2002

Foreign Direct Investment in Latin America Overview and Current Status

Reuven S. Avi-Yonah
University of Michigan Law School, aviyonah@umich.edu

Martin B. Tittle

BANCO INTERAMERICANO DE DESARROLLO
DEPARTAMENTO DE INTEGRACIÓN Y PROGRAMAS REGIONALES
DIVISIÓN DE INTEGRACIÓN, COMERCIO Y ASUNTOS HEMISFÉRICOS
INSTITUTO PARA LA INTEGRACIÓN DE AMÉRICA LATINA Y EL CARIBE

FOREIGN DIRECT INVESTMENT IN LATIN AMERICA: OVERVIEW AND CURRENT STATUS

REUVEN S. AVI-YONAH – MARTIN B. TITTLE

DECEMBER 2002

Introduction

"More firms than ever, and in more industries and countries, are expanding abroad through [foreign] direct investment [FDI]."[1] Although FDI in 1980 was equivalent to only 5% of world GDP, by the end of the 1990's, that percentage had more than tripled to 17%.[2] In 1993, the total US dollar value of world FDI was only US$ 200 billion, but by the year 2000, it had risen to US$ 1.3 thousand billion.[3] Developing countries received around 25% of these inflows, mostly in the form of "greenfield" investments, where a new enterprise is essentially created from scratch.[4]

FDI is particularly welcome in developing countries for several reasons. First, it "contributes toward financing sustained economic growth over the long term," and is "especially important for its potential to . . . ultimately eradicate poverty through economic growth and development."[5] Second, it is a source of capital that, unlike "private capital markets investments (equity and debt securities, and bank lending)" and loan-based official development assistance (ODA), does not increase the national debt load.[6] Further, FDI, at least in its greenfield incarnation, is the least volatile capital inflow.[7] The OECD has even described it as "patient" due to its generally irreversible character.[8] Finally, in addition to raw capital, FDI brings with it

[1] Organisation for Economic Co-operation and Development [OECD], Foreign Direct Investment for Development [–] Maximising Benefits, Minimising Costs 46 (2002) (visited Oct. 18, 2002) <http://www1.oecd.org/publications/e-book/2002061E.pdf> (hereinafter, FDI Book).

[2] *Id.* at 48, citing UNCTAD, World Investment Report – Promoting Linkages (2001).

[3] *Id.* at 47.

[4] *Id.* at 43, 48-49.

[5] *Final outcome of the International Conference on Financing for Development [–] Monterrey Consensus*, U.N. International Conference on Financing for Development, Provisional Agenda Item 11, at ¶ 20, U.N. Doc. A/CONF.198/3 (2002) (visited Oct. 13, 2002) <http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf >.

[6] Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 Colum. J. Transnat'l L. 483, 498 (2000).

[7] *Id.* at 498-499.

[8] FDI Book, *supra* note 1 at 44.

an increase in healthy competition, exports, and foreign exchange,[9] as well as an upgrade in local technology and managerial skills (the "spillover" effect).[10]

FDI and Tax Incentives

According to the World Trade Organization (WTO), FDI occurs "when an investor based in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset."[11] Of the "location" factors influencing an investor, one – taxation (or, more particularly, the lack of it) – can be pivotal when the other factors in two or more competing host countries are roughly equal. For instance, Harry Grubert and John Mutti have calculated that a decrease in host country taxation from 20% to 10% will result in a 65% increase in net plant and equipment of U.S. subsidiaries.[12] Peter Wilson has discriminated between service and production subsidiaries, noting that "tax considerations largely dictate location decisions for business activities . . . such as administrative and distribution centers," but that for production locations, taxes inhere in but rarely dominate the decision process.[13]

A certain amount of competition for FDI based on tax considerations is to be expected because every country has a sovereign right to decide the level of public services it wishes to provide, and the level of taxes needed to fund those services. However, tax competition can be harmful when the benefits of lower or no taxes are apportioned exclusively to FDI investors, and

---

[9] Eric M. Burt, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 Am. U. J. Int'l L. & Pol'y 1015, 1019 n.20 (1997).

[10] Kelley, *supra* note 6 at 498-499.

[11] WTO, Trade and Foreign Direct Investment, PRESS/57 (Oct. 9, 1996) 6, cited in Burt, *supra* note 9 at 1019 n.20.

[12] *See* Harry Grubert & John Mutti, *Taxes, Tariffs, and Transfer Pricing in Multinational Corporate Decision Making*, 73 Rev. Econ. & Stat. 285, 290 (1991).

[13] *See* G. Peter Wilson, *The Role of Taxes in Location and Sourcing Decisions*, in Studies in International Taxation 195, 229 (Alberto Giovannini, R. Glenn Hubbard & Joel Slemrod eds., 1993).

the host country's tax burden is shifted to immobile segments of society like land and workers. For example, until recently, Ireland offered tax preferences for production-oriented FDI. That was harmful tax competition because the rest of Irish society had to bear the entire tax burden, allowing the production-oriented FDI to free ride – to enjoy the benefits provided by taxes without paying a fair or proportional share of them. In connection with the monetary union recently achieved by the European Union, Ireland abolished these tax preferences and adopted a lower tax rate for all corporations.[14]

Unfair, or harmful tax competition by countries seeking FDI is destructive for both host and home countries because it threatens the social insurance programs of developed countries that make globalization socially possible.[15] It almost goes without saying that the home countries for multinational enterprises capable of engaging in FDI are usually developed nations.[16] Globalization inherently threatens home country employment by opening up the opportunities that host countries offer.[17] Without social insurance programs to cushion the impact (or apparent impact) of these opportunities on home country employment and the retirement savings (public and private) that employment generates, a political backlash against globalization would almost certainly develop, as it did in the early twentieth century.[18] Host countries that engage in unfair tax competition, therefore, are free riders whose opportunism threatens to destroy the very system from which they benefit.[19] This problem is complicated by the dilemma of the commons: cessation of harmful tax competition by any one country will lead only to that country's deprivation, and will not contribute to rescue of globalization, if other

---

[14] *See* Reuven Avi-Yonah, *Globalization, Tax competition, and the Fiscal Crisis of the Welfare State*, 113 Harv. L. Rev. 1573, 1625-1631, 1644, 1646, 1654, 1656 (2000).

[15] *Id.* at 1635.

[16] Kojo Yelpaala, *In Search of Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies*, 7 Nw. J. Int'l L. & Bus. 208, 214 (1985).

[17] Avi-Yonah, *supra* note 14 at 1635.

[18] *Id.*

[19] *Id.* at 1592.

countries continue to predate through tax holidays and tax preference regimes.[20]

Predatory tax practices attack the social insurance programs of developed countries by siphoning off capital, and with it, the tax revenues that capital would have generated. To forestall an immediate cutback in social insurance, the home countries shift the tax burden previously allocated to that capital to a less mobile factor – labor – via consumption and payroll taxes.[21] "Because the rich save more than the poor, taxes on labor are generally more regressive than taxes on capital or on savings. Thus, a shift in the tax burden from capital to labor tends to render the tax system more regressive. As a result, the overall distribution of income in the home countries tends to become more inequitable . . . ."[22] This increase in inequity is not invisible, and therefore there is a social limit to the increases that labor will accept. When that limit is reached, social insurance programs must begin to shrink, and that withdrawal of support, combined with the increased taxes on labor, foments an unrest that becomes the hotbed for a new round of protectionism.[23]

Harmful tax competition also presents an efficiency problem Investment is efficient when capital is allocated to its most productive (and therefore highest-yielding) pretax use.[24] For efficiency to be preserved in the presence of taxes, all tax rates have to be the same, at least from the perspective of the investor.[25] When countries successfully compete by offering lower tax rates than their neighbors for similar enterprises, the result is inefficient allocation of funds.

---

[20] *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243, 1244, 1246 (1968); OECD, Harmful Tax Competition [–] An Emerging Global Issue ¶89 (1998) (visited Oct. 20. 2002) <http://www.oecd.org/pdf/M00004000/M00004517.pdf>.

[21] Avi-Yonah, *supra* note 14 at 1576, 1624.

[22] *Id.* at 1624.

[23] *Id.* at 1576.

[24] *Id.* at 1604.

[25] This concept is called Capital Export Neutrality (CEN). *See* Peggy B. Musgrave, United States Taxation of Foreign Investment Income: Issues and Arguments (1969); *see* also James R. Hines, Jr., *The Case Against Deferral: A Deferential Reconsideration*, 52 Nat'l Tax J. 385 (1999) (re-evaluating the validity of CEN analysis).

While fair tax competition might also seem to cause inefficiency, it sometimes is not a drag on efficient allocation of funds because the lower level of services and infrastructure resulting from a lower society-wide tax rate results in a change in the productivity matrix. The country is functionally different on a physical level, as a result of but in addition to its different tax rates. In those cases where fair competition does create inefficiency, it must at present be accepted as the price for democratic societies. However, in the latter case, if the funds available worldwide for taxation are viewed as a commons, Garrett Hardin's suggestion that opportunism be curtailed by "mutual coercion mutually agreed upon" presents a possible solution.[26]

The potential for "mutual coercion" to be a solution for harmful tax competition can be seen in the OECD's remarkably successful efforts to curtail tax havens. When the OECD published "Toward Global Tax Co-operation" in 2000, it included a "technical conclusions" list of 35 countries whose tax practices met the OECD criteria for tax havens.[27] However, by April 18, 2002, when the OECD finally published its "List of Unco-operative [sic] Tax Havens," only seven of these had not agreed on some level to cooperate in changing their challenged practices.[28] To be sure, this road was not a smooth one,[29] and, as noted, some countries continue

[26] Hardin, *supra* note 20 at 1247-1248.

[27] OECD, Towards Global Tax Co-operation[,] Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs[,] Progress in Identifying and Eliminating Harmful Tax Practices 17 (2000) (visited Oct. 12, 2002) <http://www.oecd.org/pdf/M000014000/M00014130.pdf>.

[28] Those seven are Andorra, the Principality of Liechtenstein, Liberia, the Principality of Monaco, the Republic of the Marshall Islands, the Republic of Nauru, and the Republic of Vanuatu. OECD, List of Unco-operative Tax Havens (visited Oct. 7, 2002) <http://www.oecd.org/EN/document/0,,EN-document-22-nodirectorate-no-4-28534-22,00.html>.

[29] At the March 2001 meeting in Paris, the Commonwealth countries called the OECD's threatened sanctions "high-handed and undemocratic." Akiko Hishikawa, Note, *The Death of Tax Havens?*, 25 B.C. Int'l & Comp. L. Rev. 389, 410 & n.198 (2002), citing Mark Atkinson, *OECD Accused of Tyranny: Caribbean Leader Alleges Double Standards at Tax Havens Talks*, The Guardian (London), Mar. 3, 2001, available at 2001 WL 14955197. At that same meeting, "Prime Minister Arthur of Barbados expressed his anger by 'snubbing' a dinner held in his honor and accused the OECD of '"technocratic tyranny" by "nameless, faceless" people with "no common sense."'" Hishikawa, *supra* at 410 & n.200, citing Atkinson, *supra*. The threatened sanctions were not in every case mere threats. Both Nauru and Niue had been "isolated from the

to hold out (one, fiercely).[30] At the same time, as a result of several meetings held between 2000 and April 2002,[31] the OECD modified its original deadlines for commitment to change.[32] Nevertheless, this merely confirms that the coercion taking place is mutual and therefore working just as Hardin suggested thirty-four years ago.[33]

FDI Tax Incentives and the WTO

In addition to being inequitable and inefficient, unfair tax competition through incentives limited to FDI investors is frequently contrary to the standards set in WTO agreements.[34] In

---

world banking system" by the time of the February 2001 OECD meeting in Tokyo. Hishikawa, *supra* at 409 & n.186, citing Michael Field, *Pacific Tax Havens Heading for International Showdown*, Agence Fr. Presse, Feb. 13, 2001, available at 2001 WL 2341018.

30 Vanuatu has referred to the OECD's initiative as "equivalent to blackmail" and said it is reminiscent of the """neo-colonial attitude" of countries such as Britain, France, and Germany."' Hishikawa, *supra* note 23 at 415 & n.247, citing *We Will Not Comply, Vanuatu Tells OECD*, Pac. Islands Broad. Assoc. News Serv., Feb. 26, 2002, available at 2002 WL 332240.

31 The OECD published its Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices (MOU), on November 24, 2000. *See* OECD, Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices (visited Oct. 12, 2002) <http://www.oecd.org/media/MOUrev20novR1.pdf>; OECD Publishes Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices (visited Oct. 12, 2002) <http://www1.oecd.org/media/release/nw00-123a.htm>; Hishikawa, *supra* note 29 at 400. Thereafter, the following meetings were held: Barbados and London, January 2001; Tokyo, February 2001; Paris, March and June 2001. Hishikawa, *supra* note 29 at 403-413.

32 At a meeting in Paris in June 2001, the OECD agreed not to impose sanctions on countries merely for offering tax breaks to foreign investors. Hishikawa, *supra* note 29 at 413 & n.225, citing Daniel J. Mitchell, *The OECD Pulls a Bait-and-Switch on the U.S. Treasury*, Wall St. J. Eur., July 11, 2001, at 7, available at 2001 WL-WSJE 21832801 and Michael M. Phillips, *OECD Reaches Pact on Tax Havens*, Wall St. J. Eur., June 29, 2001, at 3, available at 2001 WL-WSJE 21832014.

33 Hardin, *supra* note 20.

34 Subsidies on some agricultural products are conditionally permitted by the WTO. *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Uruguay Round of Multilateral Trade Negotiations[:] Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, vol. 27, Arts. 3, 9 (1994) (visited Oct. 14, 2002) <http://www.wto.org/english/docs_e/legal_e/14-ag.pdf> (hereinafter AA). This paper does not address these subsidies.

general, tax practices that result in the foregoing of tax that would otherwise be due and that are contingent either on export performance or on the use of domestic over imported inputs are a violation of the WTO Agreement on Subsidies and Countervailing Measures (SCM).[35] As such, they subject the offending country (if it is one of the WTO's 144 members[36]) to litigation pursuant to the Dispute Settlement Understanding (DSU)[37] and to the possibility of countervailing duties on the products favored by the "tax subsidy."[38] However, as will be discussed, application of these requirements to least developed[39] and developing countries[40] is

---

[35] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Uruguay Round of Multilateral Trade Negotiations[:] Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, vol. 27, Art. 3.1 (1994) (visited Aug. 23, 2002) <http://www.wto.org/english/docs_e/legal_e/24-scm.pdf> (hereinafter SCM).

[36] *See* WTO, The Organization [–] Members and Observers, (visited Oct. 14, 2002) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (listing the 144 WTO members as of Jan. 1, 2002).

[37] Understanding On Rules And Procedures Governing The Settlement Of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Uruguay Round of Multilateral Trade Negotiations[:] Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, vol. 31 (1994) (visited Oct. 14, 2002) <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (hereinafter DSU).

[38] SCM, *supra* note 35 at Arts. 10, 19-21.

[39] Least developed countries (LDC's) for WTO purposes are those countries so designated by the United Nations. *See* U.N., Who are the Developing Countries? (visited Oct. 17, 2002) <http://www.unctad.org/conference/>. Forty-nine countries are currently designated as LDC's by the U.N., and thirty of them, including Haiti, are WTO members. *See* WTO, Least Developed Countries (visited Oct. 14, 2002) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm>.

[40] Around 100 of the WTO's 144 members are developing countries, a status that is self-proclaimed but which may be challenged. *See* WTO, Developing Countries (visited Oct. 16, 2002) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev0_e.htm>; WTO, Who are the Developing Countries in the WTO? (visited Oct. 16, 2002) <http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm>.

either foregone or delayed until a particular per capita GNP is reached or a certain period of time has elapsed.[41]

SCM, Article 1

Revenue foregone as a result of a tax incentive is defined as a subsidy in SCM, Art. 1:

> *Members* hereby *agree* as follows:
>
> PART I: GENERAL PROVISIONS
>
> *Article 1*
>
> *Definition of a Subsidy*
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> . . .
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> . . .
>
> and
>
> (b) a benefit is thereby conferred.

Determining whether a particular measure results in the foregoing of tax otherwise due involves application of a fairly straightforward test to a factually dependent legal matrix. The test is "but for": "but for" the challenged measure, would tax liability be higher?[42] The proper matrix of law to which the "but for" test should be applied is factually dependent due to the

---

[41] *See* SCM, *supra* note 35 at Art. 27, Annex VII. Annex VII refers to "GNP per capita" and states that it relies on World Bank data for this information. However, the World Bank has changed its terminology from "GNP per capita" to "GNI [Gross National Income] per capita." *See* World Bank, World Development Indicators 2001: Changes in Terminology (visited Oct. 20, 2002) <http://www.worldbank.org/data/wdi2001/wdichanginterm.html>.

[42] WTO, Report of the Panel, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/R (Oct. 8, 1999) ¶ 7.45 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/108R.doc> (hereinafter, *FSC Panel*).

"variety and complexity of domestic tax systems."[43] For example, after the United States enacted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI),[44] the European Communities (EC) complained to the WTO that the ETI was a prohibited subsidy for U.S. exporters because, contrary to SCM Art. 1.1, it allowed exporters to avoid paying tax that would otherwise be due.[45] The panel established to adjudicate the EC's complaint chose U.S. Internal Revenue Code (IRC) §§ 11, 61, and 63[46] as the appropriate legal matrix for judging whether the ETI allowed tax otherwise due pursuant to those three sections to be foregone.[47] The choice of §§ 11, 61, and 63 was colorable because they state a general rule regarding the taxability of all corporate income. The WTO Appellate Body, however, responded to the U.S.'s claim that the ETI applied only to foreign-source income by expanding the panel's matrix to include IRC §§ 901 and 904, which create a credit for foreign taxes paid.[48] In so doing, it stated a general rule: that the "benchmark" used to determine the tax otherwise due should, as much as possible, treat the same kind of income addressed by the alleged subsidy.[49] The benchmark chosen by the

---

[43] WTO, Report of the Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW (Jan. 14, 2002) ¶ 91 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/108ABRW.doc> (hereinafter *ETI App.*).

[44] Pub. L. No. 106-519; 114 Stat. 2423 (2000) (codified at I.R.S. §§ 114, 941-943). "ETI" was the acronym eventually chosen by the WTO Appellate Body for the new act.

[45] WTO, Report of the Panel, *United States – Tax Treatment for "Foreign Sales Corporations" Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW (Aug. 20, 2001) ¶¶ 1.6-1.8, 3.1 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/108RW-00.doc> (hereinafter *ETI Panel*).

[46] 26 U.S.C. §§ 11, 61, 63.

[47] *ETI Panel*, *supra* note 45 at ¶¶ 8.25-8.26.

[48] *ETI App.*, *supra* note 43 at ¶¶ 99-101.

[49] *Id.* at ¶ 90 ("In identifying the appropriate benchmark for comparison, panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare. In other words, there must be a rational basis for comparing the fiscal treatment of the income subject to the contested measure and the fiscal treatment of certain other income. In general terms, in this comparison, like will be compared with like. For instance, if the measure at issue involves

panel had included both domestic and foreign income without regard for the portions of the IRC that would change the ultimate tax to be paid with respect to foreign income. The expanded benchmark chosen by the Appellate Body corrected this error by including foreign tax credits in the analysis.

SCM, Article 3

Subsidies (other than those allowed by the Agreement on Agriculture (AA)[50]) that are conditioned on exporting or on the use of domestic over imported inputs are prohibited in SCM Art. 3:

> *Article 3*
>
> *Prohibition*
>
> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.
>
> 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.
>
> [4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.
>
> [5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

The phrase "contingent ... upon export performance" in Art. 3.1 does not mean that exporting must be the only way to qualify for the subsidy; only that it must be one of the ways.[51]

income earned in sales transactions, it might not be appropriate to compare the treatment of this income with employment income.").

In the ETI case, the U.S. made an "export precondition" argument to the WTO panel, saying that the ETI's benefits were not "contingent ... upon export performance" because they could be received for articles manufactured entirely outside the U.S.[52] The U.S. argued that, just as the specificity of a subsidy to one enterprise or group could be ameliorated by extension of the subsidy to a larger group of recipients, export-dependency could also be ameliorated by the addition of non-export avenues to a particular subsidy.[53] The panel would have none of it. It noted that, while specificity and non-specificity are mutually exclusive, the export-contingent and non-export-contingent methods of qualifying for the ETI subsidy were not.[54] Therefore, the ETI subsidy should be analyzed as two subsidies: one, export-contingent, and the other, non-export-contingent. The panel used this bifurcation to ridicule the U.S. argument, saying that the notion that a subsidy "entirely irrelevant to export activity ... can effectively remove export contingency" was "manifestly unreasonable" and "would have the practical effect of reducing the disciplines of the SCM Agreement to ineffectiveness and inutility."[55] The way to neutralize export-contingency, said the panel, was to allow subsidies on goods sold directly into and for use in the domestic market.[56] Because part of the ETI subsidy was export-contingent, it contravened SCM Art. 3.1(a).[57]

---

[50] *See supra* note 34.
[51] *ETI Panel, supra* note 45 at ¶ 8.66-8.70.
[52] *Id.* at ¶ 8.62.
[53] *Id.* at ¶ 8.65.
[54] *Id.* at ¶¶ 8.66-8.67.
[55] *Id.* at ¶¶ 8.68, 8.69-8.70.
[56] *Id.* at ¶¶ 8.71-8.74.
[57] *Id.* at ¶ 8.75.

A similar analysis probably applies to a contingency on the proscribed "use of domestic over imported goods."[58] I say probably because I have found no cases interpreting this provision. However, the ETI case gives a strong hint. The ETI had a provision limiting the combined non-U.S. labor and material inputs of qualifying products to 50% of the products' fair market value (FMV).[59] In its complaint to the WTO, the EC alleged that this provision violated both SCM Art. 3.1(b) and GATT 1994 Art. III:4.[60] The WTO panel addressed only the GATT leg of the EC's claim, finding that, while the ETI did not compel a U.S. producer to use U.S. inputs,[61] it did treat imported products less favorably than parallel domestic supplies because it placed a limit on the former and no limit on the latter.[62] The fact that taxpayers could qualify for ETI's benefits without using any domestic materials at all did not change the "fundamental fact that, as far as goods are concerned, the [50%] foreign articles/labour [sic] limitation creates an incentive to use domestic rather than imported goods."[63] Just as the availability of ETI benefits to non-exporters did not negate the export-contingency for U.S. producers under SCM Art. 3.1(a),[64] the availability of ETI benefits to nonusers of domestic materials did not "vitiate the fact

[58] SCM, *supra* note 35 at Art. 3.1(b).

[59] IRC § 943(a)(1)(C),

[60] *ETI Panel*, *supra* note 45 at ¶ 3.1. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Uruguay Round of Multilateral Trade Negotiations[:] Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, vol. 1, 1867 U.N.T.S. 190, 33 I.L.M 1153 (1994) (hereinafter GATT 1994). GATT 1994 Art. III:4 reads, in relevant part:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

[61] *ETI Panel, supra* note 45 at ¶ 8.151.

[62] *Id.* at ¶ 8.155.

[63] *Id.* at ¶ 8.157.

[64] *Id.* at ¶ 8.64. *See supra* text accompanying notes 52-57.

that [the foreign articles/labor limitation] inherently advantage[d] domestic goods and that less favourable [sic] treatment [was] thereby accorded to imported goods."[65]

In an Art. 3.1(b) context, the ETI panel would likely have reasoned that, even if ETI benefits were available to nonusers of domestic materials when U.S.-labor inputs were more than 50% of FMV, they *were* contingent on the use of domestic over imported materials when U.S.-labor inputs were less than 50%. Therefore, the ETI subsidy should be bifurcated for Art. 3.1(b) purposes, just as it was in the 3.1(a) analysis, into contingent and non-contingent halves, with the contingent half constituting a violation of SCM Art. 3.1(b).

SCM, Annex I

SCM Art. 3.1(a) refers to SCM Annex I for examples of prohibited subsidies.[66] The examples that relate to tax incentives appear in subparagraphs (e), (f), and (g) of Annex I, *infra*.[67] Footnote 5 in Art. 3.1 refers to measures that Annex I are "not . . . export subsidies" and that therefore are not prohibited by the SCM.[68] Annex I contains only one clear example of such a measure in subparagraph (k), but it has been argued that the last sentence of footnote 59 in Annex I states another "permitted" export subsidy.[69] These portions of Annex I read as follows:

ANNEX I

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

. . .

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes [footnote omitted] or social welfare charges paid or payable by industrial or commercial enterprises.[59]

---

[65] *Id.* at ¶ 8.157.

[66] SCM, *supra* note 35.

[67] *Id.*

[68] *Id.*

[69] *Id.*

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

. . .

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates [sic] provisions of the relevant undertaking, *an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement*. [Emphasis added.]

[59] The Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any Member may draw the attention of another Member to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the Members shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of Members under GATT 1994, including the right of consultation created in the preceding sentence.

Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.

Subparagraphs (e), (f), and (g) are self-explanatory: whether a tax-related export subsidy takes the form of an exemption from direct or indirect taxes or a deduction, it is prohibited.

The exception portion of subparagraph (k) (beginning "Provided that . . .") refers to the OECD's Arrangement on Guidelines for Officially Supported Export Credits (OSEC), which was initiated in 1978.[70] The subparagraph (k) language "or a successor undertaking which has been adopted by those original Members" means that this is a dynamic, standing, variable-at-will exception, not a grandfather clause.[71] The latest published version of the OSEC appeared in 1998,[72] but an electronic version that includes subsequent amendments became available on October 16 of this year.[73]

The last sentence of footnote 59 in Annex I (beginning "Paragraph (e) is not intended . . .") appears to create an exception from the proscriptions of the SCM for export subsidies that "avoid the double taxation of foreign-source income." The U.S. argued in the ETI case that the ETI was just such a measure, and that by virtue of footnote 59 in Annex I and footnote 5 to Article 3.1,[74] the ETI was totally exempt from censure under SCM.[75] The panel determined that "foreign-source income" had to refer to income "susceptible to double taxation," and that the word "avoid" indicated that a measure needed to have avoidance of double taxation as its purpose.[76] It then concluded that the ETI did not have avoidance of double taxation as its

---

[70] José E. Alvarez and Steve Charnovitz, *Symposium: The Boundaries Of The WTO*[:] *Triangulating The World Trade Organization*, 96 Am. J. Int'l L. 28, 52 (2002).

[71] *See* WTO, Report of the Panel, *Brazil–Export Financing Programme for Aircraft, Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2 (July 26, 2001) ¶¶ 5.80-5.81, 5.87 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/46RW2-00.doc> (noting that subparagraph (k) is "unusual" but that it refers to the most recent "successor undertaking"), cited in Alvarez, *supra* note 70 at 52 & n.192.

[72] OECD, Arrangement on Guidelines for Officially Supported Export Credits (1998) (visited Oct. 15, 2002) <http://www.oecd.org/ech/act/xcred/arrngmnt.htm>.

[73] This electronic version was available on Oct. 18, 2002 by using the search engine on the OECD website (<http://www.oecd.org>) to search for the full name of the agreement. There was no URL for the document itself.

[74] Footnote 5 reads "Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement." SCM, *supra* note 35 at Art. 3.1 n.5.

[75] *ETI Panel*, *supra* note 45 at ¶ 8.76.

[76] *Id.* at ¶¶ 8.93-8.94.

purpose because it did not focus on income subject to double taxation and its provisions were not coordinated with the U.S.'s network of bilateral tax treaties.[77] The Appellate Body affirmed the panel's conclusion, saying that because the ETI, viewed as a whole, did not exempt only foreign-source income, and in fact could "systematically result in a tax exemption for income that has no link with a 'foreign' State and that would not be regarded as foreign-source under any of the widely accepted principles of taxation," it did not "fall within the justification available under the fifth sentence of [footnote 59 in SCM Annex I]."[78]

SCM, Article 27 and Annex VII

As noted, application of the SCM Art. 3 requirements to least developed and developing countries is either foregone or delayed pursuant to SCM Art. 27 and Annex VII,[79] which read in relevant part as follows:[80]

Article 27

Special and Differential Treatment of Developing Country Members

27.1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.

27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:

(a) developing country Members referred to in Annex VII.

(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement,[81] subject to compliance with the provisions in paragraph 4.

---

[77] *Id.* at ¶¶ 8.103-8.104, 8.97-8.105. In reaching its conclusion that the ETI did not satisfy the requirements of footnote 59, the panel specifically declined to address whether a measure that *did* satisfy those requirements would also fall within the scope of footnote 5 in Art. 3.1 and therefore be permitted under the SCM. *Id.* at 8.108.

[78] *ETI App.*, *supra* note 43 at ¶¶ 184-186.

[79] *See supra* notes 39-41 and accompanying text.

[80] SCM, *supra* note 35.

[81] The WTO Agreement went into force Jan. 1, 1995. *See* WTO, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LT/UR/A/1 (Apr. 15, 1994) ¶ 3 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/UR/FA/03-fa.doc>; WTO,

27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.

27.4 Any developing country Member referred to in paragraph 2(b) shall phase out its export subsidies within the eight-year period, preferably in a progressive manner. However, a developing country Member shall not increase the level of its export subsidies[55], and shall eliminate them within a period shorter than that provided for in this paragraph when the use of such export subsidies is inconsistent with its development needs. If a developing country Member deems it necessary to apply such subsidies beyond the 8-year period, it shall not later than one year before the expiry of this period enter into consultation with the Committee, which will determine whether an extension of this period is justified, after examining all the relevant economic, financial and development needs of the developing country Member in question. If the Committee determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the Committee to determine the necessity of maintaining the subsidies. If no such determination is made by the Committee, the developing country Member shall phase out the remaining export subsidies within two years from the end of the last authorized period.

[55] For a developing country Member not granting export subsidies as of the date of entry into force of the WTO Agreement, this paragraph shall apply on the basis of the level of export subsidies granted in 1986.

27.5 A developing country Member which has reached export competitiveness in any given product shall phase out its export subsidies for such product(s) over a period of two years. However, for a developing country Member which is referred to in Annex VII and which has reached export competitiveness in one or more products, export subsidies on such products shall be gradually phased out over a period of eight years.

27.6 Export competitiveness in a product exists if a developing country Member's exports of that product have reached a share of at least 3.25 per cent in world trade of that product for two consecutive calendar years. Export competitiveness shall exist either *(a)* on the basis of notification by the developing country Member having reached export competitiveness, or *(b)* on the basis of a computation undertaken by the Secretariat at the request of any Member. For the purpose of this paragraph, a product is defined as a section heading of the Harmonized System Nomenclature. The Committee shall review the operation of this provision five years from the date of the entry into force of the WTO Agreement.

Report to the WTO by the Preparatory Committee for the World Trade Organization, PC/R (Dec. 31, 1994) ¶ 62 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/PC/R.wpf>.

. . .

ANNEX VII

DEVELOPING COUNTRY MEMBERS REFERRED TO
IN PARAGRAPH 2(A) OF ARTICLE 27

The developing country Members not subject to the provisions of paragraph 1(a) of Article 3 under the terms of paragraph 2(a) of Article 27 are:

(a) Least-developed countries designated as such by the United Nations which are Members of the WTO.

(b) Each of the following developing countries which are Members of the WTO shall be subject to the provisions which are applicable to other developing country Members according to paragraph 2(b) of Article 27 when GNP per capita has reached $1,000 per annum[68]: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe.[82]

[68] The inclusion of developing country Members in the list in paragraph (b) is based on the most recent data from the World Bank on GNP per capita.[83]

As may be seen, SCM Art. 27.2(a) and Annex VII(a) provide that the proscriptions of Article 3.1(a) never apply to least developed countries (LDC's), as identified by the United Nations.[84] Further, they also do not apply to any of the twenty developing countries listed in Annex VII(b) (which include Bolivia, Dominican Republic, Guatemala, Guyana, and Nicaragua)

[82] Although Honduras is not currently included in the published versions of Annex VII(b), it does qualify for inclusion with a year-2000 per capita GNI of US$ 860. *See* World Bank, Custom database search for per capita GNI, Atlas method, in current US dollars (visited Oct. 20, 2002) <http://devdata.worldbank.org/data-query/>. Further, it apparently either has been or will be added to Annex VII(b). *See* WTO, General Council - Special Session on Implementation - 3 October and 1 November 2001 - Minutes of Meeting - Held in the Centre William Rappard on 3 October and 1 November 2001, WT/GC/M/70 (Jan. 10, 2002) (visited Oct. 20, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/M70.doc> (noting the thanks of the Honduran representative for the Members' "good faith in allowing the error excluding Honduras from Annex VII of the Subsidies Agreement to be corrected . . .").

[83] The World Bank now uses the term "GNI [Gross National Income] per capita" instead of "GNP per capita." *See supra* note 41.

[84] *See supra* notes 35 and 39 (noting Haiti as one of the WTO's thirty LDC members).

until 2003, and then only if per capita GNP (now, per capita GNI),[85] as determined by the World Bank, has reached US$ 1,000.[86] Application of SCM Art. 3.1(a) to other, non-Annex-VII developing countries occurs either when a country eliminates one or more export subsidies as "inconsistent with its development needs" or, at the latest, in 2003 unless a country has applied for and received an annually-reviewable extension of time to comply.[87] If a request for an initial extension or renewal of an existing extension is denied, a country has two years from the end of the "last authorized period" – either the original eight-year period or the last approved extension following that eight years – to "phase out the remaining export subsidies."[88] SCM Art. 3.1(b) did not apply to developing countries until 2000, and will not apply to LDC's until 2003.[89] As noted, the status of "developing country" is self-proclaimed, subject to challenge, and around 100 of the WTO's 144 members are developing countries.[90]

With respect to developing countries that acceded to the WTO after its formation, some original members have taken the position that they should not automatically have the benefit of transitional periods like those included in SCM Art. 27 simply by reason of accession. For instance, according to the minutes of the December 1998 meeting of the General Council, the U.S. argued vigorously that

> the transition periods provided for in the Uruguay Round agreements were intended to allow the negotiators time to become accustomed to the new rules and to move to address in legislation their new responsibilities. Thus time was provided for full implementation. Acceding countries were in a different position. Many had been observers for many years, and would have the benefit of the period during the accession process itself to become acquainted with WTO provisions. They were dealing not with new rules, but with established rules, in place when the decision to accede to the WTO was made. Thus, neither logic nor

[85] *See supra* note 83.

[86] *See* SCM, *supra* note 35 at Annex VII(b) & n.68.

[87] *See id.* at Arts. 27.2(b), 27.4.

[88] *See id.* at Art. 27.4.

[89] *See id.* at Art. 27.3.

[90] *See supra* note 40.

> the WTO Agreement itself supported the concept of acceding countries having automatic recourse to the flexibilities included during the Uruguay Round negotiations.[91]

The EC took the same position but ameliorated it by saying it was "not opposed, a priori, to the granting of transitional periods to different categories of developing countries, but expected these countries to help the Members understand the nature of their problems."[92] Egypt took the opposite of the U.S. position, saying that "applicants from developing countries should benefit from all the provisions reserved for developing countries in the various WTO agreements, including transitional periods."[93]

Examination of the early protocols of accession shows that neither argument prevailed in full. Instead, application of the original transition periods was a subject of negotiation and varied with each accession. For example, on August 16, 1995, the WTO General Council decided to allow Ecuador to accede to the WTO.[94] Although the terms of Ecuador's Protocol gave it general access to all transitional periods allowed original members,[95] it had assured the Working Party that it intended to eliminate all export subsidies before accession,[96] and that assurance was included as an exception to the general access to transitional periods.[97] Therefore, Ecuador is

---

[91] WTO, General Council - Minutes of Meeting - Held in the Centre William Rappard on 9-11 and 18 December 1998, WT/GC/M/32 (Feb. 9, 1999) 38 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/m32.doc>.

[92] *Id.* at 39.

[93] *Id.* at 36.

[94] WTO, Accession Of Ecuador - Decision of 16 August 1995, WT/ACC/ECU/5 (Aug. 22, 1995) (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/ACC/ECU5.wpf>.

[95] WTO, Accession of Ecuador, WT/ACC/ECU/6 (Aug. 22, 1995) ¶2 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/ACC/ECU6.wpf> ("Except as otherwise provided for in the paragraphs referred to in paragraph 81 of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by Ecuador as if it had accepted that Agreement on the date of its entry into force.").

[96] WTO, Report of the Working Party on the Accession of Ecuador, WT/L/77 (July 14, 1995) ¶¶ 58-59 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/L/77.wpf>.

[97] *Id.* at ¶ 81; *see* Accession of Ecuador - Decision of 16 August 1995, *supra* note 94 at ¶ 2.

unaffected by the provisions of SCM Art. 27 insofar as they address export subsidies. The proscription of SCM Art. 3.1(a) applies to it now in full, and has since the moment of accession.

When Panama was allowed to accede a little more than a year later,[98] the result was exactly the opposite. The terms of Panama's Protocol were similar to Ecuador's in that it, too, was given general access to all transitional periods allowed original WTO members[99] "[e]xcept as otherwise provided for in the paragraphs referred to in paragraph 116 of the Working Party Report."[100] In one of those paragraphs, Panama had assured the Working Party that it would "eliminate all subsidies inconsistent with the provisions of Article 3 of the [SCM]," but then it had finished that sentence by adding "no later than 31 December 2002, as provided by Article 27 of the [SCM]."[101] Therefore, because Panama negotiated access to the transitional periods in SCM Art. 27, it is entitled to the full benefit of them.

The following chart summarizes the interaction of SCM Arts. 3, 27, and Annex VII as they affect LDC's and developing countries:

---

[98] WTO, Accession Of the Republic of Panama - Decision of 2 October 1996, WT/ACC/PAN/20 (Oct. 11, 1996) (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/ACC/PAN20.wpf>.

[99] Original WTO members were those members of GATT in 1994 who accepted the terms of Article XI of the Agreement Establishing the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Uruguay Round of Multilateral Trade Negotiations[:] Legal Instruments Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on 15 April 1994, vol. 1, Art. XI (1994) (visited Aug. 23, 2002) <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>.

[100] WTO, Accession of the Republic of Panama, WT/ACC/PAN/21 (Oct. 11, 1996) ¶ 3 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/ACC/PAN21.wpf> ("Except as otherwise provided for in the paragraphs referred to in paragraph 116 of the Working Party Report, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with the entry into force of that Agreement shall be implemented by Panama as if it had accepted that Agreement on the date of its entry into force.").

[101] WTO, Report of the Working Party on the Accession of the Republic of Panama to the [WTO], WT/ACC/PAN/19 (Sept. 20, 1996) ¶ 63 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/ACC/PAN19.wpf>.

Countries	Does SCM Art. 3.1(a) (export subsidy) apply?[102]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Annex VII(a) LDC's (includes Haiti)	Never.[103] *See* SCM Art 27.2(a).	Not until 2003. *See* SCM Art. 27.3.
Annex VII(b) developing countries (includes Bolivia, Dominican Republic, Guatemala, Guyana, and Nicaragua)[104]	Not until 2003, and then only if per capita GNP has reached US$ 1,000. *See* Annex VII(b).[105]	Yes, since 2000. *See* SCM Art. 27.3.

[102] In some circumstances, relief is not available even if SCM Art. 3.1(a) applies. *See* SCM, *supra* note 35 at Arts. 15.3, 27.7, 27.10-27.13.

[103] A LDC that achieves export competitiveness with respect to a particular product must phase out any export subsidies on that product over the next eight years. *See* SCM, *supra* note 35 at Art. 27.5. However, if it does not, it is still immune from action pursuant to SCM Art. 3.1(a) by virtue of SCM Art. 27.2(a). A complaining member would have to pursue it under SCM Art. 5, which now always requires proof of injury. Before 2000, SCM Art. 6.1 would have allowed "serious prejudice" under Art. 5(c) to be presumed in certain circumstances, but Art. 6.1 has now lapsed. *See* SCM, *supra* note 35 at Art. 31 (providing that Art. 6.1 lapses five years after entry into force of the WTO Agreement unless extended); WTO, Report (1999) of the Committee on Subsidies and Countervailing Measures, G/L/341 (Nov. 5, 1999) ¶12 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/L/341.doc> (reporting that no consensus to extend the provisions of Arts. 6.1, 8, or 9 was reached at the Committee's regular November 1999 meeting and indicating that a special meeting might be held before the end of 1999); WTO, Report (2000) of the Committee on Subsidies and Countervailing Measures, G/L/408 (Nov. 10, 2000) ¶ 12 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/L/408.doc> (reporting that no consensus was reached to extend Arts. 6.1, 8, or 9 "either as drafted or in modified form" at the Committee's special meeting on December 20, 1999); WTO, Report (2001) of the Committee on Subsidies and Countervailing Measures, G/L/496 (Nov. 1, 2001) (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/L/496.doc> (containing no mention of Arts. 6.1, 8, or 9).

[104] Honduras is probably also an Annex VII(b) developing country member, but it is not currently listed in Annex VII(b). *See supra* note 82.

[105] An Annex VII developing country that reaches export competitiveness in one or more products must phase out export subsidies on those products over eight years, just as a LDC must. *See* SCM, *supra* note 35 at Art. 27.5. However, if it did not and its per capita GNP remained below US$ 1,000, it would, like a LDC, still be immune from action pursuant to SCM Art. 3.1(a). *See supra* note 103.

Countries	Does SCM Art. 3.1(a) (export subsidy) apply?[102]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Non-Annex-VII developing countries who were original WTO members (includes all Caribbean and Central and South American members except Ecuador and Panama)	Not until 2003, per Art. 27.2(b), unless a timely request for extension was filed. If extension granted, 3.1(a) applies 2 years after expiration of extension; if extension denied, the 2-year phase out still applies.[106] *See* Art. 27.4.	Yes, since 2000. *See* SCM Art. 27.3.
Non-Annex-VII developing countries who acceded to the WTO (includes Ecuador and Panama)	Yes, but when depends on the individual accession protocol.[107] If the transitional periods in Art. 27 apply, not until 2003 unless a timely request was filed to extend that deadline. *See* Art. 27.2(b). If extension granted, 3.1(a) applies 2 years after expiration of extension; if extension denied, the 2-year phase out still applies.[106] *See* Art. 27.4. If the transitional periods do not apply, Art. 3.1(a) applies at the time of accession.	Yes, since 2000. *See* SCM Art. 27.3.

Effect of Doha Meeting on Export Subsidies

The May 1998 WTO Ministerial Declaration emphasized the importance of the "implementation of individual [WTO] agreements and the realization of their objectives" and reaffirmed the organization's "commitment to respect the existing schedules for reviews,

[106] Non-Annex-VII developing countries that reach export competitiveness in one or more products must phase out export subsidies on those products over two years. *See* SCM, *supra* note 35 at Art. 27.5.

[107] *See supra* text accompanying notes 91-101.

negotiations and other work to which we have already agreed."[108] Those "existing schedules" included, of course, the timetable for phasing out the developing-country exceptions in SCM Art. 27. The United States and other countries began expressing concern as early as fall 1998 regarding the implementation of the deadlines in the SCM and other WTO agreements for developing countries to phase out various subsidies.[109] At a General Council meeting in 2000, the Members agreed to meet in special sessions to address this issue.[110] Finally, at the 2001 Ministerial Conference in Doha, Qatar, the following course of action was adopted:[111]

> The Ministerial Conference,
>
> Having regard to Articles IV.1, IV.5 and IX of the Marrakesh Agreement Establishing the World Trade Organization (WTO);
>
> Mindful of the importance that members attach to the increased participation of developing countries in the multilateral trading system, and of the need to ensure that the system responds fully to the needs and interests of all participants;
>
> Determined to take concrete action to address issues and concerns that have been raised by many developing-country members regarding the implementation of

---

[108] WTO, Ministerial Declaration, WT/MIN(98)/DEC/1 (May 25, 1998) ¶¶ 8-9 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/MIN98/DEC1.wpf>.

[109] WTO, Preparations for the 1999 Ministerial Conference[,]General Council Discussions on Implementation Issues[,] Communication from the United States, WT/GC/W/107 (Nov. 3, 1998) 1, 8 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/W107.doc> (emphasizing the need for the deadlines to be observed); WTO, Preparations for the 1999 Ministerial Conference[,] Agreement on Subsidies and Countervailing Duties[,]Communication from Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Nicaragua and Thailand, WT/GC/W/164/Rev.2 (June 14, 1999) ¶¶ 1-4 (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/W164R2.doc> (emphasizing the need for revision of the SCM, and specifically Annex VII, to extend or eliminate the existing deadlines and allow more developing countries to benefit from the SCM's developing-country exceptions).

[110] *See* WTO, General Council – Minutes of Meeting – Held in the Centre William Rappard on 3 and 8 May 2000, WT/GC/M/55 (June 16, 2000) ¶ 180, Annex I (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/GC/M55.doc>.

[111] *See* WTO, Ministerial Conference – Fourth Session – Doha, 9 - 14 November 2001 – Implementation-Related Issues and Concerns - Decision of 14 November 2001, WT/MIN(01)/17 (Nov. 20, 2001) front language, ¶¶ 10.1-10.6 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/WT/min01/17.doc>.

some WTO Agreements and Decisions, including the difficulties and resource constraints that have been encountered in the implementation of obligations in various areas;

Recalling the 3 May 2000 Decision of the General Council to meet in special sessions to address outstanding implementation issues, and to assess the existing difficulties, identify ways needed to resolve them, and take decisions for appropriate action not later than the Fourth Session of the Ministerial Conference;

Noting the actions taken by the General Council in pursuance of this mandate at its Special Sessions in October and December 2000 (WT/L/384), as well as the review and further discussion undertaken at the Special Sessions held in April, July and October 2001, including the referral of additional issues to relevant WTO bodies or their chairpersons for further work;

Noting also the reports on the issues referred to the General Council from subsidiary bodies and their chairpersons and from the Director-General, and the discussions as well as the clarifications provided and understandings reached on implementation issues in the intensive informal and formal meetings held under this process since May 2000;

Decides as follows:

. . .

10. Agreement on Subsidies and Countervailing Measures

10.1 Agrees that Annex VII(b) to the Agreement on Subsidies and Countervailing Measures includes the members that are listed therein until their GNP per capita reaches US $1,000 in constant 1990 dollars for three consecutive years. This decision will enter into effect upon the adoption by the Committee on Subsidies and Countervailing Measures of an appropriate methodology for calculating constant 1990 dollars. If, however, the Committee on Subsidies and Countervailing Measures does not reach a consensus agreement on an appropriate methodology by 1 January 2003, the methodology proposed by the Chairman of the Committee set forth in G/SCM/38, Appendix 2 shall be applied. A Member shall not leave Annex VII(b) so long as its GNP per capita in current dollars has not reached US $1000 based upon the most recent data from the World Bank.

10.2 Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below. During the course of the negotiations, members are urged to exercise due restraint with respect to challenging such measures.

10.3 Agrees that the Committee on Subsidies and Countervailing Measures shall continue its review of the provisions of the Agreement on Subsidies and Countervailing Measures regarding countervailing duty investigations and report to the General Council by 31 July 2002.[112]

10.4 Agrees that if a member has been excluded from the list in paragraph (b) of Annex VII to the Agreement on Subsidies and Countervailing Measures, it shall be re-included in it when its GNP per capita falls back below US$ 1,000.

10.5 Subject to the provisions of Articles 27.5 and 27.6, it is reaffirmed that least-developed country members are exempt from the prohibition on export subsidies set forth in Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures, and thus have flexibility to finance their exporters, consistent with their development needs. It is understood that the eight-year period in Article 27.5 within which a least-developed country member must phase out its export subsidies in respect of a product in which it is export-competitive begins from the date export competitiveness exists within the meaning of Article 27.6.

10.6 Having regard to the particular situation of certain developing-country members, directs the Committee on Subsidies and Countervailing Measures to extend the transition period, under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, for certain export subsidies provided by such Members, pursuant to the procedures set forth in document G/SCM/39. Furthermore, when considering a request for an extension of the transition period under the rubric of Article 27.4 of the Agreement on Subsidies and Countervailing Measures, and in order to avoid that members at similar stages of development and having a similar order of magnitude of share in world trade are treated differently in terms of receiving such extensions for the same eligible programmes and the length of such extensions, directs the Committee to extend the transition period for those developing countries, after taking into account the relative competitiveness in relation to other developing-country members who have requested extension of the transition period following the procedures set forth in document G/SCM/39.

Document G/SCM/39, referenced in paragraph 10.6, reads as follows:[113]

---

[112] This report was submitted on July 30, 2002. *See* WTO, Chairman's Report on the Committee's Review Mandated by Paragraph 10.3 of the Decision on Implementation-Related Issues and Concerns Adopted on 14 November 2001 at the Doha Ministerial Conference, G/SCM/45 (July 30, 2002) (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/45.doc>.

[113] WTO Committee on Subsidies and Countervailing Duties, Procedures for Extensions under Article 27.4 for Certain Developing Country Members, G/SCM/39 (Nov. 20, 2001) (visited Oct. 18, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/39.doc>.

The Committee on Subsidies and Countervailing Measures ("SCM Committee") shall follow the procedures set forth below in respect of extensions of the transition period under Article 27.4 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") for certain developing country members. The programmes to which these procedures shall apply are those meeting the criteria set forth in 2.

1. Mechanism for extension

(a) A member that maintains programmes meeting the criteria set forth in 2 and that wishes to make use of these procedures, shall initiate Article 27.4 consultations with the Committee in respect of an extension for its eligible subsidy programmes as referred to in 2, on the basis of documentation to be submitted to the Committee not later than 31 December 2001. This documentation shall consist of (i) an identification by the member of those programmes for which it is seeking an extension under SCM Article 27.4 pursuant to these procedures; and (ii) a statement that the extension is necessary in the light of the member's economic, financial and development needs.

(b) Not later than 28 February 2002, the member seeking an extension shall submit to the SCM Committee an initial notification as referred to in 3(a) providing detailed information about the programmes for which extension is being sought.

(c) Following receipt of the notifications referred to in 1(b), the SCM Committee shall consider those notifications, with an opportunity for members to seek clarification of the notified information and/or additional detail with a view to understanding the nature and operation of the notified programmes, and their scope, coverage and intensity of benefits, as referred to in 3(b). The purpose of this consideration by the SCM Committee shall be to verify that the programmes are of the type eligible under these procedures as referred to in 2, and that the transparency requirement referred to in 3(a) and 3(b) is fulfilled. Not later than 15 December 2002, members of the SCM Committee shall grant extensions for calendar year 2003 for those programmes notified pursuant to these procedures, provided that the notified programmes meet the eligibility criteria in 2 and that the transparency requirement is fulfilled. The notified information on the basis of which the extensions are granted, including information provided in response to requests from members as referred to above, shall form the frame of reference for the annual reviews of the extensions as referred to in 1(d) and 1(e).

(d) As provided for in SCM Article 27.4, the extensions granted by the SCM Committee pursuant to these procedures shall be subject to annual review in the form of consultations between the committee and the members receiving the extensions. These annual reviews shall be conducted on the basis of updating notifications from the members in question, as referred to in 3(a) and 3(b). The purpose of the annual reviews shall be to ensure that the transparency and standstill requirements as set forth in 3 and 4 are being fulfilled.

(e) Through the end of calendar year 2007, subject to annual reviews during that period to verify that the transparency and standstill requirements set forth in 3 and 4 are being fulfilled, Members of the Committee shall agree to continue the extensions granted pursuant to 1(c).

(f) During the last year of the period referred to in 1(e), a member that has received an extension under these procedures shall have the possibility to seek a continuation of the extension pursuant to SCM Article 27.4, for the programmes in question. The Committee shall consider any such requests at that year's annual review, on the basis of the provisions of SCM Article 27.4, i.e., outside the framework of these procedures.

(g) If a continuation of the extension pursuant to 1(f) is either not requested or not granted, the member in question shall have the final two years referred to in the last sentence of SCM Article 27.4.

2. Eligible programmes

Programmes eligible for extension pursuant to these procedures, and for which members shall therefore grant extensions for calendar year 2003 as referred to in 1(c), are export subsidy programmes (i) in the form of full or partial exemptions from import duties and internal taxes, (ii) which were in existence not later than 1 September 2001, and (iii) which are provided by developing country members (iv) whose share of world merchandise export trade was not greater than 0.10 per cent,[1] (v) whose total Gross National Income ("GNI") for the year 2000 as published by the World Bank was at or below US $ 20 billion,[2] (vi) and who are otherwise eligible to request an extension pursuant to Article 27.4,[3] and (vii) in respect of which these procedures are followed.

[1] According to the calculations performed by the WTO Secretariat as reflected in Appendix 3 to the Report of the Chairman (G/SCM/38).

[2] The SCM Committee shall consider other appropriate data sources in respect of members for whom the World Bank does not publish total GNI data.

[3] The fact that a member is listed in Annex VII(b) shall not be deemed to make that member otherwise ineligible to request an extension pursuant to Article 27.4.

3. Transparency

(a) The initial notification referred to in 1(b), and the updating notifications referred to in 1(d), shall follow the agreed format for subsidy notifications under SCM Article 25 (found in G/SCM/6).

(b) During the SCM Committee's consideration/ review of the notifications referred to in 1(c) and 1(d), notifying members can be requested by other members to provide additional detail and clarification, with a view to confirming that the programmes meet the criteria set forth in 2, and to establishing transparency in respect of the scope, coverage and intensity of benefits (the "favourability") of the programmes in question.[4] Any information provided in response to such requests shall be considered part of the notified information.

[4] The scope, coverage and intensity of the programmes in question will be determined on the basis of the legal instruments underlying the programmes.

4. Standstill

(a) The programmes for which an extension is granted shall not be modified during the period of extension referred to in 1(e) so as to make them more favourable than they were as at 1 September 2001. The continuation of an expiring programme without modification shall not be deemed to violate standstill.

(b) The scope, coverage and intensity of benefits (the "favourability") of the programmes as at 1 September 2001 shall be specified in the initial notification referred to in 1(b), and standstill as referred to in 4(a) shall be verified on the basis of the notified information referred to in 1(d) and 3(b).

5. Product graduation on the basis of export competitiveness

Notwithstanding these procedures, Articles 27.5 and 27.6 shall apply in respect of export subsidies for which extensions are granted pursuant to these procedures.

6. Members listed in Annex VII(b)

(a) A member listed in Annex VII(b) whose GNP per capita has reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 shall be eligible to make use of these procedures.

(b) A member listed in Annex VII(b) whose GNP per capita has not reached the level provided for in that Annex and whose programme(s) meet the criteria in 2 may reserve its right to make use of these procedures, as referred to in 6(c), by submitting the documentation referred to in 1(a) not later than 31 December 2001.

(c) If the per capita GNP of a member referred to in 6(b) reaches the level provided for in that Annex during the period referred to in 1(e), that member shall be able to make use of these procedures as from the date at which its per capita GNP reaches that level and for the remainder of the period referred to in 1(e), as well as for any additional periods as referred to in 1(f) and 1(g), subject to the remaining provisions of these procedures.

(d) For a member referred to in 6(b), the effective date for the standstill requirement referred to in 4(a) shall be the year in which that member's GNP per capita reaches the level provided for in Annex VII(b).

7. Final provisions

> (a) The decision by ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, are without prejudice to any requests for extensions under Article 27.4 that are not made pursuant to these procedures.
>
> (b) The decision by ministers, these procedures, and the SCM Article 27.4 extensions granted thereunder, shall not affect any other existing rights and obligations under SCM Article 27.4 or under other provisions of the SCM Agreement.
>
> (c) The criteria set forth in these procedures are solely and strictly for the purpose of determining whether members are eligible to invoke these procedures. Members of the Committee agree that these criteria have no precedential value or relevance, direct or indirect, for any other purpose.

These changes basically allow the exemptions available in SCM Art. 27 to be extended until 2007, instead of expiring at the start of 2003, by simple, timely demand and compliance with minimal transparency and standstill requirements. The "eligible programmes" limitations in G/SCM/39 ¶2 are straightforward and provide the possibility of extension for the twenty-two Caribbean, Latin American, and South American WTO members whose 2000 GNI was under US$ 20 billion[114] and who also had average 1998-2000 shares of the world merchandise export trade not greater than 0.10 percent.[115]

The alterations made by the Doha documents to the pre-existing SCM Art. 27 regime are most easily seen when the changes are overlaid in bold type on the Art. 27 chart used to

---

[114] World Bank, Custom database search for GNI, Atlas method (current US$) (visited Oct. 20, 2002) <http://devdata.worldbank.org/data-query/>. Those countries include Antigua and Barbuda, Barbados, Belize, Bolivia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Panama, Paraguay, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Uruguay, at US$ 20.289 billion, was just outside the G/SCM/39 requirement. The World Bank had no GNI data for Aruba, Cayman Islands, Cuba, Nicaragua, Puerto Rico, or the Virgin Islands.

[115] See WTO, Chairman's Report on the Implementation-Related Issues Referred to the Committee at the Request of the Chairman of the General Council on 2 August and 15 October 2001 and in the 15 December 2000 Decision of the General Council, G/SCM/38 (Oct. 26, 2001) 34-36 (visited Oct. 21, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/38.doc>, cited in Procedures for Extensions, *supra* note 113 at ¶ 2 & n.1.

summarize the previous section and its footnotes. In the annotations on the chart below, the Ministerial Conference's "Implementation-Related Issues and Concerns . . ." document is abbreviated "Imp.," and the SCM Committee's "Procedures for Extensions . . ." is abbreviated "Proc." The term "'graduating' Annex VII country" means a country that leaves the Annex VII(b) list because its per capita GNP/GNI has finally exceeded the required amount.

Countries	Does SCM Art. 3.1(a) (export subsidy) apply? [original footnote omitted]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Annex VII(a) LDC's (includes Haiti)	Never.[116] *See* SCM Art 27.2(a). **Reaffirmed. *See* Imp. ¶ 10.5.**	Not until 2003. *See* SCM Art. 27.3.

[116] A LDC that achieves export competitiveness with respect to a particular product must phase out any export subsidies on that product over the next eight years. *See* SCM, *supra* note 35 at Art. 27.5. **This was reaffirmed, too. *See* Imp. ¶ 10.5; Proc. ¶ 5.** However, if it does not, it is still immune from action pursuant to SCM Art. 3.1(a) by virtue of SCM Art. 27.2(a). A complaining member would have to pursue it under SCM Art. 5, which now always requires proof of injury. [The remainder of the original footnote is omitted.]

Countries	Does SCM Art. 3.1(a) (export subsidy) apply? [original footnote omitted]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Annex VII(b) developing countries (includes Bolivia, Dominican Republic, Guatemala, Guyana, and Nicaragua) [original footnote omitted]	Not until 2003, and then only if per capita GNP has reached US$1,000 **in constant 1990 dollars for 3 consecutive years, and if that standard is met but GNP later falls back under US $1,000, the country will be re-included in Annex VII(b).** ***See*** **Imp. ¶ 10.1, 10.4**. *See* Annex VII(b).[117] **"Graduating" Annex VII(b) countries can use G/SCM/39 procedures. Proc. ¶ 6. Existing Annex VII(b) countries can reserve their use, and the standstill requirement will not apply until they "graduate."** ***Id.***	Yes, since 2000. *See* SCM Art. 27.3.

[117] An Annex VII developing country that reaches export competitiveness in one or more products must phase out export subsidies on those products over eight years, just as a LDC must. *See* SCM, *supra* note 35 at Art. 27.5**; Proc. ¶ 5**. However, if it did not and its per capita GNP remained below US$ 1,000, it would, like a LDC, still be immune from action pursuant to SCM Art. 3.1(a). *See supra* note 116.

Countries	Does SCM Art. 3.1(a) (export subsidy) apply? [original footnote omitted]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Non-Annex-VII developing countries who were original WTO members (includes all Caribbean and Central and South American members except Ecuador and Panama)	Not until 2003, per Art. 27.2(b), unless a timely request for extension was filed. If extension granted**, and it will be, on an annual basis until 2007, if proper requests are filed and standstill and transparency requirements are met, *see* Proc. ¶¶ 1(c)-(e), 3-4**, 3.1(a) applies 2 years after expiration of extension; if extension denied **or simply not requested**, the 2-year phase out still applies.[118] *See* Art. 27.4**; Proc. ¶ 1(g).**	Yes, since 2000. *See* SCM Art. 27.3.

[118] Non-Annex-VII developing countries that reach export competitiveness in one or more products must phase out export subsidies on those products over two years. *See* SCM, *supra* note 35 at Art. 27.5**; Proc. ¶ 5.**

Countries	Does SCM Art. 3.1(a) (export subsidy) apply? [original footnote omitted]	Does SCM Art. 3.1(b) (domestic content subsidy) apply?
Non-Annex-VII developing countries who acceded to the WTO (includes Ecuador and Panama)	Yes, but when depends on the individual accession protocol.[119] If the transitional periods in Art. 27 apply, not until 2003 unless a timely request was filed to extend that deadline. *See* Art. 27.2(b). If extension granted, **as it will be, on an annual basis until 2007, if proper requests are filed and standstill and transparency requirements are met, *see* Proc. ¶¶ 1(c)-(e), 3-4**, 3.1(a) applies 2 years after expiration of extension; if extension denied **or simply not requested**, the 2-year phase out still applies.[118] *See* Art. 27.4**; Proc. ¶ 1(g).** If the transitional periods do not apply, Art. 3.1(a) applies at the time of accession.	Yes, since 2000. *See* SCM Art. 27.3.

According to the WTO Secretariat, twenty-three countries have requested relief pursuant to SCM Art. 27 and G/SCM/39:[120]

Country	WTO Symbol	WTO Date	Internal Date	Selected Subsidies

[119] *See supra* text accompanying notes 91-101.

[120] *See* WTO, Note from the Secretariat, G/SCM/40/Rev.2 (Mar. 13, 2002) (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/40R2.doc>.

Country	WTO Symbol	WTO Date	Internal Date	Selected Subsidies
Antigua & Barbuda	G/SCM/N/74/ATG	Jan. 4, 2002	Dec. 28, 2001	tax holiday for enclave enterprises producing exclusively for export and for companies operating in free trade and processing zones
Barbados	G/SCM/N/74/BRB	Jan. 4, 2002	Dec. 28, 2001	income tax export allowance; international business tax incentives
Belize	G/SCM/N/74/BLZ/Suppl.1	Dec. 12, 2001	Dec. 10, 2001	export processing zones (tax holidays); commercial free zones (lower income taxes)
Bolivia	G/SCM/N/74/BOL	Jan. 10, 2002	Dec. 28, 2001	Free Zone programme; reservation of extension rights under G/SCM/39 ¶ 6(b)
Costa Rica	G/SCM/N/74/CRI	Dec. 20, 2001	Dec. 19, 2001	Free Zone Regime
Dominica	G/SCM/N/74/DMA	Jan. 7, 2002	Dec. 24, 2001	income tax exemption for enclave enterprises producing exclusively for export
Dominican Repub.	G/SCM/N/74/DOM	Jan. 8, 2002	Dec. 3, 2001	export-oriented free-trade zones
El Salvador	G/SCM/N/74/SLV/1	Jan. 3, 2002	Dec. 19, 2001	export processing zones
Fiji	G/SCM/N/74/FJI	Mar. 5, 2002	Dec. 31, 2001	short-term export profit deduction; export processing factories; export processing zones scheme

Country	WTO Symbol	WTO Date	Internal Date	Selected Subsidies
Guatemala	G/SCM/N/74/GTM	Dec. 11, 2001	Dec. 7, 2001	10-year tax holidays under special customs regimes and free zones
Honduras[121]	G/SCM/N/74/HND	Dec. 4, 2001	Nov. 20, 2001	tax holidays for free trade and export processing zones and for temporary imports
Jamaica	G/SCM/N/74/JAM	Dec. 20, 2001	Dec. 14, 2001	export industry and export free zone acts; FSC Act
Jordan	G/SCM/N/74/JOR	Jan. 15, 2002	Dec. 21, 2001	income tax exemption for export profits
Kenya	G/SCM/N/74/KEN	Dec. 21, 2001	Dec. 19, 2001	export processing zones
Mauritius	G/SCM/N/74/MUS	Jan. 16, 2002	Dec. 19, 2001	incentive corporate tax rate for export enterprises; tax holiday for freeport zone operators; tax credits for exports
Panama	G/SCM/N/74/PAN/1	Jan. 4, 2002	Dec. 20, 2001	tax holidays for exporters and companies in export processing zones
Papua New Guinea	G/SCM/N/74/PNG/Suppl.1	Dec. 21, 2001	Dec. 20, 2001	export subsidy on Ramu Nickel/Cobalt Project

[121] Honduras claimed in its request that it was an Annex VII(b) developing country. *See* WTO, Subsidies [–] Requests Pursuant to Article 27.4 of the [SCM,] Requests Pursuant to the Procedure in Document G/SCM/39 [–] Honduras, G/SCM/N/74/HND (Dec. 4, 2001) 2 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/N74HND.doc>. For Honduras's status with respect to Annex VII(b), *see supra* note 82.

Country	WTO Symbol	WTO Date	Internal Date	Selected Subsidies
St. Kitts and Nevis	G/SCM/N/74/KNA	Dec. 17, 2001	Dec. 13, 2001	15-year tax holiday for enclave enterprises producing exclusively for export
Saint Lucia	G/SCM/N/74/LCA	Jan. 7, 2002	Dec. 28, 2001	up to 15-year tax holiday on export profits
St. Vincent and the Grenadines	G/SCM/N/74/VCT	Jan. 4, 2002	Dec. 31, 2001	up to 15-year tax holidays for enclave enterprises producing exclusively for export
Sri Lanka	G/SCM/N/74/LKA	Jan. 7, 2002	Dec. 20, 2001	Export Development Investment Support Scheme
Suriname	G/SCM/N/74/SUR	Jan. 7, 2002	Dec. 28, 2001	[no detail]
	G/SCM/N/74/SUR/ Suppl.1	Jan. 16, 2002	Jan. 14, 2002	specifically states no "export subsidies"
Uruguay[122]	G/SCM/N/74/URY	Jan. 10, 2002	Dec. 28, 2002	10% tax exemption for exporters of industrial automotive products

There were two other requests for consideration under G/SCM/39 that the Secretariat did not place on the list. A request specifically invoking G/SCM/39 was received from Grenada on Jan. 7, 2002, but the Secretariat merely noted its receipt at the end of its list of requests.[123] Inspection of Grenada's request reveals that it contains no internal date,[124] and therefore, having

[122] According to the World Bank, Uruguay's 2000 GNI, calculated using what the Bank called the "Atlas method (current US$)," was US$ 20,289,250,000. *See* World Bank, Custom database search for Uruguay 2000 GNI, Atlas method (current US$) (visited Oct. 20, 2002) <http://devdata.worldbank.org/data-query/>. Therefore, Uruguay is not eligible for G/SCM/39 benefits. *See* Procedures for Extensions, *supra* note 113 at ¶ 2.

[123] *See* Note from the Secretariat, *supra* note 120 at 2.

[124] *See* WTO, Subsidies [–] Requests Pursuant to Article 27.4 of the [SCM,] Requests Pursuant to the Procedure in Document G/SCM/39 [–] Grenada, G/SCM/74/GRD (Jan. 11, 2002) 1 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/N74GRD.doc>.

been received after Dec. 31, 2001, may have been felt not to comply with that deadline for submission of extension requests set in G/SCM/39 ¶1(a). This theory is supported by the Secretariat's acceptance of Fiji's G/SCM/39 request, not received until March 5, 2002, but bearing an internal date of December 31, 2001.[125] The Secretariat also received a SCM Art. 27 extension request from Colombia that asked that Colombia be granted "the same treatment as regards eligible programmes and the duration of extensions of the transition period granted to other developing country Members that have requested such extension following the procedure set forth in document G/SCM/39."[126] This request did have a valid internal date, Dec. 31, 2001, but it was properly excluded because Colombia's average share of the world merchandise export trade in 1998-2000 was 0.2%, double the 0.1% limit, and its 2000 GNI was US$ 85.95 billion, over four times the G/SCM/39 limit.[127]

Conclusion

The extension of the SCM Art. 27 deadlines for elimination of tax-related export subsidies by developing countries has defused an important and incendiary issue. Frankly, it would have been impossible for all twenty-three countries that have applied for the G/SCM/39 extensions to eliminate their export subsidies by Jan. 1, 2003, and if the Art. 27 deadlines had been allowed to expire, it would have been possible for complaints to be filed against any of the twenty-three seeking authorization for countervailing duties. At a time when the gap between developed and developing countries is increasing rather than narrowing, and when the value of

[125] *See* WTO, Subsidies [–] Requests Pursuant to Article 27.4 of the [SCM,] Requests Pursuant to the Procedure in Document G/SCM/39 [–] Fiji, G/SCM/N/74/FJI (Mar. 5, 2002) 1 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/N74FJI.doc>.

[126] *See* WTO, Subsidies [–] Requests Pursuant to Article 27.4 of the [SCM,] Colombia, G/SCM/N/74/COL (Jan. 15, 2002) 1 (visited Oct. 19, 2002) <http://docsonline.wto.org:80/DDFDocuments/t/G/SCM/N74COL.doc>.

[127] *See* Procedures for Extensions, *supra* note 113 at ¶2 (stating eligibility requirements); Chairman's Report, *supra* note 115 at 36 (noting Colombia's export trade share); World Bank, Custom database search for Colombia 2000 GNI, Atlas method (current US$) (visited Oct. 20, 2002) <http://devdata.worldbank.org/data-query/>.

fungible FDI incentives like tax subsidies is waning,[128] this would have been a serious blow that could have effectively ended the future and current FDI that tax-related subsidies seek to attract and benefit.

The original deadlines contained in the SCM appear to have assumed that developing countries, properly exhorted, would comply with the 2003 deadline by phasing out their export subsidies over time. This assumption, however, ignored the dilemma of the commons that I touched on in my beginning section: it is never in the interest of any user of a commons to forego continued or additional use of the commons in an attempt to preserve it.[129] To the contrary, it will always be in the net self-interest of each user to increase his use.[130] That is exactly what has happened with the FDI commons. It was not in the self-interest of any of the twenty-three, G/SCM/39 developing-country users to diminish their tax incentives in order to comply with the SCM deadlines because (1) those deadlines were never imminent (until recently) and (2) to do so would only have meant individual deprivation (and perhaps political ruin) as FDI that might have alighted on the conscientious country's shore swam on to a neighboring state.

One answer to the tax-subsidy problem, now that we have a few more years to work on it, is to remove the incentive to seek lower taxes by insuring that multinational enterprises engaging in FDI pay tax where their goods are sold.[131] However, another solution that could be implemented in addition to or in conjunction with that effort would be to set annual deadlines for

---

[128] Rajneesh Narula and John H. Dunning, Globalisation and New Realities for Multinational Enterprise-Developing Host Country Interaction 2, 4-5 (1998) (visited Oct. 13, 2002) <http://www-edocs.unimaas.nl/files/mer98015.pdf>. Dunning developed the "ownership-location-internalization" (OLI) paradigm of FDI. *See*, e.g., John H. Dunning, *Toward an Eclectic Theory of International Production: Some Empirical Tests*, 11 J. Int'l Bus. Stud. 9, 9 (1980).

[129] *See* Hardin, *supra* note 20 at 1244, 1246.

[130] *Id.*

[131] *See* Avi-Yonah, *supra* note 14 at 1666-1667.

incremental restrictions of existing tax incentives. If all developing countries had to cut back their tax incentives annually by small amounts fairly apportioned, the risk to any one country if it complied with the plan and others did not would be small and therefore reasonable. Similarly, if the annual phase-out amount were small, no great gain would accrue from ignoring it, and a country that did so would be more open to opprobrium because it had acted in defiance and derogation of its neighbors when there was little to be gained. The time to begin work on such a plan is now, well before 2007, when the G/SCM/39 stopgap expires, and it would be best if a developing country or coalition of developing countries were the actor that brings such an incremental phase-out to the WTO General Council and the SCM Committee.

*

*   *