If an alleged subsidy does not meet this particular definition in the SCM Agreement, then subsequent subsidy and countervailing investigations (in which the pass-through analysis finds application) would be fruitless and unnecessarily resource-consuming, with the complainant ultimately being disappointed from the onset. Therefore, each of these elements are expanded on below, with mention first being given to financial contributions by governments, and then special attention being drawn to the element of a benefit under a separate heading thereafter.

Article 1.1(a)(1) of the SCM Agreement revolves around what the financial contribution component of a subsidy entails. Accordingly, this first element of financial contributions by a government exists in the following circumstances:

⁶ Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

⁷ See Oxford Learner’s Dictionaries ‘Subsidy’ available at https://www.oxfordlearnersdictionaries.com/definition/american_english/subsidy#:~:text=noun-,noun,reduce%20the%20level%20of%20subsidy, accessed on 26 November 2023; where a ‘subsidy’ is defined as the money that the government or institution pays to lessen the costs associated with the production or rendering of a good or service respectively in order for the overall price to be kept low.

⁸ Article 1.1(a) and (b) of the SCM Agreement. Also see Cleo Verkuijl, Harro van Asselt, Tom Moerenhout, Liesbeth Casier & Peter Wooders ‘Tackling Fossil Fuel Subsidies through International Trade Agreements’ *Climate Strategies* November 2017 at 16, available at https://climatestrategies.org/wp-content/uploads/2017/11/CS-Report_FFS-2017.pdf, accessed on 14 June 2023; Joseph F Francois & David Palmeter ‘US - Countervailing Duty Investigation of DRAMS’ (2008) 7 *World Trade Review* 219 at 219, where a subsidy is defined as ‘the provision of a financial contribution that confers a benefit to a specific enterprise or industry or group of enterprises or industries’. The fact that the two elements has found its way into these sources’ interpretation of a subsidy’s meaning, indicates the gravity of the elements in the realm of comprehending such a term in international trade law.

- (1) Where the practice of government encompasses the direct transfer, or potentially thereof, of funds or liabilities.⁹ The SCM Agreement includes the examples of loans and equity infusion in this regard.¹⁰ For example, the German government planning to provide \$17 billion in 2024 to gas plants in order for these plants to construct and operate hydrogen-ready gas power would fall into this first category of governmental financial contribution, and such assistance by the government can therefore be regarded as a subsidy (if it meets the benefit requirement as well).¹¹
- (2) Where government revenue is waived or not collected, despite it being due.¹² Tax credits as a form of a fiscal incentive is an example of this.¹³ An example of this category of financial contribution would be China's government not collecting tax from the new energy vehicle industry until the year 2027.¹⁴ Such vehicles are therefore subsidised from a trade perspective.
- (3) Where a government either supplies goods or services (excluding that of general infrastructure) or acquires goods through payment.¹⁵ This third type of contribution differs from the first one in that an actual product or service is given by the state to the recipient, as opposed to money. When the recipient uses such government-provided goods or services in the production of a certain product, that product is then said to be subsidised.
- (4) Where funding entities or systems receive payments from a government or where a private entity is directed by a government to make any one or more of the three above-mentioned contributions which is not usually done by that government.¹⁶

This first element relating to governmental financial contributions can be substituted, according to article 1.1(a)(2) of the SCM Agreement, with any type of 'income or price support' as contemplated in Article XVI of the GATT 1994.¹⁷

⁹ Article 1.1(a)(1)(i) of the SCM Agreement.

¹⁰ Article 1.1(a)(1)(i) of the SCM Agreement.

¹¹ Riham Alkousaa 'Germany outlines \$17 bln plan to subsidise gas-to-hydrogen shift' *Reuters* 05 February 2024 available at <https://www.reuters.com/business/energy/germany-agrees-subsidy-plans-hydrogen-ready-gas-power-plants-2024-02-05/>, accessed on 07 February 2024.

¹² Article 1.1(a)(1)(ii) of the SCM Agreement.

¹³ Article 1.1(a)(1)(ii) of the SCM Agreement.

¹⁴ Giulia Interesse 'China Extends NEV Tax Reduction and Exemption Policy to 2027' *China Briefing* 28 June 2023 available at <https://www.china-briefing.com/news/china-extends-nev-tax-reduction-and-exemption-policy-to-2027/>, accessed on 05 October 2023.

¹⁵ Article 1.1(a)(1)(iii) of the SCM Agreement.

¹⁶ Article 1.1(a)(1)(iv) of the SCM Agreement.

¹⁷ General Agreement on Tariffs & Trade 1994 (GATT 1994) 1867 U.N.T.S. 190, 33 I.L.M. 1153 (1994); Article 1.1(a)(2) of the SCM Agreement.

Schwartz *et al.* explains that in the GATT setting, a subsidy in international trade can be viewed as a distortion.¹⁸ The reasoning for this is based on the notion that subsidies create a ‘disparity’ between the costs that a single business incurs whilst producing a certain good and the actual costs that were involved in the entire production process.¹⁹

Subsidies are not a light matter, as its impact on the fiscus runs into the millions. For example, in the National Budget of 2023 in South Africa, the Department of National Treasury allocated R15.7 billion in current transfers and subsidies for industrialisation and exports.²⁰ The subsidies on products and production in public corporations for 2023-2024 is set at R27 687.4 million and the same subsidies for private enterprises amounts to R4 754.8 million.²¹ If another WTO Member imposes measures to counter the subsidised South African exports, then it is understandable that a heavy cost would be experienced by the South African community.²²

(b) Discussing the notion of a benefit

As mentioned above, the second element of a subsidy, is that it must confer a benefit.²³ This finds authority in the definition of a subsidy provided in the SCM Agreement, specifically article 1.1(a)(2), which states “*a benefit is thereby conferred*” in relation to the governmental financial contribution. As will be shown, this term ‘benefit’ is highly technical in the area of international trade and carries a more specific meaning in comparison to its use by the layman.

In order to quantify a benefit, article 14 of the SCM Agreement is particularly crucial. It is titled ‘*Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*’ and lists four guidelines that such a calculation should abide by, namely:

- (1) Except where the investment decision is not an ordinary investment practice by a Member’s private investors in a specific industry, the granting of equity capital by a

¹⁸ Warren F Schwartz & Eugene W Harper Jr ‘The Regulation of Subsidies Affecting International Trade’ (1972) 70 *Michigan Law Review* 831 at 833.

¹⁹ Warren F. Schwartz at 833. By ‘entire production process’ it is deduced that this refers to all processes through which the particular good has gone through, even if through various industries and businesses. For more information on subsidies see Stehn J *Subsidies, countervailing duties, and the WTO: Towards an open subsidy club* (No. 276) (1996); Singh, G *Subsidies in International Trade from the WTO Perspectives in: Subsidies in the Context of the WTO’s Free Trade System* (2017).

²⁰ Department of National Treasury ‘Budget 2023 Budget Review’ available at <https://www.treasury.gov.za/documents/national%20budget/2023/review/FullBR.pdf>, accessed on 18 May 2023, see Key Budget Statistics.

²¹ Department of National Treasury 215.

²² Whilst South Africa rarely interacts with countervailing duties and investigations, it is nevertheless a popular occurrence in other Member States. See Nathan Strout ‘US launches antidumping and countervailing duty investigation of imported shrimp’ *Seafood Source* 22 November 2023 available at <https://www.seafoodsource.com/news/supply-trade/us-launches-antidumping-and-countervailing-duty-investigation-of-imported-shrimp>, accessed 11 December 2023, where the U.S. Department of Commerce (DOC) has recently undertaken antidumping duty investigations pertaining to frozen shrimp from Ecuador and Indonesia and countervailing duty investigations in relation to frozen shrimp from Ecuador, India, Indonesia, and Vietnam.

²³ Verkuijl *et al.* at 16.

government is not regarded as conferring a benefit.²⁴ From the wording of this provision in article 14 of the SCM Agreement, it would seem that equity capital, whether provided by the government or the private sector, is to be considered as an investment as opposed to a subsidy per se.

- (2) Except where a difference exists in the repayment amount of a loan from the government and the amount that the business would have repaid for a loan that they could have actually received from a comparable commercial entity, a government loan is not regarded as conferring a benefit.²⁵ In the former instance, it is the difference in the two repayment amounts that would be considered as the ‘benefit’.²⁶ This is an interesting point relating to the first financial contribution type described in the heading above (a liability received – which includes loans), in that if a loan repayment amount is the same towards government and a bank for instance, then such a loan from the government is not a subsidy. However, if the repayment amount is less towards the government than what it would have been to the bank, then the amount which it is less than is considered the benefit and therefore a subsidy.
- (3) Except where a difference exists in the repayment amount of a loan that is guaranteed by the government and the amount that the business would have repaid for a loan that they would have received from a comparable commercial entity without such guarantee by the government, a governmental loan guarantee is not regarded as conferring a benefit.²⁷ In the former instance, it is the difference in the two repayment amounts, with the necessary adjustments to cater for fees, that would be considered as the ‘benefit’.²⁸
- (4) Except where the supply of goods or services by a government is met with remuneration that is lower than adequate or where a government purchases goods that is above adequate payment, such supply or purchase is not regarded as conferring a benefit.²⁹ This adequacy element is established in comparison to the current market conditions for the relevant good or service in the Member’s territory where it is supplied or purchased.³⁰ This may involve an inspection of ‘*price, quality, availability,*

²⁴ Article 14(a) of the SCM Agreement.

²⁵ Article 14(b) of the SCM Agreement.

²⁶ Article 14(b) of the SCM Agreement.

²⁷ Article 14(c) of the SCM Agreement.

²⁸ Article 14(c) of the SCM Agreement.

²⁹ Article 14(d) of the SCM Agreement.

³⁰ Article 14(d) of the SCM Agreement.

marketability, transportation’ that relate to the sale at hand.³¹ This provision relates to the third type of financial contribution that government can make, namely government providing goods and/or services to a recipient. In essence, this provision stipulates that if a producer or service provider has to pay the government less than what it would have paid to other entities for specific goods or services, or the government provides an excess of the goods or services in comparison to the payment it has received, then the producer or service provider has received a benefit, and thus a subsidy.

In addition to the above guidelines, article 14 of the SCM Agreement also demands that a Member’s national legislation and/or regulations must cater for the method undertaken by the investigating authority (in relation to countervailing measures) when calculating the conferred benefit as per article 1.1(a)(2). An example of this is section 771B of the Tariff Act of 1930 of the US, which is discussed later on in reference to the *US – Canadian Pork* case.

A doubt may arise as to how far article 14 assists in interpreting article 1 of the SCM Agreement, especially because article 14 begins with the phrase: ‘*For the purpose of Part V*’. However, this possible dilemma was sufficiently addressed in the *Canada – Measures Affecting the Export of Civilian Aircraft*³² case, wherein the Appellate Body (AB) explained that even though article 14 starts with a reference to Part V of the SCM Agreement, which pertains to countervailing measures, it nevertheless bears applicability to the interpretation of article 1.1(b)’s use of the word benefit as well.³³ The AB explained that because article 14 makes mention of paragraph 1 of article 1,³⁴ all the while in reference to the benefit calculation, it means that the term ‘benefit’ bears the same meaning and context in both articles 1.1 and 14 of the SCM Agreement.³⁵ Of interest is that the AB further expressed that article 14’s use of the phrase ‘benefit to the recipient’ indicates that article 1.1’s use of the word ‘benefit’ also then refers to a the benefit that a recipient receives, and does not relate to the cost to government.³⁶

This notion of a recipient seems to be a striking feature when understanding what a ‘benefit’ entails. For example, continuing with the *Canada – Aircraft* case, the Appellate Body (AB) stated that a benefit does not prevail in the abstract, rather a recipient has to receive and enjoy it.³⁷ The AB explained that in terms of the logical nature of a benefit, it can only exist if

³¹ Article 14(d) of the SCM Agreement.

³² Hereinafter *Canada – Aircraft*.

³³ *Canada – Aircraft* at 39.

³⁴ ‘...[B]enefit to the recipient conferred pursuant to paragraph 1 of Article 1’.

³⁵ *Canada – Aircraft* at 39.

³⁶ *Canada – Aircraft* at 39. Canada had argued, to the disagreement of the AB, that benefit in article 1.1 of the SCM Agreement refers to the positive impacts on the cost to government.

³⁷ *Canada – Aircraft* 38 para 154.

either natural or juristic persons, or a group of them thereof, receives something and ultimately this means that the word ‘benefit’ insinuates that there is also a recipient.³⁸

The *Canada – Aircraft* case is one which adds a plethora of interpretation to the benefit element of a subsidy in the SCM Agreement. The concept of a benefit having a positive impact on the recipient is one which the AB in this case has also not failed to make mention of, as they stated:

‘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.’³⁹

In consideration of the above points, it can be positively affirmed that when the term ‘benefit’ is used in the realm of international trade law, and in specific reference to subsidies, there firstly has to be a receiver of it in order for it to even exist. Secondly, the nature of a benefit comes into play and, as the AB in *Canada – Aircraft* was quoted above, a benefit leaves the recipient in a position that is ‘better off’ or greater than before. There is a third point that has to be considered, which relates to the action of granting or ‘conferring’ of the benefit.

The AB in *Canada – Aircraft* had expressed that the scrutiny under article 1.1(b) of the SCM Agreement must specifically focus on the recipient of the benefit as opposed to the bestower of such benefit.⁴⁰ They justified this determination by making reference to the common understanding of what the word ‘confer’ means, and then stated that ‘confer’ in its ordinary sense means to give, grant or bestow something.⁴¹ The AB had then explained from both deep legal interpretation and a high-level English literary point, one which should rather be quoted as opposed to rephrased, why ‘confer’ in this context focuses on the recipient by stating:

‘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.’⁴²

Here the AB is emphasising that the bestower of the benefit should not derive attention when reading article 1.1(b) of the SCM Agreement, but rather it is the receiver of such benefit that deserves the necessary focus. Therefore, in this *Canada – Aircraft* matter, the AB found that Canada's submission that the ‘cost to government’ is a method of determining what a

³⁸ *Canada – Aircraft* 38 para 154.

³⁹ *Canada – Aircraft* 39 at para 157.

⁴⁰ *Canada – Aircraft* 39 para 154.

⁴¹ *Canada – Aircraft* 39 para 154.

⁴² *Canada – Aircraft* 39 para 154.

benefit is, is ‘at odds with the ordinary meaning of Article 1.1(b)’.⁴³ The AB had explained that this provision places a spotlight, not on the government supplying the financial contribution, but rather on the recipient, which is then contrary to Canada’s argument of what a benefit entails.⁴⁴

As previously mentioned, countervailing measures and its subsequent investigations finds its root in the provision of subsidies by an exporter’s government. Without such subsidies having been granted, the pass-through analysis would not be needed, nor would it even be possible.

(c) The initiation of a countervailing investigation

An ‘investigation’ in a legal context is generally characterised by the authorised search for information, often referred to as evidence, in order to determine the truth or support a preconceived notion. Subsidy and countervailing investigations incorporate a similar undertaking, with its authority of application being found in Article 11.1 of the SCM Agreement. According to this provision, the initiation of an investigation must commence when a domestic industry, or one who is acting on their behalf, makes a written application for the determination of an alleged subsidy’s presence, degree, and impact.⁴⁵

However, such a written application is not an absolute requirement at all times. Article 11.6 of the SCM Agreement allows for the authorities to initiate an investigation in the absence of the written application by domestic industries, if such authorities are in possession of sufficient evidence that demonstrates a causal link between an injury and a subsidy.⁴⁶ This, of course, is a special circumstance and it is important to note that the evidence must justify the investigation that has been initiated without an application from a domestic industry.⁴⁷

An interesting point worth considering relates to the timeframe with which these countervailing investigations have to abide by. Article 11.11 of the SCM Agreement provides that, in instances other than special circumstances, investigations must conclude within a 12-month period (one year) and must not go beyond 18 months since the investigation was initiated.⁴⁸

⁴³ *Canada – Aircraft* 39 at para 154.

⁴⁴ *Canada – Aircraft* 39 at para 154.

⁴⁵ SCM Agreement art. 11.1.

⁴⁶ Article 11.6 of the SCM Agreement.

⁴⁷ Article 11.6 of the SCM Agreement.

⁴⁸ Article 11.11 of the SCM Agreement. For more on countervailing duties and investigations see: Terrence P Stewart, Amy S Dwyer & Marta M Prado ‘Antidumping, Countervailing Duties and Trade Remedies: Let’s Make a Deal-Views from a Domestic Practitioner’ (2003) 37 *The International Lawyer* 761.

(d) Differentiating countervailing duties from anti-dumping duties

Between the years 1995 and 2012, a recorded statistic at the WTO is that more than 40 of its member states had initiated 4230 anti-dumping investigations and 302 countervailing investigations.⁴⁹ There is a significant difference between these two numbers, with countervailing investigations bearing a far less occurrence in comparison to anti-dumping investigations. This raises the question as to what the difference between anti-dumping and countervailing duties are, and if the pass-through analysis applies to one or both of the investigations connected therewith.

To understand what a ‘countervailing duty’ is one does not have to look far as article VI.3 of the GATT 1994 explains that it refers to a special duty that is imposed with the objective of ‘offsetting’ a directly or indirectly granted subsidy on a merchandise’s manufacture, production, or exportation.⁵⁰ In fact, this particular article additionally stipulates, in reference to a contracting party’s product being imported into another contracting party’s territory, the latter party must not impose countervailing duties in excess of the subsidy amount that was granted to the imported product’s manufacture, production, or exportation, including to its transportation, either in a direct or indirect manner.⁵¹ Further to this, it should be noted that countervailing duties are governed by the Agreement on Subsidies and Countervailing Measures.⁵² Supriyo and Prakasa explain that the primary role of countervailing measures has to do with balancing the adverse effects caused by subsidies applied, whether through direct or indirect means, to goods and services during production, manufacturing, and transportation.⁵³

On the other hand, there are anti-dumping duties which are governed by a separate agreement all-together, that being the Anti-Dumping Agreement.⁵⁴ A dumped product is defined in article 2.1 of the Anti-Dumping Agreement as a product which is sold by one country to another at a sale price that is lower than its normal value in the originating country for a comparable item intended for domestic consumption.⁵⁵ Zhang notes that anti-dumping duties are firstly used frequently by developed and developing states and secondly, such duties are imposed in order to protect domestic industries from competition.⁵⁶

⁴⁹ Wanli Li, Ziqiao Yan & Wei Sun ‘The effect of antidumping and countervailing investigations on the market value of firms’ (2014) 36 *International Review of Financial Analysis* 97.

⁵⁰ Article VI.3 of the GATT 1994.

⁵¹ Article VI.3 of the GATT 1994.

⁵² Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

⁵³ Agus Supriyo and Satria Unggul Wicaksana Prakasa at 13.

⁵⁴ Agreement on the Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement) 1868 U.N.T.S. 201.

⁵⁵ Article 2.1 of the Anti-Dumping Agreement.

⁵⁶ Hongyong Zhang, Political connections and antidumping investigations: Evidence from China’ (2018) 50 *China Economic Review* 34.

Anti-dumping and countervailing duties do have similar purposes. As Li *et al.* explained, anti-dumping and countervailing duties offer protection to domestic producers from unfair trade practices.⁵⁷ Further to this, another similarity is that the investigations pertaining to both anti-dumping and countervailing duties have three common occurrences, namely, there is a petition, then an initiation, and finally a decision.⁵⁸ A petition is filed by a domestic industry injured in both instances, either being injured by the dumped imports or the subsidised imports.⁵⁹

However, there is a technical difference that exists between countervailing and anti-dumping duties, a difference which affects the applicability of the pass-through analysis. In countervailing instances, it is subsidies provided by government that is the object of concern, wherein legal standards and procedures are set and any deviations thereof can be traced back.⁶⁰ Inversely, however, dumping is said to be an industry or company specific action, it is 'independent of government policy' and its ascertainment of its presence requires market-based variables, including but not limited to, prices and costs.⁶¹

This in essence means that the overall impact of dumping can occur if the import product is being sold domestically below the prices of domestic industries. Such lower price could have occurred by the exporting industry's own volition, or because such exporting industry benefited from subsidies, and this is where the key difference between anti-dumping and countervailing duties come in. Anti-dumping duties tackle dumping that occurs due to an exporting industry's own volition, meaning that such an industry was able to export their products at a low price due to the very simple reason that they can afford to do so (any reason other than being subsidised by government). When the government has subsidised the production of an exporting industry's product, this then requires countervailing duties to come into play in order to offset the impact of such subsidies. Countervailing duties, being a countervailing measure, would initiate countervailing investigations upon disagreements relating to its imposition, and because the pass-through analysis primarily concerns itself with the movement of a subsidy's benefit it is argued that the pass-through analysis only concerns countervailing measures and

⁵⁷ Wanli Li, Ziqiao Yan & Wei Sun 'The effect of antidumping and countervailing investigations on the market value of firms' (2014) 36 *International Review of Financial Analysis* 97 pg.98.

⁵⁸ Wanli Li, Ziqiao Yan & Wei Sun 'The effect of antidumping and countervailing investigations on the market value of firms' (2014) 36 *International Review of Financial Analysis* 97 pg.98. See Wanli Li pg. 98 where it is explained that in the United States, the United States Department of Commerce (USDOC) ascertains if a petition meets all the applicable legal requirements, then it will publish a notice of initiation and thereafter the United States International Trade Commission (USITC) decides on whether or not a material injury has been caused to the domestic industry by the imports.

⁵⁹ Wanli Li pg. 98.

⁶⁰ 'Dump Anti-Dumping' (1999) 34 *Economic and Political Weekly* 1303 at 1303.

⁶¹ 'Dump Anti-Dumping' at 1303.

not anti-dumping measures. Due to this interconnectedness that exists between the pass-through analysis and countervailing duties, which is explained greatly in depth further on in this paper, it can therefore be said that the pass-through analysis would occur far less frequently in comparison to anti-dumping issues being raised based off the earlier statistics of the occurrence of anti-dumping and countervailing investigations.⁶²

III UNDERSTANDING WHAT THE PASS-THROUGH ANALYSIS IS AND ITS RELATIONSHIP TO THE DETERMINATION OF THE COUNTERVAILING DUTY

(a) *The placement of the pass-through analysis in the grater scheme of trade*

The pass-through analysis is an undertaking that finds application in a very specific area of international trade law. For this reason, it is beneficial to first ‘map-out’ the larger components that surround this analysis and then delve into its specific meaning and application.

To start off with, the fundamentals of business theory and economics have to be recalled. In particular, the functional area relating to the operations of a business is the setting upon which the pass-through analysis comes into play. Erasmus *et al.* defines the operations function as “*that function of the business aimed at executing the transformation process*”.⁶³ This function is directly linked to the creation of products and the supply of services for purposes of achieving the business’ objectives.⁶⁴ For example, in an automobile factory, its operations function concerns the manufacture of motor vehicles, but such a factory being a business, will also have other functional areas, such as a finance department, human resources, etc. However, seeing that this paper specifically concerns the international trade of goods, services and the like are excluded. The manufacture of many products involves the conversation process of input materials into final products, such as steel being used as an input material for the production of washing machines, glass in the production of watches, plastic in the production of radios, etc.

Slack *et al.* outlines the transformation process involved in the operations function by drawing up a model showing how input resources are processed into output products.⁶⁵ Input

⁶² See Reid M Bolton ‘Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny’ (2011) 29 *Berkeley Journal of International Law* 66 at 67, wherein it is explained that the prevalence of anti-dumping investigations are extremely high because dumping elements alleged in a quick manner, it is proven in an equally speedy manner and anti-dumping duties have become a weapon in international trade relations.

⁶³ Barney Erasmus, Johan Strydom & Sharon Rudansky-Kloppers *Introduction to Business Management* 10 ed (2018) at 282.

⁶⁴ Erasmus *et al.* 282.

⁶⁵ Nigel Slack, Alistair Brandon-Jones & Robert Johnston *Operations Management* 7 ed (2013) 3. This is the relatively familiar input-process-output model. Also see Massimiliano M. Schiraldi (ed) *Operations Management* (2013) Preface wherein the operations function is described as “*the process that converts inputs (in the forms of materials, labour, and energy) into outputs (in the form of goods and/or services)*.”

resources include materials, information, customers, facilities, and staff.⁶⁶ Although this list may vary according to divergent views, it nevertheless highlights the main resources which are transformed by a business and in this regard the input resource of ‘materials’ is the centre of attention. Although this pinpointing of ‘materials’ may seem exact, further narrowing down is possible. Erasmus *et al.*, whilst acknowledging that a great variety of material may be used in the input stage, notes that two broad categories exist, namely processed and unprocessed materials.⁶⁷ Examples of processed input material include steel, glass, and plastic whereas unprocessed input material hint to more natural occurring materials, such as wool, cotton-balls, wood, etc.⁶⁸

Although prematurely stated, the subsidies granted to this input materials are nevertheless of chief concern to the pass-through analysis, and thus it can be safely submitted that the pass-through analysis exists in relation to those products that have been produced or manufactured by converting input materials to output goods. The legal understanding of this analysis will now be elaborated upon.

(b) The meaning of the pass-through analysis in WTO cases

The pass-through analysis is an undertaking that the SCM Agreement does not specifically regulate, and therefore there is a limitation in the authoritative meaning and/or process of this analysis. However, reports emanating from the Dispute Settlement Body (DSB) of the WTO have, in the past, made mention of this analysis and having a formal interpretation of it is therefore not completely absent. In the *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*⁶⁹ case, the Panel in their report had stated that the issue of the obligation under WTO law to carry out a pass-through analysis in a countervailing duty investigation had been addressed twice before, namely in the *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*⁷⁰ and the *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*⁷¹ cases. Hence, special attention is now drawn to these last-two mentioned cases for purposes of understanding what the pass-through analysis entails.

⁶⁶ Slack *et al.* 3.

⁶⁷ Erasmus *et al.* 291.

⁶⁸ See Victoria State Government ‘Properties of natural and processed materials’ 05 September 2018 available at <https://www.education.vic.gov.au/school/teachers/teachingresources/discipline/science/continuum/Pages/naturalproc.aspx>, accessed on 17 November 2023.

⁶⁹ Hereinafter *Mexico – Olive Oil*.

⁷⁰ Hereinafter *US – Canadian Pork*.

⁷¹ Hereinafter *US – Softwood Lumber IV*.

(i) *US – Canadian Pork*

In this matter, the US had imposed countervailing measures on Canadian imports consisting of fresh, chilled, and frozen pork.⁷² Canada objected to these measures on the basis that article VI.3 of the GATT 1947⁷³ had been violated and submitted that the US' calculation of the subsidisation amount pertaining to the imported pork was incorrect.⁷⁴ Due to such an alleged mistaken calculation, Canada had then argued that the US did not guard against the countervailing duties being in excess of the subsidisation amount as required by article VI.3 of the GATT 1947.⁷⁵ It is submitted here that this is the ground on which the pass-through analysis finds application, when subsidy amounts and the countervailing duty impose thereof are unparallel. The US had of course maintained that the countervailing duties imposed by them was in line with article VI.3 and requested the Panel to reject Canada's complaint.⁷⁶

The first point that must be noted is that the Panel acknowledged that article VI.3 of the GATT 1947 limits the countervailing duty amount to the subsidy amount that has been '*granted directly or indirectly on the production of "such product"*'.⁷⁷ The Panel had then held that the US could only impose countervailing measures on the imported pork if it is determined that a subsidy was granted on the pork's production.⁷⁸ It is deduced from the wording of the Panel's last mentioned sentiment that a direct or indirect subsidy on the pork's production suffices when looking at the adequacy of the countervailing duty imposed. It should be noted that this, in itself, does not expound on the pass-through analysis. In fact, it does not add much to what can already be surmised after reading article VI.3 of the GATT. Nevertheless, this view of the Panel reinforces the idea that indirect subsidies carry an equal weight to direct subsidies in the determination of countervailing duties.

It is interesting to note that the US relied on a two-part test, based on section 771B of their Tariff Act of 1930, in substantiating their determination of the imposition of countervailing measures.⁷⁹ In this regard, the Panel found that such a two-part test was

⁷² *US – Canadian Pork* 1 at para 1.1. The author wishes to emphasise that the views expressed in this research, specifically regarding WTO cases, does not endorse or condone the consumption of meat or animal-derived products.

⁷³ General Agreement on Tariffs and Trade (1947) (GATT 1947) 61 Stat. pt. 5, T.I.A.S. 1700, 55 U.N.T.S. 194. See Heading II(d) '*Differentiating countervailing duties from anti-dumping duties*' above wherein article VI:3 is discussed.

⁷⁴ *US – Canadian Pork* 4 at para 3.1.

⁷⁵ *US – Canadian Pork* 4 at para 3.1.

⁷⁶ *US – Canadian Pork* 4 at para 3.2.

⁷⁷ *US – Canadian Pork* 13 at para 4.6. See *In Mexico – Olive Oil* 44 at para 7.132, wherein the Panel signalled that 'such product' as alluded to in this *US – Canadian Pork* case, refers to the 'imported product'.

⁷⁸ *US – Canadian Pork* 13 at para 4.6.

⁷⁹ *US – Canadian Pork* 7 at para 3.11. Section 771B of the Tariff Act of 1930 reads '*In the case of an agricultural product processed from a raw agricultural product in which (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and (2) the processing operation adds only*

insufficient in determining if all of a subsidy's benefit granted to an agricultural input had passed through to the processed product.⁸⁰

The main disputed issue in this case was not the meaning of a subsidy, but rather whether or not a subsidy provided to one industry's producer can carry over to another industry's production and thus justify a countervailing duty bestowed on the produced good.⁸¹ The Panel had indicated that the clear wording of article VI.3 of the GATT 1947 allows for the US to impose a countervailing duty on the Canadian pork if it is concluded that the pork's production was granted a subsidy, and it is not sufficient that the pork's trade was merely impacted by subsidies bestowed to the swine producers.⁸² This is a helpful expression, despite it being somewhat ambiguous. It is submitted that the Panel here meant that simply because an input product (i.e., the swine) has been subsidised does not automatically mean that the processed product is indirectly subsidised, but rather a determination has to be made as to whether or not the subsidy's benefit has passed through to the processed product (i.e., the pork).

Of key importance is that the Panel stated that the subsidies granted to the swine producers could only be passed through to the pork's production if such subsidies led to lower prices paid by Canadian pork producers for Canadian swine in comparison to what they would pay for the swine from alternative sources that have a commercial availability of the supply.⁸³ Here the Panel is getting to the crux of matter. How would one know if a subsidy's benefit has passed from an input material to a processed output? According to the Panel, this is the case if the processed product enjoys a lower price in comparison to its market equals. This of course is not a set-in-stone principle, nor is it the sole method of determining the pass-through of the subsidy's benefit, but it is one of the most tangible and practical methods of doing so. The Panel admitted that this meant that an analysis of the subsidy's impact on the price of swine was required in order to determine if it can be said that the pork production has been subsidised due to the swine producers benefitting from subsidies.⁸⁴ Despite this last line being a relatively short viewpoint from the Panel, it does encapsulate the concept of the pass-through analysis. The Panel is, in essence, stating that an analysis of the processed product's price in relation to other similar products is needed in order to conclude if the subsidised input materials affected the processed product, i.e., if the processed product benefitted from the subsidies granted to its

limited value to the raw commodity, countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.'

⁸⁰ *US – Canadian Pork 7* at para 3.11.

⁸¹ *US – Canadian Pork 7* at para 4.6.

⁸² *US – Canadian Pork 7* at para 4.6.

⁸³ *US – Canadian Pork 7* at para 4.9.

⁸⁴ *US – Canadian Pork 7* at para 4.9.

input materials. This then paints the pass-through analysis, in part, as a comparative analysis where processed products are compared to other similar products.

Ultimately, the Panel in this *US – Canadian Pork* case found in favour of Canada and determined that the countervailing duties that were levied by the US was contrary to article VI.3 of the GATT 1947.⁸⁵ The basis of such a determination related to the US' deduction that the production of the pork in Canada had benefitted from subsidies, yet such deduction was found to be incongruous to the requirements of that GATT 1947 provision, specifically article VI.3.⁸⁶

(ii) *US – Softwood Lumber IV*

In 2002, Canada had a trade dispute with the United States pertaining to the latter's imposition of a countervailing duty on certain softwood lumber from Canada as determined by the US Department of Commerce.⁸⁷ The measures in dispute included, but was not limited to, the inception and conduct of the investigation, the final outcome, as well as the provision of expedited reviews.⁸⁸

The Panel established at the WTO found in favour of Canada, who had claimed that the US' measures were inconsistent with and in violation of duties of the United States as per various articles of the SCM Agreement and the GATT 1994.⁸⁹

The AB affirmed the Panel's determination that the United States breached SCM Agreement and GATT 1994 provisions by neglecting to assess whether subsidies were transferred during sales of logs from sawmill-owning harvesters to unrelated lumber producers.⁹⁰

The need for the pass-through analysis had been succinctly expressed by the AB in this *US – Softwood Lumber IV* case. The AB had stated that it would be impossible to conclude if the countervailing duties that were imposed on processed products are in excess of the total subsidy amount that has been accrued to such products without first determining whether or not, and to what extent in terms of amounts, the '*subsidies bestowed on the producer of the input flowed through, downstream, to the producer of the product processed from that input*'.⁹¹ This is a critical expression by the AB as the pass-through analysis is captured in words

⁸⁵ *US – Canadian Pork* 15 at para 5.1.

⁸⁶ *US – Canadian Pork* 15 at para 5.1.

⁸⁷ World Trade Organization 'DS257: United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada' available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds257_e.htm, accessed 14 August 2023.

⁸⁸ World Trade Organization available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds257_e.htm.

⁸⁹ Articles 1, 2, 10, 11, 12, 14, 15, 19, 22 and 32.1 of the SCM Agreement and Articles VI:3 and X:3 of the GATT 1994.

⁹⁰ World Trade Organization available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds257_e.htm.

⁹¹ *US – Softwood Lumber IV* 56 at para 141.

completely for the first time. Subsidies flowing downwards from an input product to an output or processed product – this is the determination that underlies the objective of the pass-through analysis. The AB has stated that the excess calculation of countervailing duties, which is the hallmark of article VI.3, cannot be achieved unless and until the total subsidies accruing to the processed product has been determined. It is submitted that this determination is the purpose of the pass-through analysis. It can be read into this statement that by total subsidies, the AB has referred to subsidies that are not only granted to the production of the processed product itself (i.e., direct subsidisation) but also refers to the subsidies that were granted to the input materials used in the production or manufacture of the processed products.

This above view of the AB has several implications. First, it establishes the absolute necessity of carrying out a pass-through analysis in order to satisfactorily determine if the imposed countervailing duties equates to a greater amount when compared to the subsidy that pertains to the good. Secondly, by stating ‘subsidy accruing to that product’ and then ‘subsidies bestowed on the producer of the input’, the AB has put forward the concept that where the input material has been subsidised, then such a subsidy in some way or another has an impact on the production process of the output product and thus the action of ‘accruing’ to this latter product is described. Thirdly, a brief overview of the pass-through analysis is described, as the AB speaks to the notion of establishing if the subsidies granted to the input material flows to (or in other words, passes through to) the output product.

However, the AB did not simply stop after introducing the concept of the pass-through analysis, and instead went on further to reason it by stating:

‘Because Article VI:3 permits offsetting, through countervailing duties, no more than the “subsidy determined to have been granted ... directly or indirectly, on the manufacture [or] production...of such product”, it follows that Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products.’⁹²

The AB has ingeniously found a ground in the GATT 1994 to justify the necessity and parameters of the pass-through analysis. By article VI:3 of the GATT 1994 making reference to subsidies being granted indirectly to the production of a product, the pass-through analysis is born. This is because interpretation of this provision allows for the rational argument that subsidies in relation to input materials of a products production constitutes the indirect granting of a subsidy to the latter processed product. Furthermore, the AB clarified that a countervailing measure (which in the instance of *US – Softwood Lumber IV* related to countervailing duties)

⁹² *US – Softwood Lumber IV* 56 at para 141.

should not be resorted to if the subsidy of the input material did not pass-through to the output product.

Any doubts arising in relation to whether or not indirect subsidies include those subsidies granted to input products, is cleared by importantly taking note of the following that was further stated by the AB in this *US – Softwood Lumber IV* case:

‘It is only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties.’⁹³

In this regard, the AB was clear that a countervailing duty amount has to equate to the indirect and direct subsidies accruing to the processed product, with the indirect subsidy including those that were granted to the input material used in the production of the output product.

The AB had not randomly come to the above conclusion as it is worth considering that the AB had expressed the above in reference to interpreting article VI:3 of the GATT 1994 and had justified such interpretation by stating that the definition of countervailing duties, as contemplated in footnote 36 to Article 10 of the SCM Agreement, supports this interpretation.⁹⁴ Support for this interpretation is further accounted for by the AB relying on the general definition of a subsidy as in Article 1 of the SCM Agreement.⁹⁵

The *US – Softwood Lumber IV* case sheds great light on the concept of the pass-through analysis in countervailing investigations. In terms of the requirements that must be satisfied in order to justify the imposition of countervailing duties, the AB had acutely explained that:

‘If countervailing duties are intended to offset a subsidy granted to the producer of an input product, but the duties are to be imposed on the processed product (and not the input product), it is not sufficient for an investigating authority to establish only for the input product the existence of a financial contribution and the conferral of a benefit to the input producer. In such a case, the cumulative conditions set out in Article 1 must be established with respect to the processed product, especially when the producers of the input and the processed product are not the same entity.’⁹⁶

This above sentiment links back to the two elements of a subsidy’s definition,⁹⁷ and as explained by the AB, these elements of financial contribution and benefit must not only be met

⁹³ *US – Softwood Lumber IV* 56 at para 141.

⁹⁴ *US – Softwood Lumber IV* at 56.

⁹⁵ *US – Softwood Lumber IV* at 56-57.

⁹⁶ *US – Softwood Lumber IV* at 56-57.

⁹⁷ See ‘(b) *Discussing the notion of a benefit*’ under ‘II *Understanding subsidies and counter above*’.

by the input product (i.e., input material), but also by the processed product, all the while referring to the one subsidy originally and only granted to the input material. This is deduced by the AB's use of the phrase 'not sufficient', which indicates that both the input and output products are answerable to the elements of a subsidy. This is a complex point, and another way of understanding it would be to say that a subsidy bestowed on an input material must meet the elements of financial contribution and conferment of a benefit, and in order for this subsidy to be successfully 'passed-through' to the processed product, then these elements must 'pass-through' as well. Of course, the element of financial contribution requires no further analysis, but it is the benefit element that matters the most. This is clearly true as the AB had affirmed the following further on:

'The investigating authority must establish that a financial contribution exists; and it must also establish that the benefit resulting from the subsidy has passed through, at least in part, from the input downstream, so as to benefit indirectly the processed product to be countervailed.'⁹⁸

The pass-through analysis therefore looks at the movement of the benefit element of a subsidy that has been granted to an input material to a processed product, and whether or not that final product can therefore be countervailed by certain duties based on it enjoying such original subsidised input materials.

IV DISCUSSION

(a) Challenges of the pass-through analysis

In light of all of the above information, one can see that there are several complexities that face the pursuit of understanding what the pass-through analysis means. For instance, no WTO agreement defines the pass-through analysis; DSB cases explain what this analysis entails but it is warped in a manner that makes it relatively difficult to understand from a non-trade background; and a systematic approach is absent when unpacking the steps of this analysis.⁹⁹

Development of law is an ever-ongoing process, and the same can be said of the international legal principles that pertain to countervailing investigations. Ambiguity is one issue that drafters of these international trade agreements ought to consider, so as to lessen the chances of trade disputes occurring in the future.

⁹⁸ *US – Softwood Lumber IV* at 56-57.

⁹⁹ Further information on the pass-through analysis can be found through the following sources: Sherzod Shadikhodjaev 'How to Pass a Pass-Through Test: The Case of Input Subsidies' (2012) 15 *Journal of International Economic Law* 621; Brian Kelly 'The Pass-Through of Subsidies to Price' (2014) 48 *Journal of World Trade* 295; Gagné G & Roch F 'The US–Canada softwood lumber dispute and the WTO definition of subsidy' (2008) 7 *World Trade Review* 547.

(b) Ambiguity of WTO law

The premise on which this paper has been built is that the trade agreements adopted by the WTO and its state members fail to provide an adequate meaning and process of the pass-through analysis. This is clearly justified when the GATT 1994 and the SCM Agreement are read in its totality. To recapitulate, there are in total three major provisions from these two agreements that introduces and assists, but does not solve, the ambiguity surrounding the pass-through analysis. First, there is article VI.3 of the GATT 1994 and the most significant aspect of this provision is that it prohibits countervailing duties to be levied against a product in excess of the subsidies that such a product enjoys, even if indirectly so. Indirect enjoyment of subsidies – this is where article VI.3 of the GATT 1994 peaks and closes in terms of its relevance to understanding the pass-through analysis. It does not explain what an indirect enjoyment of subsidies entails, nor does it refer to how processed products are influenced by subsidised input materials.

The second provision major provision is article 1.1 of the SCM Agreement. This provision is evidently relevant as it defines what a subsidy is. Tying into this, comes the third major provision which is article 14 of the SCM Agreement that outlines the calculation of a benefit in relation to a subsidy. Put in simple words, without there being a benefit, there is no subsidy, which means that a countervailing investigation is redundant, as a countervailing duty only exists to counter a subsidy. In the absence of a countervailing investigation, the pass-through analysis is devoid of any relevance, as this analysis exists to determine the justifiability of a countervailing duty applied to processed products owing to it being made of subsidised input materials. This ambiguous treatment of the pass-through analysis leads only to one recommendation, that of clarity, which is highlighted below.

(c) Recommendation

One of the key issues that this paper has highlighted is that there is a lack of an adequate explanation and provision for the pass-through analysis in WTO agreements. Where it does find application, it is coated in ambiguity and uncertainty. If it were not for the DSB, particularly in reference to the *US – Canadian Pork* and the *US – Softwood Lumber IV* cases, the existence of the pass-through analysis in countervailing investigations would be borderline fictional. Whether it is in these formal agreements, annexures to it thereof, further WTO legal matters in at the DSB, or memorandum documents emanating from the WTO, it is certain that a formal, concise, and all-encompassing definition is needed for this analysis that has formed the backdrop of this paper thus far.

It is to this end that the following definition is put forward, one that hopefully captures the very core and purpose of the pass-through analysis:

A pass-through analysis is an investigation carried out by national or investigating authorities or customs administrations in order to achieve the following two consecutive outcomes: First, to determine if the benefit of a subsidy on an input resource used directly or indirectly in the manufacture of the processed product has carried through to this processed product, and secondly, to then determine if the countervailing measure that was imposed on the import of the processed product was in excess of the total subsidies accruing to that processed product, both from its input resources and that which was granted, if any, to the processed product itself.

V CONCLUSION

Subsidies undoubtedly confer a certain advantage on the direct receiver of it. The good that has benefitted from the subsidy would then have a lower production cost and thus profits arising therein are increased accordingly. However, to presume that the subsidy, along with its impact on that specific good, ends with such an initial receiver is a premature conclusion in situations where the subsidised good is then sold, transferred, or given to another entity for the sake of further production purposes. The reaching impact of a subsidy over various industries, albeit indirectly, would ultimately influence the countervailing measures that faces the end-product when it is being imported by another Member.

The ‘pass-through analysis’ is a phrase in trade law, particularly in countervailing investigations, describing the analysis of the movement of a subsidy’s benefit through a production process from input resources to the output good. The purpose of this analysis is to determine whether or not a Member is justified in the imposition of the countervailing duty amount in relation to the import of the aforementioned output good. The importing Member is permitted, according to WTO law, to take into consideration the subsidised impact on an imported product’s input materials, despite the fact that the producer of the final good may not have directly received any government subsidies.

Understanding this very minute aspect of the laws surrounding subsidies and countervailing measures can assist exporting industries in being strategic when choosing the materials that will be converted into processed products, as later costs can be heavily influenced by such a choice. From the perspective of importing states, having knowledge of this analysis and its impact means that it can better safeguard its domestic industries from imported goods that are offered at lower prices, through the correct imposition of countervailing duties. The

pass-through analysis is a significant yet very definitive area in international trade law, that offers a great consideration to the entire scheme of product production and distribution.

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