

Review of the Subsidies workshop

22 and 23 January 2009

Cape Town

On 22 and 23 January 2009 **tralac** held a workshop on subsidies with the objectives to provide an overview of the WTO Agreement on Subsidies and Countervailing (SCM) measures, examine case law and to indicate some experience with subsidies in several sectors. The discussion was led by Prof Debra Steger, the founding Director of the WTO Appellate Body, and currently the Director of the EDGE Network at the University of Ottawa. The workshop was attended by private sector and the government of both South Africa and Lesotho.

The discussions highlighted various areas of interest in the SCM Agreement and the application thereof:

- The Agreement is only applicable to trade in goods. In terms of trade in services the GATS contains no provisions dealing specifically with the application of subsidies. Although not explicitly governed, subsidies in services can result in a violation of the MFN and national treatment commitment a member country has made under the WTO.
- Case law has provided some answers to the application of the SCM Agreement. The benefit that a subsidy must confer to the recipient is calculated by looking at the benchmark in the marketplace and not the cost to government. The calculation provided in article 14 to determine the benefit to the recipient pertains to countervailing measures, but is also used for the benefit determination regarding subsidies. The SCM Agreement provides an interpretation of the term “like product”. However, case law has provided a wide range of factors to determine when products are “like

products”. These factors include the consumer preference for a product and the physical characteristics of the product. In the analysis to determine whether products are “like products” the factors as stated by case law is preferred to the interpretation given in the SCM Agreement.

- Certain provisions in the Agreement have expired. This includes articles 8 and 9 that dealt with non-actionable subsidies. These articles provided an exemption for countries from multi-lateral and domestic countervailing action. Article 27 of the SCM Agreement provides for the special and differential treatment of developing country members. This article provides for an exception to developing and least developed countries in terms of export and import-substitution subsidies. A large part of this article is not applicable any more due to the fact that the provisions pertaining to developing countries have expired. The article is still relevant in terms of least developed countries as referred to in Annexure VII.
- Some overlapping between the SCM Agreement and other agreements exist. Article 1 of the Agreement refers to Article XVI of GATT 1994. This article provides that all export subsidies are prohibited, except on primary products. With the reference in article 1 the result is that both articles have to be read in conjunction. Article 10 of the SCM Agreement makes reference to Article VI of GATT 1994 and the Agreement on Agriculture. The discussion revealed that article 13 of the Agreement on Agriculture was applicable, but this article has since expired. Article VI of GATT is still applicable and continues to be of importance in the application of the provisions relating to subsidies.

The workshop was highly informative, revealing these and other crucial issues relating to the interpretation and application of the SCM Agreement.