Biofuels, Subsidies, and Dispute Settlement in the WTO

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1. INTRODUCTION

The nascent but growing trade in biofuels presents complex and contentious issues that have stymied the negotiators of the World Trade Organization (WTO)’s Doha round. That is the bad news. The good news is that WTO disputes, should they materialize, offer a valuable opportunity to expound the Agreement on Subsidies and Countervailing Measures (SCM) and by so doing to create an environment of legal certainty that the stalled round has failed to provide.

This article builds on a discussion paper outlining the “opportunities and constraints in the creation of a global marketplace” for biofuels. As pieces in that puzzle, subsidies and their disciplines illustrate the wide range of values, tools, and tendencies implicated by the trade in biofuels. This article develops each of these in the context of the SCM’s disciplines in general and its provisions for dispute settlement in particular. It ultimately suggests that a mutually beneficial relationship is possible among the biofuels trade, the SCM, and the WTO tribunals that are asked to reconcile the two.

It is important to note that dispute settlement is just one part of the WTO regime. However, given the lack of progress in the Doha round, the threat, consultation, resolution, and enforcement of disputes may become the primary vehicles for reconciling the WTO’s agreements with the current reality of global trade—a reality that includes growing markets for biofuels. Because both the WTO’s panels and its Appellate Body can play a role in this adaptation and application of the regime, this article refers in the abstract to both levels of adjudication as the “panel or Appellate Body” (PAB).

Following this introduction, Part 2 summarizes relevant portions of the SCM. Part 3 explores some of the global values that these measures implicate. Part 4 considers the most likely form of an early biofuels dispute under the SCM. Part 5 then analyzes the tools that the PAB could apply to such a dispute. Part 6 discusses these tools in the context of three broad tendencies that might motivate the PAB. Part 7 concludes.

2. **AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM)**

A WTO member can challenge another member’s financial support of biofuels under two agreements. The Agreement on Agriculture (AoA) addresses support for a specific product like ethanol (but not biodiesel).\(^2\) By contrast, the SCM addresses support for a specific or limited class of users.\(^3\) Since the expiration of the AoA’s “peace clause,” some supports can be challenged under both the AoA and the SCM.\(^4\)

Under the SCM, a measure is only a subsidy if it both involves a financial contribution by government and confers a benefit.\(^5\) (For the purpose of this article, financial contribution also includes income or price support.)\(^6\) A subsidy so defined is prohibited if it is specific (that is, it targets or disproportionately benefits a specific or limited class of users) and is either contingent on the export of a product or contingent on the use of domestic over imported goods.\(^7\) A subsidy is otherwise actionable if it is specific and causes certain adverse effects, including serious

\(^2\) See Agreement on Agriculture, Apr. 15, 1994, Annex 1; Howse, supra note 1, at 9-11.

\(^3\) See Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994.

\(^4\) See Agreement on Agriculture, supra note 2, at art. 13.

\(^5\) See Agreement on Subsidies and Countervailing Measures, supra note 3, at art. 1.

\(^6\) Id. at art. 1.1.

\(^7\) Id. at arts. 2-3.
prejudice to another member’s interests. Only if subsidized imports have caused injury to a member’s domestic industry can that member invoke its own domestic investigation procedure for the imposition of countervailing duties. In all cases it can proceed through the dispute settlement process.

Because “subsidy” has a specific meaning under the SCM, this article uses the terms “measure” or “program” to describe government support for biofuels that is not necessarily a subsidy per the SCM. These measures can take many different forms and apply at many different points along a continuum of development, cultivation, production, sale, and consumption.

3. **VALUES IMPlicated BY BIOFUELS**

Energy, agriculture, and environmental policy are each fields with complex and contentious issues (and subsidies). As the gore between all three of these fields, trade in biofuels presents even more numerous and complex issues. They include but are by no means limited to the economic interests affected by trade, development and its global disparities, food security, environmental protection, and the very nature of the WTO regime. Consideration of these issues transcends mere balancing to enter the realm of juggling; the extent to which the PAB can act as the juggler is a question that imbues the remainder of this article.

3.1. **Competition**

Biofuel policy affects many different economic interests. Economic as well as political competition among these interests takes many forms: between fossil fuels and biofuels, between

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8 *Id.* at arts. 2 & 5-7.
9 *Id.* at arts. 10 & 11.2(iv).
10 *Id.* at arts. 4, 7 & 9.
11 *See, e.g.*, Howse, *supra* note 1, at 9 (listing seventeen different examples of support measures).
food and feedstock, between different kinds of feedstocks, between different kinds of biofuels, and between downstream energy users, to identify just a few.\textsuperscript{12} Measures relating to biofuels tend to implicate more than one form of competition. For example, by enhancing the viability of biofuels vis-à-vis fossil fuels, a support program may also impair the viability of foreign biofuels vis-à-vis domestic biofuels.

In a purely rational world devoid of externalities and government intervention, competition could be purely economic: The objectively cheaper sources would prevail. At the other extreme, competition would be purely political: Government would wholly define the market for each source. Reality inhabits the murky middle, where government intervention pervasively shapes the energy markets in general and the biofuels markets in particular.\textsuperscript{13}

3.2. Global Divisions and Development

Some commentators, Ted Turner among them, have suggested that trade in biofuels can satisfy both developing and developed countries in a way that can resolve the Doha round’s logjam.\textsuperscript{14} That now seems unlikely, particularly in light of the considerable political support in the United States for the continuation of ethanol tariffs.\textsuperscript{15} Instead, biofuels have heightened some of the tensions between developing and developed countries, particularly those concerning agricultural subsidies, food prices, and environmental degradation.


\textsuperscript{13} See Howse, supra note 1, at 8.


Special and differentiated treatment for developing countries is explicit in the SCM. But its inverse can be implicit in the SCM’s application. For example, countervailing duties are available for harm to an industry’s domestic sales but not for harm to its foreign sales. In the context of biofuels, the availability of this initially domestic remedy might tend to disproportionately benefit developed countries with large energy markets.

3.3. Food Security

A person and an automobile cannot eat the same piece of corn (or the same cassava). Crops harvested for ethanol are unavailable for both people and livestock, and land devoted to those crops cannot be used to grow others. Increases in food prices are particularly harmful to the world’s poor: They “already spend 50 to 80 percent of their total household income on food,” and their caloric consumption “declines by about half of one percent whenever the average prices of all major food staples increase by one percent.” A sharp rise in U.S. corn prices in 2006 helped fuel a sharp rise in the price of tortilla flour in Mexico, which in turn fueled massive protests and the imposition of a price cap.

Greater trade in biofuels might be expected to have a mixed effect on world food prices. On one hand, substitution of sugarcane ethanol from Brazil for corn ethanol from the United States might relieve the upward pressure on food prices caused by the diversion of U.S. cropland

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16 See Agreement on Subsidies and Countervailing Measures, supra note 3, at art. 27.
18 Id.
to ethanol production. On the other hand, increased demand for cassava could render this equatorial staple too expensive for many of its consumers.

Financial supports likewise might be expected to have a mixed effect on both trade and prices. On one hand, they help make biofuels competitive with fossil fuels that also benefit from substantial government support. On the other hand, they can create market distortion, although agricultural import restrictions impose a far greater cost in terms of market distortion than do agricultural support measures.

3.4. Environmental Protection

There is an abundance of argument about whether—and if so, which—biofuels are biofriendly. The environmental effects of biofuel production stretch from the local through the regional to the global. They include water depletion and pollution, deforestation, loss of biodiversity, and the release of greenhouse gases, and they vary “for each feedstock, production pathway, and location.” Assuming that energy demand will be satisfied somehow, the important but vexing question is whether a particular biofuel produced in a particular way in a particular place imposes fewer environmental costs per unit of energy than each alternative, evaluated in the same way.

20 See Seelke, supra note 7, at 17-18.
21 See Runge, supra note 17 (noting that the price of cassava “is expected to increase by 33 percent by 2010 and 135 percent by 2020).
22 See, e.g., John Kruse, Patrick Westhoff, Seth Meyer & Wyatt Thompson, Economic Impacts of Not Extending Biofuel Subsidies, 10 AgBioForum 94, 98, available at http://agbioforum.org/v10n2/v10n2a04-kruse.htm (arguing that U.S. corn prices, acreage, and production will fall while demand and export volume will rise if the U.S. tax credit for ethanol is eliminated).
23 See Kojima, supra note 19, at 7. Market distortion, however, seems a rather unhelpful phrase. Depending on the values considered, government intervention might be said to impose or correct certain market distortions. See infra.
24 See, e.g., id. at 68-70; Runge, supra note 17.
25 See, e.g., Kojima, supra note 19, at 68-70; Coelho, supra note 12, at 21.
This second-order question in turn raises a number of third-order questions about trade in and support of biofuels. As with food security, one might expect mixed impacts on the environment. On one hand, a shift from corn to feedstocks that require less energy input could improve the efficiency of (and reduce the greenhouse gas emissions associated with) biofuels generally. On the other hand, this benefit might come at the expense of biodiversity in tropical regions. Back on the first hand, a reduction of poverty in those regions might provide a net environmental (as well as social) benefit. But again on the other hand, “the history of industrial demand for agricultural crops in these countries suggests that large producers will be the main beneficiaries.”

3.5. Interpretation and Evolution of the WTO Regime

Whether through rounds, dispute resolution, or common practice, the WTO regime will remain dynamic. The PAB can help to shepherd change by interpreting the treaty texts. But interpretation also raises many questions. For example, how should the PAB stretch its “accordion of likeness”? What balance should it strike between substance and formalism? And what role should dispute resolution play in the WTO regime as a whole? The remainder of this article considers these questions. Before examining how they might influence a dispute, the article first discusses the likely characteristics of such a dispute.

4. SIMPLIFYING ASSUMPTIONS OF AN EMERGING TRADE

The complexity of international trade, political forces, and the trade agreements themselves are bound to create novel and unexpected disputes; as one commentator noted, the

\[\text{Runge, supra note 17.}\]
next WTO “spat” could just as easily “be over corsets, fire engines, or marmalade” as over biofuels.27

Given the current nascent state of biofuels production and trade, however, an SCM dispute about biofuels that reaches the PAB is likely to have several characteristics that can simplify this article’s analysis. First, the dispute will likely involve a package of allegedly offending measures. Second, the members requesting consultations will be successful biofuel producers, developed or developing, that will themselves have supported their industry. Third, the member subject to the complaint will be a developed country with a supported biofuels industry.

Finally, the complaint will allege that the adverse effect is “serious prejudice” per paragraphs 1a and 3a of article 6. As discussed below, adverse effect is the critical element that starts and ends the analysis. Only if an industry or enterprise feels harmed will a member request consultations. And only if that harm qualifies under the SCM will that member prevail on paper. Assuming the complaint is against a developed country, serious prejudice will also involve burden shifting.

The alleged adverse effect will likely take the form of serious prejudice because the alternatives—jury to domestic industry and nullification or impairment of benefits—seem less plausible. Injury to domestic industry only applies to harm caused by subsidized imports, and a member in such circumstances may in any case opt to apply countervailing duties; the allegedly subsidizing country would then challenge the imposition of those duties. Nullification or impairment of benefits may be difficult to argue for a trade that was virtually nonexistent during

the Uruguay round. Serious prejudice is therefore neither too close nor too remote—the Goldilocks of adverse effect. Accordingly, this article focuses on the countermeasures of SCM article 6 rather than the countervailing duties of part V, on the serious prejudice analysis, and on the burden-shifting imposed on developed countries by that analysis.

Two current disputes have many of the characteristics of a likely dispute. In United States – Subsidies and Other Domestic Support for Corn and Other Agricultural Products (DS357), Canada requested consultations with the United States per the AoA and the SCM.28 Several large agricultural producers (including Brazil and the European Communities) joined the consultations.29 Canada then requested a panel per both the AoA and the SCM, but in November 2007 withdrew its request without prejudice and requested another panel per only the AoA.30

In United States – Domestic Support and Export Credit Guarantees for Agricultural Products (DS365), Brazil, like Canada, requested consultations with the United States per the AoA and the SCM.31 Several large agricultural producers (including Canada and the European Communities) joined the consultations.32 In November 2007, Brazil requested a panel per only the AoA.33

Why, in neither of these disputes, has a member requested a panel per the SCM? It seems unlikely that the members have resolved their SCM complaints. They might simply expand their panel requests later, or they may initiate a countervailing duty investigation. Their focus on the

29 See id.
30 See id.
32 See id.
33 See id.
AoA may also suggest the difficulty of resorting to dispute settlement in subsidy cases, an issue explored below.\textsuperscript{34}

5. **TOOLS AVAILABLE TO THE APPELLATE BODY AND PANELS**

The Appellate Body is equipped with more than just a dictionary. Even when the PAB purports to do nothing more than give effect to treaty language, it can use interpretive tools to shape the robustness, manage the attractiveness, and guard the legitimacy of its regime.

This section discusses several of these tools.\textsuperscript{35} The first four are the very elements of the SCM. As outlined above, a complaining member must demonstrate four elements under the SCM: financial contribution, benefit, specificity, and adverse effect. Only specificity appears to have been spared interpretation by the PAB; the parties in one dispute simply agreed that the contested measure was specific.\textsuperscript{36} The PAB has otherwise emphasized the independent nature of each element; benefit, for example, is not the converse of financial contribution. Nonetheless, as illustrated below, the four elements are inextricably linked. Together, through the permissiveness or restrictiveness of their interpretation, they must accommodate the broader issues described above.

Related to these elements are the burdens, and burden shifting, associated with each. The PAB can also wield, and has wielded, the “likeness” tests found across the WTO agreements as well as other kinds of categorization, even if not explicit in the text of the agreement. It can

\textsuperscript{34} See also Howse, supra note 1, at 20.

\textsuperscript{35} The Guide to WTO Law and Practice was indispensible to this section’s analysis. See generally Guide to WTO Law and Practice – Agreement on Subsidies and Countervailing Measures, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/subsidies_e.htm .

import obligations and concepts from other agreements, and it can employ the language of both substance and sovereignty.

5.1. **Financial Contribution**

Although panels have suggested that the requirement of a financial contribution from government exists because of concern that a definition based on benefit alone would be too inclusive, the tribunals have nonetheless been reluctant to let a complaint fail on this element.\(^{37}\) The Appellate Body has expressed misgivings about any tests that could be circumvented by creative members.\(^{38}\) With regard to the government provision of goods or services, one panel defined goods as “tangible or movable personal property, other than money,” but then applied this to include what was legally the mere provision of a right to one such good (timber).\(^{39}\)

The interpretative flexibility of the tribunals—what one panel deemed its use of “actual substantive realities” rather than “pure formalism”\(^{40}\)—is most interesting with regard to government revenue foregone. The Appellate Body insists on basing its analysis on a “defined normative benchmark” but for reasons of national sovereignty uses the member’s own tax rules as that benchmark.\(^{41}\)

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\(^{37}\) *See generally Guide to WTO Law and Practice, supra* note 35, at II.B.3(b). The financial contribution requirement also serves both to ensure that a government has acted and to limit which of those actions might be considered a subsidy. Interestingly, government action is not required in the context of dumping, which is in a sense nongovernmental dumping. *See* Agreement on Implementation of Article VI (Anti-dumping). Apr. 15, 1994.


Whether the failure to tax a certain activity at a certain level constitutes foregone revenue will therefore depend on the “essential shape and the rationale exhibited” by the member’s own tax system.\(^{42}\) But such an assessment hardly brings simplicity or avoids difficult questions of sovereignty. Critically, should a country’s motives matter to the PAB? If so, how should these motives be determined and then, once determined, presented?

### 5.2. Benefit

The PAB has emphasized that the benefit inquiry is necessarily distinct from the financial contribution inquiry. Only if “the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution” does that contribution constitute a benefit and hence a subsidy under the SCM.\(^{43}\) Any such advantage must be measured relative to market conditions.\(^{44}\) Given that government intervention has had such an enormous effect on the biofuels markets, not to mention the larger energy and agricultural markets, how complex is the determination of benefit?

The discussion paper that inspired this article argues that this determination is quite complex.\(^{45}\) Benefit is an “advantage in relation to normal market conditions.”\(^{46}\) Because government intervention has significantly distorted the biofuels market, there may not be a meaningful market benchmark against which to determine the comparative advantage conferred by the particular measure.

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\(^{42}\) Panel Report, *United States – Tax Treatment for “Foreign Sales Corporations”: Recourse to Article 21.5 of the DSU by the European Communities*, supra note 40, at ¶ 8.29.


\(^{44}\) *Id.* at ¶ 157.

\(^{45}\) See Howse, *supra* note 1, at 17.

\(^{46}\) *Id.*
In contrast, another paper argues that the determination is generally straightforward.\textsuperscript{47} Most biofuel measures involve clear financial contributions by governments. While the determination of a market benchmark may be more complex in the case of extensive government provision of goods and services, this is not the dominant form of biofuel subsidy.\textsuperscript{48}

Although the PAB seems to favor complexity, neither conclusion is dictated by the text of the SCM. While SCM article 14 does suggest a market comparison, it may be less instructive when government transfers funds or forgoes revenue to promote certain domestic policies than when government acts as a market participant.\textsuperscript{49} So how might the benefit determination assess whether government fiscal policy has conferred a benefit? Several highly simplistic scenarios suggest one possible approach.

Imagine a government program that covers the full cost of certain optional safety equipment for farmers, satisfies the elements of financial contribution and specificity, and does not fall under SCM article 8. If the program merely negates the benefit that the farmer would realize from \textit{not} purchasing the equipment, then it confers no comparative advantage on the farmer. The alternative activity that the program deters is \textit{not} purchasing the equipment.\textsuperscript{50}

Now imagine a government program that pays the farmer to grow what otherwise would be a less profitable crop. The farmer is still no “better off” as long as the profit from the new crop does not exceed the profit from the original crop. The program has simply made the farmer

\textsuperscript{47} See Bigdeli, supra note 12, at 17.

\textsuperscript{48} Id.

\textsuperscript{49} See Agreement on Subsidies and Countervailing Measures, supra note 3, at art. 14.

\textsuperscript{50} Deter may be too strong a word. For these examples, the effect of the program would be to eliminate the advantage enjoyed by the alternative activity by equalizing the costs and the benefits between the two activities.
indifferent between two means to the same amount of profit. The alternative activity that the program deters is planting the original crop.

Finally imagine a government program that pays an ethanol producer to produce ethanol from any source.51 Without the government payment, what would the ethanol producer do? The alternative activity implicated by this program is less clear. While the producer might invest in an entirely different enterprise (say, Iowa theme parks), such an enterprise is too dissimilar from ethanol production to be useful to an analysis; to use a term discussed later, the two are not “like.” Selling ethanol might be more usefully compared to selling unprocessed corn or oil or foreign ethanol. Indeed, the aim of the program might be to deter all of these alternative activities.

Of these alternative activities, foreign ethanol is the most like domestic ethanol, and a comparison of the two can suggest whether the program confers any advantage. Once financial contribution has been established, the initial formula for determining per-unit benefit might be:

\[
\text{Advantage} = \text{Financial Contribution to Producer} + \text{Production Cost without Contribution} - \text{Importation Cost} - \text{Financial Contribution to Importer}
\]

This formula would describe the difference in profit between the producer’s two options: manufacturing and then selling its own ethanol, or buying and then reselling another producer’s ethanol. This cost-of-importation would include tariffs permitted under GATT and the value of any financial contributions provided by the exporter’s country. In this regard, WTO and national jurisprudence related to anti-dumping might help to inform these calculations.52

51 See, e.g., Howse, supra note 1, at 19.
52 As would those trained in economics. I am not.
If the advantage is zero, then the program has not conferred a benefit to the producer; it has merely made that producer indifferent between buying and producing ethanol. If the advantage is positive, then the program has conferred a benefit; the financial contribution has increased the producer’s profit above that which it could make from importing ethanol.

If the advantage is negative, then ethanol production is more profitable than ethanol importation. In other words, the foreign ethanol is simply not competitive. This result could be characterized in two ways. First, even if the producer enjoys a financial advantage, it does not enjoy a comparative advantage. Second, regardless of the characterization of benefit, there has been no adverse effect, because the imported ethanol could not compete even without the support measure.

This approach makes numerous assumptions. For example, it assumes that financial contributions can be apportioned by unit of production; volumetric tax credits are exactly that. It also assumes that financial contributions provided by the complaining member to its exporters should matter to the analysis, a point considered in the discussion of adverse effect below. It further assumes conceptually a liquid world in which ethanol producers can choose between producing and importing ethanol, a plausible assumption given the large agribusinesses involved in ethanol. And, critically, it may not account for feedback—the changes in demand, supply, and price that result from the government measures.

53 Because of “exceptionally high insurance and freight costs for all goods including liquid fuels,” this is often the case. See Kojima, supra note 19, at 57. It is easy to show a large number of countries where local costs of biofuel production would be higher than import-parity prices for biofuels and for equivalent petroleum fuels. But it is difficult to find countries that are potential large exporters of ethanol or other biofuels (Brazil being a recent exception). Id.

54 See, e.g., Howse, supra note 1, at 19.

55 See Runge, supra note 17.
Ultimately, however, the benefit analysis can tolerate some simplification. The SCM’s “gotcha” moment is adverse effect rather than benefit—only if there is harm are countermeasures permitted. And since the degree of adverse effect is an inquiry distinct from benefit, the precise quantification of benefit may not matter.\(^{56}\)

One other complicating aspect of benefit merits mention. Although the PAB has never found the recipient of the financial contribution to be different than the recipient of the benefit, it has at least considered the possibility that benefit might accrue to entities upstream or downstream of the recipient of the financial contribution.\(^{57}\)

### 5.3. Specificity

Specificity is a U.S. law export.\(^{58}\) In the U.S. context, whether subsidies are specific “will depend in large measure on form rather than substance.”\(^{59}\) If the PAB embraces the U.S. test, “a program aimed at growers of particular agricultural product, such as wheat, would be specific. But a program that gave assistance to all farmers regardless of what they grow would not be specific.” And if the PAB chooses to recast the meaning of “certain enterprises,” it will face yet another exercise in categorization.\(^{60}\)

The PAB can also use the interaction between financial contribution, benefit, and specificity to regulate the permissiveness of the SCM’s regime. For example, consider a payment program to the domestic corn industry that lowers the cost of ethanol production. As applied to

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\(^{56}\) Or it might. Presumably, a member could resolve the dispute by reforming its measure just enough to negate benefit and thus escape a subsidy determination. However, that measure would then be subject to subsequent challenge should the value of any of the advantage equation’s variables change.

\(^{57}\) See Howse, supra note 1, at 17-18.

\(^{58}\) See Alan O. Sykes, The Economics on Subsidies and Countervailing Measures, 15, available at http://www.law.uchicago.edu/Lawecon/workshop-papers/sykes.pdf. It is unclear whether that export has been subsidized.

\(^{59}\) Id. at 20.

\(^{60}\) See Agreement on Subsidies and Countervailing Measures, supra note 3, at art. 2.
corn growers, the measure is specific and involves financial contribution but lacks a benefit. As applied to the ethanol producers (foreign or domestic), the measure may lack both specificity and financial contribution even if benefit can be demonstrated. And in such a case, what is the “like” product for purposes of adverse effect under SCM article 6.3? The reach of the SCM’s disciplines will depend on the PAB’s willingness to fish for the four elements with a wide net rather than a narrow pole.

5.4. **Adverse Effect**

As suggested above, the adverse effect requirement is the most critical of the elements. It determines whether a member is likely to bring a complaint and, if so, how that member will be allowed to act on the complaint. Several aspects of this element give the PAB considerable flexibility.

The first such aspect is the burden-shifting mechanism of SCM article 6.61 A complaining member can establish serious prejudice to its interests by showing that an actionable subsidy provided by a *developed* member takes a particular form, for example that it results in “the total ad valorem subsidization of a product exceeding 5 per cent” or covers “operating losses sustained by an industry.” Given the extensive government support of the ethanol industry, a complaining member might well show the first and, when oil prices were lower, might well have shown the second.

The subsidizing member can then refute the determination of serious prejudice by demonstrating that its subsidy has not actually caused serious prejudice to its fellow members.62

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61 See Agreement on Subsidies and Countervailing Measures, *supra* note 3, at art. 6 (¶¶ 1-3).

62 The term “subsidizing member” is appropriate if the PAB has already determined that a subsidy exists. As noted below, however, the DSB might determine adverse effect before it determines whether a subsidy has caused that adverse effect.
For the likely dispute described above, in which the complaining member seeks access to the subsidizing member’s domestic market, the key showing would be that the subsidy does not “displace or impede the imports of a like product of another Member into the market of the subsidizing Member.”\textsuperscript{63}

A subsidizing member’s high tariff may actually negate such an effect by rendering the imported ethanol uncompetitive with even unsubsidized domestic ethanol. In other words, a subsidy cannot impede imports that have already been effectively impeded by a valid tariff.

A second aspect is likeness, which is discussed below. Closely related is a third—the SCM’s tentative support for what might be called a “clean hands principle.” Article 6.3’s reference to “non-subsidized like product” suggests that a member that subsidizes its own ethanol industry may face some difficulty in claiming adverse effect from another member’s subsidies.\textsuperscript{64} And although article 6.3 applies only to third-country markets, the PAB could apply the principle more broadly.

The PAB can use the element of adverse effect strategically. For example, to avoid a difficult determination of benefit, it might simply determine that adverse effect has not been demonstrated or that it has not been demonstrated with respect to a non-subsidized like product. Conversely, in the style of U.S. Supreme Court Justice John Marshall, it might move WTO jurisprudence forward by facilitating discussion of the other three elements before negating the effect of that discussion by finding no adverse effect.\textsuperscript{65}

\textsuperscript{63} See Agreement on Subsidies and Countervailing Measures, \textit{supra} note 3, at art. 6.3(a).

\textsuperscript{64} Agreement on Subsidies and Countervailing Measures, \textit{supra} note 3, at art. 6.4.

\textsuperscript{65} See, \textit{e.g.}, \textit{Marbury v. Madison}, 5 U.S. 137 (1803). Most of Marshall’s opinion is dicta.
5.5. **Burdens**

In addition to enforcing the burden shifting described above, the PAB can demand more or less from the parties to a dispute. For example, the Appellate Body noted that “a panel is vested with ample and extensive discretionary authority to determine when it needs information to resolve a dispute and what information it needs” and has “the legal authority and the discretion to draw inferences from the facts before it.”66

5.6. **Likeness**

The Appellate Body once referred to the numerous appearances of the concept of likeness in the WTO as an “accordion of ‘likeness.’”67 Although it insists that the treaty texts themselves mandate differing definitions of likeness, the tribunal is undoubtedly the one playing the accordion. In the context of the SCM, the PAB can select one uniform definition of likeness for the entire agreement, or it can expand and contract that definition for each appearance of the term.

5.7. **Other Comparisons**

In the context of foregone revenue, the Appellate Body has referred to the use of “categories of revenue,” “legitimately comparable income,” and taxpayers of the same country in “comparable situations.”68 Like likeness, these exercises involve grouping. Unlike likeness, they do not appear explicitly in the SCM. Their use by the Appellate Body therefore suggests that the tribunal has been willing to go a step beyond the treaty text to effectively implement that text.

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5.8. **Other Agreements**

The SCM exists in the context of broader international law, both within and beyond the WTO. In addition to the SCM, both the AoA and the GATT address subsidies. Unresolved is whether “the fact that [certain] subsidies are explicitly reserved by WTO Members under the Agreement on Agriculture affects the disposition of a WTO complaint under the substantive law of the SCM Agreement.”\(^{69}\) The Appellate Body can also determine the effect of all other international obligations “under its power to interpret WTO Agreements in accordance with customary rules of interpretation of public international law” as codified in the Vienna Convention on the Law of Treaties.\(^{70}\)

5.9. **Substance versus Restraint**

Tribunals have vacillated between insisting that the SCM has substance that cannot be circumvented and emphasizing that members enjoy sovereignty to make their own fiscal judgments. Although the SCM does not extend to “every government intervention in the market,” it does not give governments “carte blanche to evade any effective disciplines.”\(^{71}\) Within these limits, the PAB must interpret the text to provide “legally binding security of expectations.”


6. POSSIBLE PANEL OR APPELLATE BODY TENDENCIES

Panels have characterized the object and purpose of the SCM as imposing “multilateral disciplines on subsidies which distort international trade” and providing “legally binding security of expectations” to the WTO’s members.72 What, then, is the PAB’s role in fulfilling that object and purpose? The Appellate Body grounds itself, perhaps obsessively, in the text of the WTO treaties.73 At the same time, it emphasizes case-by-case resolution based on close consideration of the individual circumstances. Rather than focus on the individual circumstances of disputes that have not yet materialized, this section outlines three broad tendencies that might influence how the PAB views such circumstances—or at a minimum, which definitions it selects from its dictionary.

6.1. Prioritizing Domestic Policy Space by Skirting Disciplines

Under this approach, the PAB would cautiously apply existing disciplines in a way that provides room for members to promote their domestic biofuel industries. This approach would acknowledge the limits of applying a treaty to particular situations its drafters may not have contemplated, but in so doing it would implicitly reinforce existing power structures.

This approach might be easy in practice, as most of the prominent biofuels measures seem unlikely to satisfy all four of the SCM’s elements. The PAB could ensure such an outcome by encouraging settlement and by calibrating its interpretation in several ways. First, it could emphasize formalism and note that the SCM is an agreement limited in scope. Second, it could take a restrictive view of adverse effect by applying the clean hands principle broadly and by


73 See Douglas A. Irwin & Joseph Weiler, Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285), 24 (criticizing the Appellate Body’s “textual fetish”).
imposing stringent burdens. Third, it could also take a restrictive view of benefit in general and avoid finding upstream and downstream benefits in particular by determining that these benefits had been either consumed by the recipients of the financial contribution or excluded by the nexus of the other elements. Finally, it could determine that exclusions under the AoA preclude challenge under the SCM.

6.2. **Forcing Conflict by Imposing Disciplines**

Under this approach, the PAB would focus on enforcing trade rules without considering the consequences. It would, in effect, say what the law is and force the subjects of that law to shape it. The members could do so on a case-by-case basis in the Dispute Settlement Body or more generally through the rounds.

The PAB could impose the disciplines by emphasizing purpose and insisting that the SCM has meaningful substance. It could take an expansive view of benefit, treat special tax provisions for biofuels as deviations from the tax regime, and determine that exclusions under the AoA do not preclude challenge under the SCM.

6.3. **Accommodating Biofuels by Expounding the Disciplines**

Under this approach, the PAB would go beyond just the text of the SCM to develop standard interpretations that actually implement that treaty. A panel noted the importance of providing “legally binding security of expectations” to members.\(^4\) Under this approach, the PAB would attempt to provide a broad sense of this security that members could then adjust through the Dispute Settlement Body or overhaul through the rounds.

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But since the current round has failed to produce useful and specific rules for biofuels, the PAB could treat consultations and their negotiations as substitutes for the round negotiation process. Any broad negotiated settlements that it could facilitate may themselves produce the blueprint for wider agreement. The PAB could open up the dispute settlement process by allowing domestic disagreements to be aired (if not resolved) through amicus briefs. And, through the generous use of greenlighting under the AoA, it could encourage members to standardize and channel questionable support measures.

7. **CONCLUSION**

Future PAB decisions affecting the biofuels trade might well reflect some or all of Part 3’s values, Part 5’s tools, and Part 6’s tendencies. To advance the “legally binding security of expectations” that underscores the SCM, the PAB should openly acknowledge these influences. Even if dispute resolution cannot successfully juggle all of the competing values implicated by biofuels, an open process will at least throw these issues into the air for others—whether the Dispute Settlement Body, the negotiators of the current round, or the parties to a particular dispute—to catch. Absent speedy consensus in the current round, the PAB’s decisions and the process by which it reaches them will play a particularly important role in shaping both the disciplines on subsidies and the foundations of the biofuels trade. The PAB can begin, advance, and as prudent imprint this debate within the necessarily evolving jurisprudence of the WTO.