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Résumé de l'article

Réunis à La Malbaie du 5 au 7 août 1990, une trentaine de juristes et d'économistes européens, nord-américains et africains ont échangé sur l'évolution du droit international économique.

Ce premier colloque organisé par la SDIE (Canada) en collaboration avec la SDIE (France) aborde les aspects historique, théorique, pratique et éthique de ce secteur du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.

Le présent dossier reproduit, en français ou en anglais, les principaux exposés. Les deux premiers textes traitent de questions générales et du cadre dans lequel se développe le droit international économique. Les exposés suivants présentent divers aspects de ce secteur du droit en cours de transformation.

NOTES, INFORMATIONS ET DOCUMENTS

Société de droit international économique (SDIE)* Colloque international de La Malbaie (1990) sur la transformation du droit international économique

International Economic Law Society (SDIE)* La Malbaie International Colloquium (1990) on Transformation of International Economic Law

RÉSUMÉ

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ABSTRACT

In the course of a meeting held in La Malbaie (Québec, Canada) on August 5th to 7th, 1990, thirty european, north-american and african jurists and economists exchanged ideas on the evolution of international economic law.
This first colloquium organised by the SDIE (Canada) in cooperation with the SDIE (France) covered historical, theorical, practical and ethical aspects of this sector of

* Nous tenons à remercier Philips & Vineberg, M^cs^ Bruno Deslauriers, Godin, Raymond, Harris, Thomas ainsi que Jolicoeur, Lacasse, Simard, Normand et associés pour leur soutien financier dans la publication de ces actes de colloque, monsieur Jacques Paquet ainsi que monsieur Ernest Caparros, de la *Revue générale de droit*.

* We would like to express our thanks to Philips & Vineberg, Mes Bruno Deslauriers, Godin, Raymond, Harris, Thomas and Jolicoeur, Lacasse, Simard, Normand & associates for the financial support in publishing these acts Mr. Jacques Paquet and to Mr. Ernest Caparros of the *Revue générale de droit*.

du droit qui couvre l'organisation de la production et du commerce, les relations monétaires et financières, le droit du commerce international, la gestion des ressources et la protection de l'environnement.
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law which covers the organisation of trade and production, monetary and financial relations, international trade law, resources management and environmental protection.
The present document reproduces the texts submitted by the speakers in their original language. The first two papers aim at giving a general perspective of the variables of International Economic Law. The following papers focus on specific areas of international economic law where changes are taking place.

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The Concept of Specificity in US Steel Bilateral Consensus Agreements

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On July 25, 1989, President Bush announced a program to extend steel voluntary restraint arrangements for a transitional two and one-half year period, and to negotiate an international consensus to remove trade-distorting practices in global steel markets. The goal of the President's Steel Trade Liberalization Program is to ensure that market forces, not governments, determine the patterns of trade and the price and quantity of steel. The President directed U.S. Trade Representative Carla A. Hills to coordinate implementation of the program. The idea was to negotiate bilateral agreements which could serve as a model for a multilateral discipline on subsidies.

By April 27, 1990, the United States had concluded 10 Bilateral Consensus Agreements (BCAs) on steel.[2] The agreements were directed at steel export subsidies, domestic subsidies that give advantages to steel producers, and closed markets in steel. The main section of this paper is devoted to a summary and analysis of selected BCA provisions dealing with prohibited domestic subsidies. The purpose is to highlight provisions dealing with the concept of *specificity*. A brief introduction to this concept may be useful here.

United States law defines a domestic subsidy as actionable only when the subsidy is "specific". Just what this means has been the subject of several juridical interpretations. But the basic idea is that there is no subsidy when the government-distributed benefit is so widespread that it could be said that the benefit was to the exporting society as a whole rather than to a particular industry.

1. The views expressed herein are those of the speaker and in no way represent the views of the U.S. Department of Commerce or the U.S. Government.

2. United States had concluded an Agreement in principle with Austria and Bilateral Consensus Agreements with Australia (March 9, 1990), Brazil (February 26, 1990), European Communities (November 28, 1990), Finland (March 23, 1990), Japan (February 14, 1990), Mexico (October 3, 1989), South Korea (Apri 28, 1990), Trinidad and Tobago (April 12, 1990) and Yugoslavia (January 30, 1990).

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As Professor Jackson points out, the international rules (as they stood prior to the BCA's) probably do not require the use of the specificity concept.[3] Thus, the BCA's may well mark the beginning of a new era for this concept. After the following analysis of the BCA's, we shall return to general considerations concerning the concept of specificity.

Australia

The key defining language for domestic subsidies is found in Appendix A, such appendix made binding on the parties by Article 2 of the Agreement. Interestingly, Article 2 commitments are phrased in terms of the obligation to "undertake not to provide such subsidies". The defining language for prohibited subsidies is:

> Any intervention or support specifically provided, whether directly or indirectly, to the steel industry by law or in fact by the parties, their states or regional or local authorities, or through public resources in any form whatsoever. The term "specifically" includes any intervention provided exclusively to the steel sector or to a small group of industries of which the steel industry is a part.

For example, an intervention or support provided only to the steel industry and the chemical industry would be considered specifically provided to the steel industry. On the other hand, a domestic subsidy would not be considered "specifically provided" to the steel industry if it is generally available to industries.

We are also provided with illustrative lists of prohibited and non-prohibited subsidies. On the prohibited list are: "equity infusions, loans, and loan guarantees which cannot be regarded as a normal provision of risk capital according to normal investment practice in the country in question", and "grants such as cash outlays, infrastructure benefits, and debt forgiveness". Among the accepted domestic subsidies (with built-in limitations) are: research and development, environmental protection, worker compensation for layoffs, and public support for plant closure.

Brazil

Article 2 says the governments agree that, "public support shall not be granted to (each party's) steel industry except as provided in Appendix B". Public support is defined as:

> any intervention specifically provided by law or in fact to the steel industry by the parties, or through public resources in any form whatsoever. It shall in

3. J. JACKSON, *The World Trading System*, Cambridge, Massachussets, MIT Press, 1989, p. 267.

> particular cover the foregoing of receipts, such as fiscal concessions, and the transfer of public resources to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing which cannot be regarded as a genuine provision of risk capital according to normal investment practice in the country in question.

Appendix B prohibits public support for the steel industry, with certain exceptions. The exceptions have built-in limitations and apply to: research and development, environmental protection, worker compensation for layoffs, and public support for plant closure.

European Community

Article 2 states that public support "shall not be granted to (the parties) steel industries, except as provided in Appendix A". It goes on to say that,

> For purposes of this Agreement, "Public Support" to the steel industry means intervention specifically provided by law or in fact to that sector by the US or EC, their Member States or States, or any regional or local authorities or through public resources in any form whatsoever. It shall in particular cover the foregoing of receipts, such as fiscal concessions, and the transfer of public resources to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing which cannot be regarded as a genuine provision of risk capital according to usual investment practice in a market economy.

Appendix A says that public support to the steel industry is prohibited with the following exceptions (with built-in limitations): research and development, environmental protection, worker compensation for layoffs, and public support for plant closure.

Japan

Article 2 states that the "Government of Japan and the Government of the United States of America confirm their commitment to their respective policies not to take steps to provide the other subsidies listed as prohibited subsidies in the Appendix". In the Appendix, under "Prohibited Subsidies", there is a listing for domestic subsidies. This latter term is defined as such subsidies as: grants such as cash outlays and debt forgiveness; or equity infusion, loans, and loan guarantees which cannot be regarded as a normal provision of risk capital according to normal investment practice in the country in question; or certain tax benefits and preferential supplies of goods. There is a note as to the meaning of specificity which reads:

> The following are among the domestic subsidies that would not be considered "specifically provided to the steel industry":
> (a) Domestic subsidies that are generally available, with the conditions for eligibility being based on neutral and objective factors, or

> (b) Subsidies whose economic effects are mostly in areas outside the steel industry.

Note that under U.S. domestic law, a law, regulation, program or rule which in fact granted a benefit to the steel industry would not be saved by conditions of eligibility which were objective and neutral.[4]

Exceptions to coverage by the prohibited list include: research and development subsidies, and subsidies for plant closure.

Mexico

Article 2 of the Agreement states that the parties "agree that public support shall not be granted to their steel industry except as provided in Appendix A". It further provides this definition of "public support":

> For the purpose of this Agreement "Public Support" to the steel industry means any intervention specifically provided by law or in fact to that sector by the parties, or through public resources in any form whatsoever. It shall in particular cover the foregoing of receipts, such as fiscal concessions, and the transfer of public resources to steel undertakings in the form of acquisitions of shareholdings or provisions of capital or similar financing which cannot be regarded as a genuine provision of risk capital according to normal investment practice in a market economy.

Appendix A excludes from the broad scope of public support the following (with limitations): public support for research and development, environmental protection, workers compensation for layoffs, and support for plant closures. Appendix C includes the following definitions pertaining to Article 2:

> Specificity of intervention: The reference in Article 2.3 to intervention "specifically provided" to the steel industry includes intervention directed exclusively to the steel sector or to a small group of industries of which the steel industry is a part.

Similar financing which cannot be regarded as a genuine provision of risk capital according to normal investment practice in a market economy. Covered is the provision of capital of all kinds for the party in question from public resources, directly, *e.g.* in the form of grants or loans, or indirectly, *e.g.* in the form of state guarantees, contributed in circumstances that would not be commercially reasonable investment practice to a private investor operating in the economy in question.

4. See legislative history of 1988 Omnibus Trade Act, S. Hrg. 100-71, *Senate Finance Committee*, 100th Cong., 1st Session, 1987, p. 122.

General Considerations

It needs to be emphasized that these conceptions of specificity have given rise to vigorous disputes amongst the commentators and courts. As such, we could only attempt to gain a general familiarity with the following notions relating to specificity: *de facto* vs *de jure* specificity; general availability; exclusive benefit; level of analysis; amount of discretion; and "green light" provisions.

De jure specificity is found when a specific beneficiary[5] is mentioned in the authorizing statute or regulation. *De facto* specificity is found when it is only by seeing who benefits from the subsidy that we can find a specific beneficiary. The "general availability" test has often been thought to require a finding of non-specificity whenever there is no *de jure* specificity.[6] Similarly, the exclusive benefit test would require a finding of non-specificity unless the beneficiary in question was the *exclusive* beneficiary of the subsidy.

The level of analysis issue comes up frequently. A governmental program may grant benefits to a wide variety of industries. However, a particular project (within that program) may give all of its benefits to one industry. Is this a specific subsidy?

On the issue of discretion, should there be a "green light"[7] for subsidy programs in which the subsidy is *automatically* given whenever certain neutral and objective factors are present (*i.e.* factors which on their face do not target a particular industry)? The answer to this question depends in part on what we think the policy basis for the specificity requirements is. Are we attempting to eliminate "international" targeting of industries? Are we attempting to eliminate distortions in the economy of exporting country?[8] If the answer is the latter, it could be argued that any distortion, even when produced by application of facially neutral rules, should be actionable. Even if the answer is the former, it could be argued that *de facto* specificity is some evidence that the neutral criteria were designed in such a way as to target a specific beneficiary. Would it be enough evidence to create a presumption of specificity?[9]

One thing is certain. The notion of specificity, as applied to subsidies, will continue to be of interest to international economic lawyers.

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5. "Beneficiary" here could mean a particular enterprise, a particular industry, or — sometimes — a small group of industries.

6. *See, Cabot Corp.* v. *United States*, 620 F. Supp. 722 (CIT 1985).

7. A blanket exception from coverage by the subsidy rules.

8. See J. JACKSON, *op. cit.*, note 3, pp. 261-268.

9. If it were, we would have to determine whether, and to what degree, the presumption is rebuttable.