ENVIRONMENTAL SUBSIDIES

UNDER

THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

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1 Introduction.

In this thesis an overview of environmental concerns and the role of environmental subsidies under the Subsidies and Countervailing Measures Agreement (SCM Agreement) is proposed, as well as a legal analysis of the environmental subsidies as they are regulated at the moment under the same agreement. There is a short discussion over the development of the WTO system in relation to utilization of environmental subsidization, since the text of environmental subsidies lapsed on 1 January 2000, due to lack of consensus among the country Members of the WTO for its renewal.

The research question in this thesis is: *should the environmental subsidies regulation had been renewed or no?*.

Environmental subsidies are an economic tool and, as it is shown by their name, have a special characteristic related to the result they must achieve, namely preservation and protection of the environment. Environmental subsidies are not the only one economic tool designed for completing environmental goals. Environmental taxes are other economic tool with the same goal. They will be discussed in this thesis with the notion that they might be an alternative to environmental subsidies as well as other subsidies regulated in the SCM Agreement will be reviewed with the same purpose. The latest developments mainly in the USA and shortly in Europe considering the plans for imposition of "carbon tariffs" on goods imported from countries that do not strictly regulate their greenhouse gas emissions will be reviewed accompanied by a legal analysis of the possible results of imposition of such tariffs from the point of view of the WTO legal rules. The research question of whether environmental subsidies needed to be continued, is approached through legal analysis of how the subsidization of

environmentally friendly production functions under the regime of the SCM Agreement now, after 1999. The categories of subsidies under the same agreement - Prohibited[1] and Actionable are noticed as well, with main emphasis on Actionable subsidies. The controversy or coherence between the International Trade law goals designed through utilization of environmental subsidies and the substantive principles and the equity principle of Common but Differentiated Responsibilities of International Environmental law (IEL) are discussed and on the basis of this discussion a conclusion is proposed of to what extent environmental subsidies are compatible with these principles and thus whether it was needed their action to be continued. And a final chapter is devoted for conclusive remarks about do we need the regulation of environmental subsidies for environmental preservation and protection as it was done by adoption of Art. 8, §2, litra c) of the SCM Agreement, or we can rely on other alternative economic tools for achieving the same environmental goals.

The subsidization under the Agreement on Agriculture, 1994 will not be discussed here, with a consideration that it is a fruitful topic for a separate research.[2] The subsidization under General Agreement on Trade in Services will not be discussed either in this thesis, since the main focus is on the SCM Agreement.

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[1] In this thesis Prohibited subsidies will not be of interest, so they will only be mentioned briefly with a purpose of giving the full list of the categories of subsidies under the SCM Agreement.

[2] The subsidies under the Agreement on Agriculture have an important relevance to environmental protection and preservation, since the area and the products regulated in this agreement are of great importance for the countries and are tightly connected to many of the present and future environmental concerns such as the pollution of soil, water, air, genetically modified organisms and their possible negative effects on the environment.

As far as the methodology is concerned the research question here will be approached by researching how environmental subsidies were assessed by the country Members during the meetings of the Committee on Subsidies and Countervailing Measures, devoted to the revision of the text of Art. 8, §2, litra c), and organized at the end of 1999.

The text will be assessed on the basis of the standards that had to be met in order a subsidy to be environmental. Here the research question will be answered by collecting data from the practical use by the country Members to the WTO of the environmental subsidies during the period of time five years period they were in force, according to the data available at the web site of the WTO. Also through a parallel between environmental subsidies and environmental taxes and subsidies that are not defined as environmental, and the effectiveness and efficiency for the benefit of environment of each of these tools. Also through interpretation of the texts, according to the rules of the Vienna Convention on the Law of Treaties, 1969 (Art. 31), concerning these economic tools when they are used for environmental preservation and protection. And finally assessment in the conclusive remarks of the need for environmental subsidies will be proposed.

1.1 Environmental concerns and environmental subsidies.

Environment as such as we know it, we have lived in and where all living organisms were evolved in, is changing constantly and often irreversibly. The adverse effects on the environment have appeared during the last four decades due to increasing human activity in post industrialized era. The need for preservation and protection of the environment was fully recognized by the international community in the late 1960s. This relatively

late recognition, from the prospective of the whole span of mankind history, of the problems related to the environment has its reasons ”First, industrial developments had not spawned pollution and damage to the environment on a very large scale. Second States still took a traditional approach to their international dealings: they looked upon them as relations between sovereign entities, each pursuing its self-interests, each eager to take care of its own economic, political, and ideological concerns, each reluctant to interfere with other States' management of their space and resources, and unmindful of general or community amenities. Third, public opinion was not yet sensitive to the potential dangers of industrial and military developments to a healthy environment”.[3] The awareness of the seriousness of threats connected with the pollution of the earth to the population on the earth and for the earth itself becomes clearer during the years and some of the effects are already visible. The impacts on the environment have global significance, since the pollution created in the territory of a country can not always be limited only into its own borders. The transboundary nature of the environmental pollution creates problems with the internalization of international externalities since there is no property rights on the global commons.[4] The way in which internalization of international externalities is made is directly connected to

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[3] Cassese, Antonio, International Law, (2005), 2nd edition, Oxford (Oxford University press), p.482.

[4] According to the World Conservation Strategy, a report on conservation published in 1980 by the International Union for Conservation of Nature and Natural Resources (IUCN) in collaboration with UNESCO and with the support of the United Nations Environment Programme (UNEP) and the World Wildlife Fund (WWF), " 'A commons' is a tract of land or water owned or used jointly by the members of a community. The global commons includes those parts of the earth's surface beyond national jurisdictions - notably the open ocean and the living resources found there - or held in common - notably the atmosphere. The only landmass that may be regarded as part of the global commons is Antarctica”.

some questions such as: who has to pay for offsetting the damages on the environment? How it should be made in order to give effective and efficient results not only at national but also at international level?

The time of the first signs of the pollution of the environment accompanied by certain measures designed to mitigate and remove the pollution dates from the beginning of 20th century. Since then[5] there have been many attempts on behalf of the international community to mitigate and stop the noxious consequences which have their adverse effects on all living and non living nature[6].

In approaching the environmental problems there are many difficulties in achieving the desired environmental protection[7]. During the years the international community has taken important steps in this field and has

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[5] One of the earliest case connected to pollution of the environment date from the 20th century and it is the Trial Smelter case, 1937, which is a clear reflection of the first efforts for mitigation of extra-territorial environmental harm and the implication of the principle of the International Environmental law for Prevention of harm.

[6] Another case with much significance in the field of environmental protection is the Torrey Canyon case. It brought to further elaboration of the protection of environment connected to the civil liability of owner of a ship. In 1967 a super tanker capable of carrying a cargo of 120,000 tones of crude oil owing to a navigational error struck pollard's rock in the Seven stones reef between the Cornish mainland and the Scilly Isles. This was the first major oil spill. About 15,000 sea birds were killed, along with huge numbers of marine organisms, before the 270 square miles (700km^2) slick dispersed. The disaster led to many changes in international regulations - The Civil Liability Convention (CLC) of 1969, which imposed strict liability on ship owners without the need to prove negligence, and the 1973 International Convention for the Prevention of Pollution from Ships.

[7] Under the term 'desired level for protection of the environment' here is taken into account accepted by the OECD approach that the environment should be in an acceptable state and that the reduction of pollution beyond certain level will not be practical or even necessary in view of the costs involved, Recommendation of the Council on guiding principles concerning international economic aspects of environmental policies, 26 th May 1972.

adopted many international instruments. The mechanisms that are implicated in them still do not form a comprehensive and fully adequate mechanism or approach resulting in a desired level for protection of the environment. Each multilateral environmental agreement (MEA) has legally binding rules, which are not strictly formulated[8] and usually indicate areas of cooperation, or aims to be achieved and, in some cases, the means states parties should adopt to achieve the goals of the treaty.

Since the environmental subsidies are a main topic in this paper it is fair to be noticed from the beginning of this research, that it is hard to say that through such subsidization a desired level of protection of the environment can be achieved, at least because they form only one tool for resolving the complex problems of deteriorated environment. As a starting point we will need to look closely at definitions of subsidy in general terms and of environmental subsidy in particular.

1.2 Definitions of subsidy and of environmental subsidy.

1.2.1 Definition of subsidy.

The SCM Agreement regulates a particular trade practice in the WTO system - subsidization, which is unfair trade, since it can cause adverse effects on trade and investment interests of trading partners through unfair competition coming from subsidized products. Countervailing measures,

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[8] Look for example the Convention on Biological Diversity, Art. 5 "Cooperation", Art. 7'Identification and Monitoring", and Art. 8 "In-situ conservation" or the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), Art2, §1a) " General Obligations".

regulated by the same agreement are designed to offset the adverse effects caused by the subsidized products.

Subsidization's purpose is usually legitimate objectives of economic and social policy to be achieved by the government of a country. It is mainly done by a government which, broadly speaking, gives a financial contribution, so the production of certain goods to be stimulated or research and development to be achieved. The result is that the goods are produced at a lower production cost and thus a benefit is conferred to the producer. The research activities which are subsidized might have, for example as a purpose the production process to be optimized[9].

The basic categories of subsidies are differentiated in the texts of Art.3 “Prohibited”, Art. 5 “Actionable” and Art. 8 "Non-actionable" of the SCM Agreement. The latter category is not in force since the end of 1999.

As far as the definition of subsidies is concerned[10] it is to be noticed that subsidization has several perspectives and this fact creates some of the difficulties when the consequences and the benefits for the environment has to be assessed. It has to be taken into account that it is an economic instrument through which governments provide certain policy on the market. From this starting point their environmental implications not always have

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[9] Peter Van Den Bossche " The Law and the Policy of the WTO" 2nd edition, pp. 404-405 and the SCM Agreement Art.8; The optimization may be appointed to be achieved a decrease of the costs of the product production process (using cheaper materials or reusing the same materials, etc.), or a better environment, as is the case with the environmental subsidization or both.

[10] The regulation of subsidies, in general terms, is placed in the GATT, 1947 later in the GATT, 1994 and in a more precise and detailed manner in the SCM Agreement, 1994.

been taken into account when the subsidization is designed by the policy-makers, nationally and even internationally[11].

The definition of subsidy given in Art.1 of the SCM Agreement is the first comprehensive one in the realm of the WTO system:

"…a subsidy shall be deemed to exist if: litra a) subpara 1.... there is a financial contribution by a government or any public body within the territory of a Member…or subpara 2.... there is any form of income or price support in the sense of Art. XVI of GATT, 1994 and litra b) a benefit is thereby conferred." Art.1.2 determines that "A subsidy defined in §1 shall be subject to the provisions of Part II " Prohibited subsidies" or Part III "Actionable subsidies" or Part V " Countervailing measures" if such a subsidy is specific in accordance with the provisions of Art.2."

In brief the main elements of a subsidy according to the SCM Agreement are: i) financial contribution or any form of income or price support in the sense of Art. XVI of GATT, 1994; ii) given by a government or any public body; iii) benefit is thereby conferred, and in order a subsidy be qualified 'prohibited' or 'actionable' or even 'non-actionable[12]' and, if the case requires 'countervailing measures' or countermeasure under Art/s 4 or 7 of the agreement to be imposed it is necessary a subsidy to be specific, so next element is - iv) specificity.

A closer look at each element of a subsidy gives us the following picture:

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[11] In this recourse the text of Art. 8, §2, litra c) SCM Agreement is not taken into accoun keeping in mind that it is no longer in force after according to Art. 31 of the same agreement its action has not been renewed, but it will be further discussed as it was adopted in 1994.

[12] Here with disregard that the provisions of Art. 8 of SCM Agreement are no longer in force, look Part IX "Final Provisions", Art. 31 of the SCM Agreement.

i) Financial contribution is deemed to exist if it falls in one of the groups described in Art.1§1 and §2 of the SCM Agreement. In case they fall within one of these groups there is a financial contribution. Art.1 §1, a), i-iv) contains a list of what can be regarded as subsidy, and they are i) "a government practice /which/ involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)". This form of subsidization as it is termed 'practice' is, when is interpreted in good faith in accordance with its ordinary meaning , understood to be last for a long period of time[13]. The other forms of subsidization are "ii) government revenue that is otherwise due is forgone or not collected (e.g. fiscal incentives such as tax credits);[14]" "iii) a government provides goods or services other than general infrastructure, or purchases goods; "iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one of the type of functions illustrated in i) to iii)..." *and* Art. 1.1 litra a) para 2 " any form of income or price support in the sense of Art. XVI of GATT, 1994 "…which operates directly or indirectly to increase exports of any product from , or to reduce imports of any product into…" the territory of a contracting party.

ii) The financial contribution is granted *by a government or a public body*. Government includes central, regional and local authorities as well as State -owned companies. The public body is an entity which is controlled by

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[13] Art. 31 , §1 of the Vienna Convention on the Law of Treaties, 1969.

[14] As it will be discussed later in this paper this form of subsidization has certain importance in relation to environmental protection and is close to environmental subsidies from this point of view and from the point of view they can be imposed on production process inputs. Environmental subsidies are given for adaptation of existing facilities to new environmental requirements imposed by law and /or regulations.

the government or other public bodies.[15] Pursuant to Art. 1.1(a), 1), iv) a financial contribution made by a private body is considered to be a 'financial contribution by a government' when the government entrusts or directs the private body to carry out one or more of the type of functions illustrated in Art. 1.1 a),1 i) to iii). The other form of subsidy under Art. 1, a), 1.2 of the SCM Agreement is defined as "any form of income or price support in the sense of Art. XVI of GATT, 1994."

iii) The financial contribution, as is defined by the Art. 1, litra b), has to confer *"a benefit"*. The concept of a benefit was defined in the Appellate Body (AB) Report in Canada – Measures Affecting the Export of Civilian Aircraft[16]. The AB firstly considered the ordinary meaning of benefit. "The dictionary meaning of benefit is "advantage", " good", "gift", "profit"…." §153 ABR. The AB held that a benefit "must be addressed and enjoyed by a beneficiary or a recipient....the focus of the inquiry under Art.1.1 b) of the SCM Agreement should be on the recipient and not on the granting authority." Ibid.§154. The rules for calculation of the amount of a subsidy in terms of the benefit to the recipient are stated in Art.14 of the SCM Agreement.

iv) An important characteristic is the *specificity* of subsidization. The provisions concerning actionable subsidies are of main focus in this

[15] In The case Korea – Commercial Vessels the Panel stated that "The *SCM Agreement* envisages a more straightforward approach, based on a clear distinction between public and private bodies." §7.49 and in the next §7.50 " In our view, an entity will constitute a "public body" if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the *SCM Agreement*. "

[16] Canada – Measures Affecting the Export of Civilian Aircraft, AB R, adopted 4 August 2000.

thesis, since they are applicable to the environmental subsidy after th etext of Art. 8§2, litra c) lapsed. The criteria of "specificity" are defined in Art. 2 of the SCM Agreement and are in short referred to an enterprise or industry or group of enterprises or industries, within the jurisdiction of the granting authority, to which specified by the same article principles shall be applied.

Subsidies are defined as not specific and thus non actionable, according to Art.2, §2.1, litra b) where objective criteria or conditions govern the eligibility for, and the amount of, a subsidy in a way that the granting authority, or the legislation pursuant to which it operates explicitly does not limit access to a subsidy to certain enterprises. However, subsidies which are limited to certain enterprises located within a designated geographical region or are prohibited subsidies according to the provisions of Art. 3 of the SCM Agreement are specific and actionable according to the Art. 2,§ 2.2 and §2.3 of the same agreement. From the definition given by Art. 1 of the SCM Agreement we see that subsidies do not have any defined in the agreement purpose and they are evidently used by governments to influence the market while pursuing and promoting important and fully legitimate objectives of economic and social policy .

In short it may be stated that a subsidy is a financial contribution, granted by a government or any public body that is specific and that confers a benefit to the recipient, which is the producer in a way that decreases the costs of the products and that is not necessarily concerned with the settlement of environmental problems, since no special aim is envisaged in the texts of Art. 1 and Art.2 of the SCM Agreement. It might bring positive effects on the environment, but as an additional and not necessarily pursued ones by the subsidization. If for example a subsidy is made with a main purpose a market

demand for more fish to be satisfied and is made with an intention the fishery to be increased, for certain period and for satisfying short period market shortage. When it is done by providing fishermen with loans for purchasing particular fishing devices which at the same time are more modern and protective to the rest of the sea plants and animals. Such subsidization will help to increase the catch of fish stock and are, since the devices are modernized, more protective for other sea animals and sea plants. Then the main goal of the subsidization the market demand for fish stocks will be satisfied through increased quantities of fish caught by using new fishing devices. Simultaneously there will be a positive environmental impact - protection of other sea animals and sea plants that was not primarily pursued.

1.2.2 Definition of environmental subsidies.

Environmental subsidies are defined in Part IV " Non-acionable subsidies", Art.8§2, litra c) of the SCM Agreement and this is a definition of non-actionable subsidies, for specific purpose of the Agreement.

The text of Art. 8§ 2, c) of the SCM Agreement is no longer in force, since in 1999 there was no will among the country Members to extend its operation in accordance with the requirement of Art. 31 of SCM Agreement.[17]

The Committee on Subsidies and Countervailing Measures held a special meeting on 20 December 1999 to conclude the review under Art.

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[17] Annual Report (1999) of the Committee on Subsidies and Countervailing Measures, point VI "Review of the operation of Art/s 6.1; 8 and 9 ."; Minutes of the Special Meeting of the Committee on Subsidies and Countervailing Measures, held on 20 December , 1999 under the Chairmanship of Mr. Jan Söderberg (Sweden).

31which had commenced earlier in 1999. Art. 8 has lapsed since no consensus was reached by the Committee to extend Art. 8 either as drafted or in modified form at that special meeting.

Environmental subsidies give opportunity governments to provide environmental policy. They have a defined aim and it is preservation and protection of environment through process and production of products. These are subsidies that give " assistance to promote adaptation of existing facilities to new environmental requirements, imposed by law and/or regulations..." The text gives additional cumulative standards that has to be met, so the subsidy to be environmental and they are:

The assistance is: "i) a one -time non – recurring measure; *and* ii) is limited to 20 per cent of the cost of adaptation; *and* iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; *and* iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; *and* v) is available to all firms which can adopt the new equipment and/or production processes."

Thus in addition to the characteristics given by the Art. 1 and 2 of the SCM Agreement for a subsidy, the environmental subsidy is appointed with a special purpose that is the environment to be protected and preserved by adaptation of the existing facilities for production of certain products, Art.8§2, litra c) of the SCM Agreement, since the facilities that exist are environmentally harmful and need to be adapted. In brief the environmental subsidies are placed with environmentally harmful facilities for production in such a way so to give a chance these facilities to continue their work under a more environment protective regime.

Taking into account the characteristics of a subsidy and of an environmental subsidy we see that the environmental subsidy differ from a subsidy in that it has a special and well defined purpose "adaptation of existing facilities to the new environmental requirements" and that have many cumulative standards that need to be met.

Environmental subsidies are a tool of the economics which was meant to help the process production to be done in more environmental friendly way by giving a legal motivation to producers, since the requirements are imposed to them by laws and/or regulations, to produce goods taking into account the environmental concerns. Sometimes environmental subsidies could be a very costly incentive relative to the benefits delivered (preservation and protection of the environment), and their reduction and final removal was discussed by the Organization of Economic Cooperation and Development countries (OECD).[18] At the same time it was considered that they might appear to be the best available at the moment means for providing public goods. The question of whether the regulation of environmental subsidies had to be continued after the five year period of their action is connected to another one and it is is it worth keeping such environmentally harmful facilities working through subsidization or it is more appropriate to search and design other facilities for producing like goods which will be environmentally friendly and would not need additional financial contributions for their adaptation, since they will conform to the environmental requirements? And the answer will mainly depend on whether there is such possibility at all. Here an estimation with due care and on a case - by - case basis is needed, since sometimes or

[18] OECD Documents, (1996) Subsidies and Environment Exploring the Linkages.

even often there would not be other ways for production of certain products which are important for a certain key area of a State or/and for society. An example for such importance is the economy of a given State where stopping the production of products without any other alternative for production of these goods would have severely harmful effects on the economy of this State. A good example for latter is Norway, and its petroleum production. Norway is a large exporter of oil and gas and its own energy sector relies on hydro power[19] having maximized its most efficient sources of hydroelectricity, at the same time it can not afford to reduce more its CO2 emissions by cutting petroleum products production without distorting its economy. So the adaptation of the existing facilities for production of oil and gas to the new environmental requirements, since there is no other new and environmentally friendly way aligned with the new requirements, is a way for keeping the environmentally harmful production which has a paramount importance for the society and economy of the country. To this end Norway started projects for carbon capture and storage (CCS) through which the capture of CO2 is done during the production of petroleum and gas and is stored under the sea bed. There are three projects for CCS in Norway two at

[19] "Norway has the world's largest per capita hydropower production, and is the sixth largest hydropower producer in the world. In a year with normal precipitation, hydropower generation is around 120 TWh, corresponding to approximately 99 percent of Norway's total power production. In addition to hydropower, Norway has wind power stations, thermal power plants, and is constructing gas-fired power plants. Total generation from the Norwegian electricity system in a normal year is now calculated to be about 121 Twh." Electricity generation, the web site of the Norwegian Ministry of Petroleum and energy available at : **http://www.regjeringen.no/en/dep/oed/Subject/Energy-in-Norway/Electricity-generation.html?id=440487**,

Mongstad and one in Kårstø.[20] These projects are very costly research initiatives related to adaptation of an environmentally harmful production, to the best possible extent, to the environmental requirements with regard to the CO2 emissions released in the atmosphere. In this case the research activities undertaken by Norway are not in line with the principle Polluter pays of IEL to the extent that Norway pays for internalization of international externalities for reducing its CO2 emissions released by Statoil Hydro company while producing petroleum and gas which pollute the environment not only locally but also globally. Hence not the polluter itself pays these costs.

Environmental subsidies may serve as a useful tool for creating incentives for producers to produce goods in an more environmentally friendly manner and thus to take care for the protection of environment, but the costs covered through the subsidization will not be in conformity with the polluter pays principle, since they are covered by the government of the state and not by the producer which in fact pollutes. Some of them is likely to bear negative impacts on the economy, since the adaptation of the existing facilities might be very costly. The financial contribution given by the government or any public body could, in some cases, impose big burden on the taxpayers, if the finances are taken from the taxes that need to be paid. The existing facilities will continue to work, even in a more protective, but still harmful to some extent to the environment way, so the deterioration of environment through process production will not be fully eliminated.

[20] CCS projects in Norway, Minister of Petroleum and Energy Mrs. Åslaug Haga, Open hearing in the European Parliament, 5 March, Brussels, 2008

Simultaneously, environmental subsidies might pose distortions in trade and investment, because the products gain comparative advantage and the producers competitive advantage against like products produced without subsidization in other countries. Despite all these negative impacts it might be argued that it is still better environmental subsidies to be utilized than nothing to be undertaken, since they will ensure at least some higher level of preservation and protection of the environment.

The degrading processes of the environment which continue on endlessly require effective measures to be taken for preservation of the status of environment now and in the future[21] or in other terms to internalize the environmental externalities to the best possible extent.

Environmental subsidies would be a useful tool especially in cases where the goods are of importance for a State or/and society as in the Norway's case. Their utilization might be difficult, since they are defined quite narrowly in the text of Art. 8§2, litra c). These narrow definition of environmental subsidies was probably done with the intention to serve as a guarantee against their misuse- to prevent a government to make environmental subsidization for other purposes, for example to gain bigger share in a market under the excuse of environmental protection.

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[21] The Synthesis Report of the Intergovernmental Panel on Climate Change (2007) based on the assessment carried out by the three Working Groups (WGs) gives an overall review of the problems and the prospectives related to adverse effects on the environment by the climate change. It is clear that the climate change impacts have affected and will affect ecosystems, food, coasts, industry, settlement and society, health and water. The report is available at: http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm

The energy supply is a milestone for the economic growth and poverty reduction and at the same time is environmentally harmful, because the use of fossil energy has a negative impact on the climate caused by its greenhouse gases emissions. So one reasonable measures from legal point of view is energy production to be environmentally subsidized[22] either under the regime of the Art. 8,§2, litra c) *or* under the regime in Art. 1 and Art. 2 of the SCM Agreement, making all efforts not to pose adverse effects on the interests of the other trading partners in the WTO system. From this perspective environmental subsidies have positive impact on the environment, if for example environmental subsidies are given for adaptation of existing energy sources to renewable energy sources - sun, water, wind and on the economy of a State, since they will help to keep activities that are important to its economy. But it would be possible only in case the State has enough sun, water or wind resources which may be utilized.

Simultaneously we may not neglect that the subsidization of such facilities with harmful effects to the environment in practice may serve as a method trough which the establishment of new environmentally friendly facilities is detained, or hindered.

Where the present facilities for production of certain products is not in conformity with the new environmental requirements imposed by law and/or regulations it would be an advantage to estimate, from *lege ferenda* perspective, whether the products are of main importance for the State or/and of daily importance for the people and whether there is no other environmentally friendly way for their production, and finally a decision to

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[22] To be subsidized with a main purpose of preservation and protection of the environment.

be made the adaptation to the environmental requirements of the facilities for production of these goods to be subsidized. It will help to weight the positives and negatives in an environmental subsidization in context of environmental subsidies.

In practice environmental subsidies, for the period of their action from 1994 till 1 January 2000, were not discussed in the Dispute Settlement System. Moreover, there are no notifications according to Art.8, §3 of the SCM Agreement, made by the countries about imposition of environmental subsidies. Thus it may be concluded that they were not a popular measure among the country members of the WTO for dealing with environmental problems[23]. Thus it is difficult the environmental positive or negative results of the environmental subsidies to be assessed on the basis of their utilization in order the renewal of their regulation after 1999 to be defended. The reason might be that the regulation of environmental subsidies is quite demanding setting a lot of standards for their imposition (Art. 8, §2, litra c) of the SCM Agreement), but it may be argued that these standards serve as a guarantee against misuse of environmental subsidization.

In order the environmental subsidies to be justified or defended here will be used a made up example with a trial to attract all relevant pro and coins. We can consider here the basic for mankind glass, so far no adequate substitute to this product exists, except some plastic materials which still do not bear the same characteristics as the glass from the point of view of their effects on the human health[24]. Environmental subsidies would be of use in the

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[23] Information about these statements is available on the WTO web site: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm under the titles "Disputes" and "Notifications."

[24] People are exposed to these chemicals not only during manufacturing, but also by using plastic

production of glass. They will aid the production of a product which is important for the people, and which process production is environmentally harmful and will secure the preservation and protection of the environment in the best possible way. The glass production has not changed so much during the years, natural gas – powered furnaces burn at up to 2,000 degrees Farenheit for twenty four hours to melt sand into glass and the burning of gas adds to globe's greenhouse emissions[25]. In this case it is worth giving assistance through environmental subsidies while there is not fully aligned with the new environmental requirements alternative facility. At the same time it would be of use to organize research activities about environmentally friendly or at least more environmentally friendly facility (process production method) to be designed, and ultimately the existing environmentally harmful facility be replaced by the best environmental protective one. The research activities can receive subsidies as well, and thus an incentive for finding a way of environmentally friendly production of glass will be created. Other decision will be to sacrifice human health in the name of the protection of atmosphere from CO2 emissions and a total ban of the production of glass to be imposed. But if we look for a solution which lead to a balance between the human health and the protection of environment then the carbon capture and storage facilities seems to be a good solution. The production of glass will continue on, supplemented by carbon capture and storage facility. Then the human health is in safe while the environment is best protected.

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packages, because some chemicals migrate from the plastic packaging to the foods or liquds they contain.

[25] Goleman, Daniel "Ecological Intelligence Knowing the Hidden Impacts of What We Buy", Allen Lane, Penguin Group, p. 16

In the next chapter a legal analysis of the environmental subsidies under the SCM agreement is proposed taking into consideration that the text of Art. 8§2, litra c) is no longer in force. On the basis of the existing legal regime a conclusion is made about the research question in this thesis – should the environmental subsidies regulation had been renewed or not after 1999?

2 Legal analysis of environmental subsidies under the SCM Agreement. Categories of subsidies.

As it was already mentioned there are three basic categories of subsidies under the SCM Agreement: Art.3 “Prohibited”, Art.5 “Actionable” and Art. 8"Non-actionable". With the consideration that latter is no longer in force .

The category of Prohibited subsidies is marked here with the purpose to give the whole list of the categories of subsidization under the SCM Agreement.[26]

The category, which is of main interest is of Actionable subsidies, regulated in Art.5, Part III of the SCM Agreement, since after the text of Art. 8 lapsed, the environmental subsidies fall under the legal regime of actionable subsidies. The legal analysis here is made with a purpose to clarify the research question of this thesis with the point of view whether the actionable subsidies regulation is an appropriate alternative to the environmental subsidies’ non actionable regulation. Hence to answer whether non actionable regime of environmental subsidies had to be continued or not.

Actionable subsidies are not banned, but in case they cause adverse effects to the trade and investment interests of other Member state/s the latter may take action - to use the multilateral dispute settlement system or to

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[26] They are defined in Art. 3 of the SCM Agreement, as subsidies contingent in law or in fact whether wholly or as one of several conditions, on export performance, or these are the so called “export subsidies” *and* subsidies contingent whether wholly or as one of several conditions , upon the use of domestic over imported goods or “local content subsidies” or import substitution subsidies. Prohibited subsidies in their two forms - export subsidies and local content or import substitution subsidies - are banned since they will directly and most likely have adverse effects on the interests of other Members to the WTO.

impose countervailing duty. There are three types of adverse effects under the text of Art. 5 of the SCM Agreement:

i) injury to a domestic industry caused by subsidized imports in the territory of the complaining Member[27] ;

ii) nullification or impairment of benefits accruing directly or indirectly to other Members in particular the benefits of concessions bound under Art. II of the GATT, 1994[28];

iii) serious prejudice, such as taking bigger share or replacing in the market of the subsidizing Member or in a third country market the imports/exports of a like product of another Member[29] .

The "Non – actionable subsidies" legal regime, gave a detailed regulation of environmental subsidies, but as it was already established in sub sub section 1.2.2 in this paper through the research of the documents available at the web page of the WTO, they were not used by the countries. As their name shows they were a category of subsidization against which the countries did not have possibility to take action. Their regulation included notification, arbitration and consultation and authorized remedies in accordance with Art. 8 §3;§4; §5 and Art. 9 of the SCM Agreement.

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[27] Footnote 11 of the SCM Agreement clarifies that "injury to the domestic industry" is used here in the same sense as it is used in Part V;

[28] Footnote 12, ibid, "the term nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT, 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

[29] Footnote 13, ibid, defines the term "serious prejudice to the interests of another Member"…in the same sense as it is used in paragraph 1 of Art. XVI of GATT, 1994, and includes threat of serious prejudice and Art. 6, §6.3 of the SCM Agreement.

Under the legal regime for actionable subsidies if a contracting party grants or maintains any subsidy it shall notify the contracting parties in writing of the "extent and nature of the subsidization, of the estimated effect of subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary "[30] Notification aims to give enough and precise information about subsidies and thus to create transparency about the subsidies granted or/and maintained by the country Members of the WTO.

Consultations are among the remedies, provided by the SCM Agreement in case there is doubt in one Member that actionable[31] subsidies granted or maintained by another Member result in adverse effects (as they are formulated in Art.5 of SCM Agreement) to its domestic industry[32].

The request for consultations shall include a statement of available evidence with regard to the subsidy, to its nature and the adverse effects caused by the subsidy in question. Parties may refer the matter to DSB for immediate establishment of a Panel, after consultations failed, and the DSB has to provide its report within 120 days.

When a panel is established the complaining party bears the burden of proof and has to show that there is a specific subsidy which causes adverse effects on its interests.

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[30] Art. 25.3 of the SCM Agreement gives the minimum standard for the content of a notification and it should contain: "i) form of a subsidy (i.e. grant, loan, tax concession, etc.); ii) subsidy per unit or, in cases where this is not possible, the total amount or the annual amount budgeted for that subsidy...; iii) policy objective and/or purpose of a subsidy; iv) duration of a subsidy and/or any other time limits attached to it; v) statistical data permitting an assessment of the trade effects of a subsidy."

[31] It is also in case of prohibited subsidies

[32] See Art. 7 of the SCM Agreement.

Among the considerations about “injury”[33], “domestic industry[34]” and “like products[35]” necessary in a dispute about actionable subsidy, in this thesis these concerning the "like product" assessment will be discussed in more details since the reference here is to environmental subsidies which were designed to assist environmentally friendly production of goods.

The injury is caused to *“like product”* produced by the domestic industry, so the like products are in competition. The meaning of the term is stated in Footnote 46 to the SCM Agreement:

“'like product' shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or….although not alike in all respects has characteristics closely resembling the product under consideration”.

The text of Art. 8, §2, litra c) as it was adopted was clearly oriented to process production, since the subsidy had to help “to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations”.

The concept of “like products” does not demand considerations about the process and production method (PPM), if it does not affect the physical characteristics of the product, neither under the SCM Agreement or the GATT, 1994 as well as in the case law so far. In the contrary this criteria is without any special significance. In case of environmental subsidies the process and production method had a central role in justifying the

[33] Footnote 11 to the SCM Agreement provides that the term “injury to the domestic industry”is used in the same sense as it used in Part V of the Agreement.

[34] About the definition of domestic industry Art. 16 of the SCM Agreement.

[35] Footnote 46 to the SCM Agreement

subsidization. Therefore, in cases of environmental subsidization, from *de lege ferenda* perspective. it would be preferable the like products test to include considerations through the given by the SCM Agreement criteria for likeness and by assessing the environmental impacts of the process and production method, so that the environmental subsidization to be taken into account from more practical point of view in accordance with the purpose of the environmental subsidies.

The criteria used in the discussions of the concept of “like product” under the GATT, 1994 are useful and may be taken into account. The concept of “like product” as it is stipulated in Art. I:1; Art III:2 and Art. III:4 of the GATT, 1994 is not defined under the GATT provisions, but has been very well developed by the case law. The main criteria that are used in the assessment of the likeness are stipulated in the Report of the Working Party on Border Tax Adjustments, 1970:

i) the properties, nature and quantity of the products; ii) the end uses of the products; iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior- in respect of the products; and iv) tariff classification of the products.

The PPM must contribute to the preservation and protection of environment in case of environmental subsidization. If the facilities are not adopted to the new environmental requirements so that the pollution of the environment is reduced, then the subsidization would not be justified. The internalization of externalities will not be achieved and the result will be a competitive advantage for the producer and comparative advantage for the subsidized product in accordance with other like non-subsidized products.

The producer will produce cheaply and the consumer will receive products at a less price, but the environmental externalities will not be internalized.

From a practical point of view, since the PPM does not affect the physical characteristics of a product then it is logical to presume that the consumers won't have a reliable criteria or method to make a difference between environmental friendly and environmental harmfully produced like products. Probably the only way is to label the products according to their environmental merits, including these gained under the process and production method. Hence it would be useful the environmental subsidization of production of a product to be labeled. The labeling may influence the consumers' or/and sellers tastes. They will know the impacts of what they buy.[36] There is no adequate universal labeling system so far and there was no such in 1999 either.

The discontinuance of the operation of Art. 8§2,litra c) seems to be justified taking into account that the regime of actionable subsidies can be applied to subsidies made with environmental purpose. The narrowly defined standards under the environmental subsidies regime seemed to create difficulties for the countries and they did not used this category of subsidization during the period of their operation[37]. The very important and central for the environmental subsidy criterion of the process and production method is not among the criteria used by the

[36] Goleman, Daniel (2009) " Ecological Intelligence Knowing the Hiden Impacts of What we buy", Penguin group, 2009.

[37] The countries could have used it, but there are no traces of that in the documents of the WTO published in its internet site.

DSBs in assessing the like products. The country Members to the WTO did not consider necessary to extend the legal regime of environmental subsidies, even there were some countries that stated they would support the extension of the text as Mexico, Canada and Turkey.[38] In the next chapter the environmental taxes will be discussed as other economic tool for achieving environmental purposes in assessing whether they might be alternative to the environmental subsidies. Also the possibility of subsidization as it is regulated in Art. 1, §1.1(a)1., ii) "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)"of the SCM Agreement and the text of Annex I and II to the same agreement, as import oriented production process subsidies, will be mentioned with the same purpose. These considerations are related to the research question in this paper did the legal regime of environmental subsidization have to be continued or not.

[38] Minutes of the Special Meeting held on 20 December, 1999 of the Committee on Subsidies and Countervailing Measures.

3 Environmental taxes.

Another economic tool with purpose of preservation and protection of environment are environmental taxes. They are imposed by the countries in such way that allows to influence the behavior of producers and consumers and to implement national environmental policy

This tool combines two perspectives economic and environmental. From the economic perspective environmental tax revenues might be used to shape the consumers' and producers' behavior, and from environmental perspective environmental taxes need to be justified primarily by the cost-effective achievement of environmental goals. From the perspective of environmental policy the main concern of the utilization of environmental taxes (or other economic tools) will be the matter of efficiency[39]. In case of natural resources and environment, market forces usually fail to account the future and even the present values of environmental assets. So these missing values, environmental externalities, imply the need for mechanisms to integrate them into the current term of decision - making process so that their internalization be ensured[40.]

As we saw previously in this paper subsidization is also economic tool which might be utilized for internalization of externalities in the realm of environmental management.

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[39] Fullerton, Don; Leicester, Andrew, and Smith, Stephen NBER Working Paper No. 14197 July 2008, JEL No. H23,Q28, pp.2-8, available at:
http://scholar.google.no/scholar?hl=no&lr=&cluster=4567571473910010886&um=1&ie=UTF-8&ei=bbJySoXoLNGH_Ab0q4HnAQ&sa=X&oi=science_links&resnum=1&ct=sl-allversions

[40] OECD documents, (1996) pp. 8-9.

Environmental taxes are to be discussed in a way to see whether other alternative tool to environmental subsidies for achieving the same environmental purpose exists and thus to answer the question whether the text of Art. 8, §2, litra c) of the SCM Agreement needed to be continued.

What are environmental taxes? The definition of the Organization for Economic Cooperation and Development (OECD) will be used in this thesis, and according to it:

"They are taxes that been introduced to achieve specific environmental objective, and which have been explicitly identified as environmental taxes *or* taxes which have been introduced initially for non-environmental reasons, but which impact on environmental objectives, and which may be increased, modified or reduced for environmental reasons".[41] So whatever is the reason for the introduction of the environmental taxes they must always serve the purpose for protection and preservation of the environment. Here the internal taxes or charges are of interest as they are regulated by the Art. III:2 of GATT, 1994 from the point of view to what extent they can lead to the desired results in protection and preservation of environment. The so called border tax adjustments fall also in the group of taxes under the text of Art. III: 2 of GATT.[42]

Art. III of GATT, 1994 in principle imposes one of the cornerstone principles in the WTO system the principle of National treatment on internal taxation and regulation. There are general exceptions of this principle if environmental concerns exist. These exceptions are applied when the specific

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[41] OECD (1993), pp.28-29, also Fauchald, Ole Kristian (1996) "Environmental Taxes and Trade Discrimination", Department of Public International Law, University of Oslo, p.35.

[42] Fauchald , Ole Kristian (1996) " Environmental Taxes and Trade Discrimination", p 210

grounds of Art. XX, litra b) or g) are proven, namely that the measures are " necessary to protect human, animal or plant life" or "relating to the conservation of exhaustible natural resources". In addition the requirements in the chapeu of the same article have to be fulfilled - so that the measures are not "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguise restriction on international trade'

The burden of proof is with the responding party at a dispute.

In principle, the members to the WTO can freely impose customs duties on imported products. They are direct or indirect 'applied directly or indirectly on products' Art. III: 2 of GATT. The first group is imposed on the products and the second on the process of production of product or in connection with a product[43]. Notwithstanding, whether they are direct or indirect, environmental taxes can not be imposed so as to afford protection to domestic production, Art. III:2, 2nd sentence, with reference to Art. III:1 of GATT. Thus environmental taxes, in principle, must not be used in a way that violate the non-discrimination principle of the WTO system, by for example creating protection for the domestic industry that produces like to the imported products. Border tax adjustments are explicitly allowed by the GATT provided that the tax imposed on imports is no greater than the domestic tax and the rebate of tax on export is no greater than that previously paid.[44]

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[43] Bossche, Peter Van Den "The Law and Policy of the World Trade Organization (2008), 2nd edition, p.350

[44] Art. III:2 and ad Art XVI of GATT, 1994

The principle that governs the border tax adjustments is called "destination principle" and refers to the freedom of exporting countries to export products without imposing certain internal taxes or to give rebate or remission from such duties or taxes, in amounts not in excess of those which accrued in exporting country. Ultimately taxes are imposed by the importing country. Thus the products are taxed not in the country of their origin, but in the country of their destination and not in excess of taxation of the domestic like products. [45]

Border tax adjustments were regarded by the Working Party on Border Tax Adjustment as indirect taxes which put into effect, in whole or in part, the destination principle.[46]

The destination principle or indirect taxes give the WTO Members a tool through which they provide their environmental policy, since through them states might create incentive for producers to produce goods in a more environmentally friendly manner. They are very disputed issue among the Members of the organization, since they might be a disguised protectionist measure imposed in the name of the environment. It should be admitted that they are effective economic tool which imposition helps to reduce or increase the consumption (when the principle of origin applies) or the production

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[45] As opposed to this principle is the principle of origin of products according to which a product destined for export could be taxed by the country of export and exempted from taxes by the country of mport/destination. Indirect taxes are subject to the destination principle, while direct taxes are subject to the principle of origin.

[46] Border Tax Adjustments, Report of the Working Party, adopted on 2 December 1970, § 4 where the Working Party admits to use the definition of border tax adjustments applied by the OECD, where border tax adjustments were regarded " as any fiscal measures which put into effect, in whole or in part, the destination principle.

(when destination principle applies) of certain products depending on the specific environmental need.[47]. The achievement of environmental goals through the imposition of environmental taxes is described shortly in two made up cases by J.Andrew Hoerner in the Working paper "The Role of Border Tax Adjustments in Environmental taxation: Theory and U.S. Experience."[48]

There are two nations that are troubled in different way by salt. Angina is an aging nation with exploding national health insurance costs and with the purpose of reducing the health risks related to heart disease it decided to introduce a tax through which to encourage the reduction of national salt consumption. The tax system in Angina is designed primarily to collect business taxes. Therefore it places taxes on salt producers, adds border tax adjustments (BTAs) of the consumption-tax type, rebating the tax previously paid on exported salt and imposing a tax on imported salt at the same rate as if it was produced domestically. At the end the price of the salt is higher, which leads to reduction of the consumption of salt. Salina is troubled by runoff from its salt mines, which injure nearby wildlife and plants. Salina wishes to discourage the production of salt, and perhaps to compensate those injured by salt runoff. Salina collects most of its tax revenues with retail sales taxes, so to achieve implementation of a tax on national salt production,

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[47] Of corse if we disregard the environmental concerns and goals, or in other cases out of the environmental protection, taxes will be appointed merely and primarily for achieving certain market and fiscal goals

[48] Hoerner, J. Andrew (1998), Working Paper "The role of Border Tax Adjustments in Environmental Taxation: Theory and U.S. Experience, presented at the International Workshop on Market Based Instruments and International Trade of the Institute for Environmental Studies Amsterdam, The Netherlands

Salina must exempt imports produced outside of the nation and impose tax on domestically produced salt which is exported, thus the production of salt in the territory of Salina will be not so profitable and this fact will discourage the production of salt in Salina. Finally through imposition of appropriately designed taxes both countries achieve their environmental goals - protection of the health risks of the nation, by decreasing the consumption of salt, and thus decreasing the health insurance costs in the case of Angina and protection of the environment from the salt runoff, by decreasing the production of salt, and creating a possibility for compensation of those injured by the salt runoff.

The achievement of environmental goals through the imposition of environmental taxes is possible and it is predictable to the extent that environmental desired results could be completed with a quite degree of certainty. This predictability gives to the authority some flexibility. In addition and in connection with the protection and preservation of the environment Art. XX "General exceptions" of the GATT, 1994 establishes the standards for exceptions from the principles of non-discrimination and the rule on market access[49]. These exceptions are 'limited' as the list of exceptions is exhaustive[50]. Through the imposition of environmental taxes the polluter pays principle of IEL is observed, since the costs of the environmental pollution are placed with the polluter. If we look how

[49] Non-discrimination principles set out in Art. I 'General most – favoured nation treatment'; Art.III 'National treatment on internal taxation and regulation' and the rule of market access in Art. XI 'General elimination of quantitative restrictions' of the GATT, 1994

[50] In US – Section 337, the Panel noted in its report that Art. XX provides for limited and conditional exceptions from obligations under other GATT provisions, bid. § 5.9

environmental subsidies could be applied in both cases in order the pursued results by the two governments to be achieved, they should merely not give any subsidization, so the price of the salt as an end product in Angina not to be decreased by subsidization and the costs for product production in the case of Salina not to be decreased either. At the same time both countries could use environmental subsidies for research activities in the consumption and production of salt so that to find the most appropriate way for solving their environmental problems.

The discussion of environmental taxes or BTAs (that will be imposed with the justification of the general environmental exceptions of GATT, 1994) in the USA and in the EU lately, is interesting to be looked closely since there are some difficulties likely to emerge mainly in connection with non-discrimination principles of the WTO law and the rule of free market access.

2.1. "The Carbon tariffs" discussion.

In the beginning of July, 2009 the US House of Representatives passed a bill that includes a provision for ' border tax adjustments '[51] on certain products as chemicals, iron and steel, glass, cement, some pulp and paper products, lime and non-ferrous metals such as aluminium and cooper imported in the US from countries that do not restrict their GHG emissions. Some US lawmakers consider the measures essential for ensuring that rapidly emerging economies pull their weight in reducing the world's greenhouse gas emissions. The same measures are discussed in the European Union, after France has led a European call for a climate levy on imports that have been

[51] Information about the latest discussions is available at: http://ictsd.net/i/news/bridgesweekly/49962/

produced without regard to climate concerns. A major part of the concerns regarding the environment protection are connected to the green house gases (GHG) and their proved relation to the Climate change. [52]

As might be expected these draft measures met a bitter opposition from the countries against which they will be imposed, mainly China, India and Brazil, all are developing countries. The reaction of these countries is not without grounds in the WTO law. These measures will be discriminatory from the point of view of the main principles of non-discrimination – Most-favoured nation, Art.I of the GATT, 1994 and National treatment, Art. III: 2 of the GATT, 1994 and they will be against the rule of free market access announced in the WTO law. At the same time they will go against the principle of Common but differentiated responsibility (CBDR) accepted in WTO law and in International Environmental law. The principle of CBDR stipulates that developed countries shall bear the costs for mitigating the environmental damages, in this case for mitigating the climate change[53]. In addition to all arguments that are against Carbon tariffs comes the heavy

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[52] The Climate change/The global warming is a result of human activity which alters directly or indirectly the composition of the global atmosphere. The Intergovernmental Panel on Climate Change, a network of 2000 scientists and policy experts advising governments on climate policy in its Report (2001) concluded that most of the warming observed in the last 50 years has been due to the increase in greenhouse gas concentrations produced as a result of human activity. The CO2 is a basic by-product of the combustion of fossil and other natural fuels – wood, coal, oil and gasoline. The increasing temperatures is likely to result in rising sea levels and this is a serious threat for the low-lying coastal regions where a significant number of the world's population is settled. The UN Framework Convention on Climate Change, 1992 and adopted in 1997 Kyoto Protocol to it are the main international treaties in the area.

[53] One of the best examples of the application of the CBDR principle is the Clean Development Mechanism defined in Art. 12 of the Kyoto protocol to the UNFCCC.

situation of the world's economy. The financial crisis that the world is experiencing from the end of 2008 continues on and is the deepest one in decades. The bad economic conditions worldwide is not in favour of imposing such measures which might be interpreted as protectionism and which will create additional obstacles to the already significant drop in the global trade. The latter was pointed out by the US president Obama in relation with the bill of BTAs in the USA[54].

It will be interesting to presume how it will work if US impose BTAs on goods imported in their territory from countries (for example from China) that do not strictly regulate their GHG emissions. The regulation of the Schedules of concessions is in Art. II of the GATT according to which the WTO Members are obliged to impose tariffs and charges not in excess than those that are provided for in their schedules of Concessions. In addition the text of Art. III:2 of the GATT comprises the BTAs via the reference to the Add. Art. III first paragraph, and prohibits levying of "internal taxes or other internal charges" in excess of those applied to the like domestic product. The US bill carbon tariffs will impose process production taxes or indirect taxes imposed in the territory of importing country (the USA) in accord with 'destination principle'. At the same time the US must impose the same internal taxes or internal charges to its domestic like products ,n case their production is not in line with the requirements for reduction of GHG emissions. The US Act must not contemplate any discrimination between domestic and imported like products, and should preferably be aimed at

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[54] Washington post June 29, 2009 "Obama prises Climate Bill's Progress But Opposes its Tariffs", available at:
http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062801229.html

offsetting, by imposing the BTAs, the taxes and charges applied to domestic producers. Then the principle of National treatment in the WTO system will be observed. The principle of the Most-favoured nation will be violated, since there will be countries from which like products[55] to these imported from China will be imported under more favourable conditions. And the Art. XI General elimination of quantitative restrictions, GATT, 1994 will be violated as well.

The principle of CBDR and the social equity in the WTO law and in the International Environmental law, according to which developing countries will receive assistance from developed countries in the process of implementation of their commitments for the protection and preservation of the environment, here for mitigation the climate change, will be violated by the US, since instead of giving assistance it will impose a burden on the products produced in developing countries. This principle is clearly stated in the UN Convention on Climate Change (UNFCCC) and the adopted to it Kyoto protocol (KP).[56] Despite the fact the USA did not ratify the KP, which in the field of climate change mitigation, places stricter and specific obligations on each industrialized country, and excludes the developing countries from these obligations, however, the same principle is stipulated in the UNFCCC to which USA is a party. One question that emerges in relation to the principle of CBDR is - Who has to pay for the internalization of externalities for the reduction of GHG and the mitigation of the climate change? It seems fair that the US should pay the costs for the necessary

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[55] There will be some difficulties with regard to the like products test, since the criteria used by the test do not comprise the process and production method, here this matter is discussed in Chapter 2.

[56] For example the preamble § 6 and Art. 4.7 of the UNFCCC; Art. 12 of the Kyoto protocol

technology for the reduction of GHG for the Chinese' or Indian' or Brazilian' producers. If it pays these costs then the process production will be in line with the requirements for reduction of GHG and the mitigation of climate change will be achieved. Still the national authorities of China, India and Brazil have to take necessary steps for the implementation of legal requirements in their territories for GHG reductions, so to support it administratively. Thus in short if the US imposes BTAs it will most probably be in violation of the basic principles for non-discrimination and the rule of market access in the WTO system.

There are another perspective of this particular issue as well, and it is are the developing countries in a position to dictate and to demand that their products be imported without any objections by the importing country, even it is worldwide recognized as produced via GHG - process and production? Thus the countries will be obliged to accept the importation into their territories of GHG products, that would be against their environmental policy.

On the other hand, as was mentioned earlier here, the GATT, 1994 provides general exceptions for WTO – inconsistent measures, which are necessary to protect human, animal or plant life or health, or which relate to the conservation of exhaustible natural resources, Art. XX, litra b) and litra c), of the GATT. So far in the majority of WTO cases, WTO Members failed to justify their environmental – related measures under such exceptions[57]. At

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[57] The US-Tuna I (Mexico) case (The Panel Report was unadopted) ; The US-Shrimp case, adopted as modified by the AB R, 6 November 1998 and US – Shrimp (rt. 21.5- Malaysia), adopted 21 November 2001 , as upheld by the AB R.

present the climate change have never been the object of a trade dispute at the WTO.

The EU new climate and energy package[58], does not now include provisions requiring polluter exporters to buy EU emissions permits. It leaves the door open for a decision on the issue at a later stage in 2010 when there is more clarity regarding the global climate change regime.

The "carbon tariffs" may certainly contribute to the climate change mitigation in case they are imposed via mutually agreed by all concerned countries legal steps in accordance with the WTO law, and in accordance with the principles of the International Environmental law and the general principles of the Public International law. Thus they can be considered as an alternative tool to the environmental subsidies.

3.1 How much could environmental subsidies be used?

The regulation of environmental taxes is still in force in difference with the regulation of environmental subsidies. In addition in connection with the utilization of environmental taxes under the GATT, 1994 there is a well developed case law. There is no case law in connection with environmental subsidies neither are texts concerned with particular environmental problems in the SCM Agreement in a sense they permit exceptions from the general principles of non-discrimination and the rule for free market access of the WTO law as these in Art. XX of the GATT, 1994. To my view the texts of SCM Agreement would be interpreted in the light of object and purpose of the Agreement Establishing the WTO and the related to it agreements in a

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[58] Bridges Trade BioRes, Volume 8, No. 1, 25 January, 2008, “EU Climate Strategy: Border Measures Remain an Option”.

dispute. If there is subsidization according to Art. 8§2, litra c) of SCM Agreement it seems logical to connect the new environmental requirements imposed by law or/and regulations with the specific grounds stipulated in Art. XX, litra b) or g) and the chapeu of Art. XX of the GATT, 1994 and to impose such requirements when they are “necessary to protect human, animal or plant life or health” or “ relating to the conservation of exhaustible natural resources...” and “ are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or disguised restriction on international trade ...”.[59] Hence, it might be argued that the text of Art. XX, litra b) and g) and the chapeu of Art. XX of GATT, 1994 may be used in a case of environmental subsidization also, as in case of environmental taxes.

Environmental taxes provide *an ongoing incentive* for environmentally harmful producers to seek ways of reducing the environmentally harmful effects, since they are imposed constantly if the process and production is environmentally harmful. The environmental subsidies as they were regulated by the text of Art. 8§2, litra c) is a *one time* non - recurring measure, which is limited to 20 % of the cost of adaptation. Therefore the producers receive a benefit that reduces the costs of the production, so environmental subsidies are not in line with the Polluter pays principle of IEL. Environmental taxes are in coherence with the Polluter pays principle of the International Environmental law, they are fully paid by the polluters[60].

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[59] Vienna Convention on the Law of Treaties, Art. 31 "General rule of interpretation"

[60] The principle of Polluter pays has a central role in the utilization of environmental taxes and environmental subsidies it will be discussed in the Chapter 4 in this thesis along with the other substantive principles and the equity of the Common but Differentiated Responsibilities of the International

In addition through environmental subsidies it is likely to detain or hinder the invention and construction of new facilities which are environmentally friendly. At the same time it has to be noticed that they might be used for research activities in order new and environment protective facilities to be designed and constructed.

There is a form for subsidization that resembles environmental taxes or more precisely BTAs, it is mentioned in Chapter 2 in this thesis, and that is not regulated by the text of Art.8,§2, litra c) of the SCM Agreement. It is listed in Art. 1§1, litra a) of the SCM Agreement and is : " fiscal incentives such as tax credits"[61] these fiscal incentives might be imposed with purpose of environmental protection, for example for research and development activities or for using environmentally friendly technology. Except with the cases related to in the Footnote 1 of the SCM Agreement, such fiscal incentives will constitute subsidies.

According to Annex II to the SCM Agreement, para 1

"Indirect tax rebate schemes can allow for exemption, remission or deferral of prior stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product…..Similarly, drawback schemes can allow for remission or drawback of import charges levied on inputs that are consumed in the production of the exported products." Footnote 61 of the Annex II provides that "Inputs consumed in the production process are inputs physically incorporated, energy fuels and oil

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Environmental law.

[61] From these are exempted duties or taxes that are not collected of an exported products or the remission of such duties or taxes in amounts not in excess of those which have accrued, Footnote 1 of SCM Agreement.

used in the production process…" In this respect subsidies (fiscal incentives) seem quite similar to BTAs they are imposed in the destination country. They are not environmental subsidies as they were defined in Art. 8§2, litra c) of the SCM Agreement. However, they might be used for environmental purposes.

It seems that the regulation of environmental subsidies has its alternatives in BTAs, Art. III:2, GATT, 1994 and in fiscal incentives Art. 1§1, (a) 1, ii) of the SCM Agreement.

4 Development of the WTO system, in short, with relation to utilization of environmental subsidization.

There was no international organization on trade till the end of the Second World War (WWII). After the WWII and with the initiative of the USA in 1945 multilateral negotiations were started. As a result an International Conference on Trade and Employment was held in Havana in 1947 under the auspices of the UN Economic and Social Council and led to the draft of so called "Havana Charter" that have never been adopted. Parallel to the Havana Charter the General Agreement on Tariffs and Trade (GATT,1947) was negotiated and subsequently entered into force on 1 January 1948. GATT, 1947. It served the main goals of the international trade relations among the countries in the post war times. It helped the economic world order to be redesigned and to create conditions for free trade at international level and doing so it helped the isolationism to be overcome. The GATT,1947 ensured that commitments undertaken during tariff negotiations remain reciprocal, as well as it ensured trade liberalization by tariff reductions included in the binding for the contracting parties Schedules of concessions. There was adopted the text of Art. XVI “Subsidies” which did not give a clear definition of subsidy and where no environmental subsidies were regulated. The Uruguay round of negotiations lasted eight years and in 1994 resulted in the adoption of a revised version of the texts of the GATT, 1947 called GATT, 1994 and in the establishment of the World Trade Organization by the WTO Agreement. Along with the WTO Agreement were adopted other binding to all WTO Members agreements. Initially the main goal in establishment of international trade organization was the liberalization of trade and overcoming the devastating on the

economies of the countries results from the WWII. There was not so much emphasis on the environmental problems. Some NGOs and individuals consider liberalized trade as threat to environment. Argumentation is that the desire to take more advantages from liberalization of the international trade drives the players to give more priority to material than to the moral (non material) values. Under the moral values, here, it is appropriate to place environmental preservation and protection along with the internationally recognized high importance of the respect for human rights. Under the material values is placed money and profit as well as different kinds of possibilities through which material benefits are received. After the Uruguay Round in 1994 environmental concerns resulted in adopting texts for protection of the environment in the WTO law among which the text of environmental subsidies in the SCM Agreement. The text was binding to all Members to the WTO until the end of 1999 and was not renewed according to the requirement of Art. 31 of the SCM Agreement.

In the beginning subsidies were considered to be a useful tool for preservation and protection of the environment, through ensuring some extent of the internalization of the environmental externalities. But they had not been used in practice. The reason for that non-use could be the fact that their regulation was very demanding, according to some country Members of the WTO it was so complex[62] as they could not use it. To my opinion the

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[62] The text of Art. 8 of the SCM Agreement, where the environmental subsidies were placed , was discussed by the country members of the WTO at the end of 1999, and some of them stated that the provision is complex and they had difficulties to design programmes covered by these provisions. Point 12. of the Minutes of the Special Meeting of the Committee on Subsidies and Countervailing Measures, held on 20 December 1999 under the chairmanship of Mr. Jan Söderberg (Sweden) where the representative of

standards placed in the text of Art. 8§2, litra c) served as a guarantee against misuses of this type of subsidization, but they were not balanced, so to meet the needs of the country Members and more important were too demanding and resulted in a text which was not practically utilized (at least according to the data available in the web site of the WTO).

Discussing the environmental subsidies from *de lege ferenda* perspective it would help if there was a system for reporting the results and benefits for the environment, and thus the environmental subsidy programme to be justified. The non-discrimination principles and the rule for free market access must be observed under the WTO law in case of environmental subsidization and it is difficult a subsidization to be combined with them, since it creates favourable position for the producer, that receives a benefit. This benefit gives a comparative advantage for the product, produced through subsidization and competitive advantage for the producer of subsidized product. The subsidized product will be produced through less costly process of production than other like products which are not subsidized, so the ultimate result would be market distortions. Subsidization is a government / budget expenditure which serves to ensure the internalization of environmental externalities, and is not in line with the Polluter pays principle of the IEL.

One example for combining the subsidization of a process and production with as far as possible environmental friendly impacts would be

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Colombia stated " that Colombia's lack of experience in the application of such subsides and the complexity of the drafting of article 8 had made it difficult for Colombia to design programmes covered by these provisions".

an investment in a production in a developing country done by a developed country. As was shown earlier in Chapter 3 It is not necessary to be done in accordance with the standards of Art. 8§2, litra c) of the SCM Agreement, it might be done, broadly speaking[63], as a subsidization under the meaning of Art.1 §1.1, (a) 1 or 2, but with a clearly defined environmental purpose. If for example Norway subsidizes investments in environmentally friendly cotton production in India with environmental purpose of decreasing the CO2 emissions or decreasing the quantities of pesticides in the soil, needed to prepare it for the fragile young cotton plants, so they can grow, or other negative impacts during the whole cycle of production of end cotton products. This subsidization would be in coherence with the principle of CBDR. The result would be growth of the economic development in India, since there will be more work places for local people, certain know – how, how cotton can be produced in the best environmentally friendly manner. At the same time the subsidized investment will lead to benefit for the Norwegian company which will make profit through the production of cotton in India at lower cost for production. The preservation and protection of the environment will be achieved at local and at global level by the reduction of CO2 emissions, or decreasing the pesticides' quantities in the soil. Norway as developed country will execute its obligations in connection with the principles of Sustainable development and of CBDR according to ITL and IEL. There is a win-win situation for all parties and for the environment.

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[63] This statement is with the consideration that only subsidization under Art. 1,§1.1 (a) 1., ii) in the form of fiscal incentive such as tax credit was discussed in relation to environmental taxes regulated in the Art. III:2 of GATT. The other forms of subsidization could also have environmental purpose, but they were not discussed in detail in this paper.

There is no need to make the subsidization strictly under the narrow standards of the text of Art. 8,§2, litra c), since the same results can be achieved through a subsidization under Art.1 ,§1.1 (a) 1., ii) in the form of fiscal incentive of the SCM Agreement. The environmental taxes in line with the destination principle , Art. III:2 GATT 1994 , imposed in Norway when importing the cotton products produced in India by the Norwegian company also could be a useful tool.

The threats to the deterioration of the status of the environment will suffice to be noticed shortly with the notion that to all of them could be one or more appropriate form of environmental subsidization. Nuclear wastes and chemical agents (hazardous or toxic substances) are cumulating in the air, water and soil. They also often produce additional effects with other substances. International instruments dealing with hazardous substances have been adopted and developed after 1980s[64]. The wastes create similar problems. The simple ban for movement or storage of hazardous wastes will not make them extinguish. Nuclear materials are other serious concern for the environment.[65] The depletion of the stratospheric ozone layer is other global problem related to the emission of substances into the atmosphere one of them is the chlorofluorocarbons (CFCs) they are stable and can migrate

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64 The Stockholm Convention on Persistent Organic Pollutants, 2001 (POPs). POPs Convention imposes a global ban on certain toxic and environmentally hazardous chemicals; at regional level the EU adopted a programme on Registration, Evaluation and Authorization of Chemicals, 2006. Chemicals have to be registered with the EU data base.

65 The Treaty banning Nuclear Weapons Tests in the atmosphere, in Outer Space, and Underwater (Moscow, Aug.5, 1963), the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency both signed Sept. 26, 1986

over long distances and stay for long period of time producing harmful effect to the ozone layer.[66]

Biotechnology is among the latest threats to the environment. There is considerable scientific uncertainty about the scope and degree of the environmental risk such organisms create. There is fear that these genetically modified organisms may have destructive effect on the other naturally evolved organisms.[67]

Environmental subsidies of research activities might be of use in the GMOs if there is a major food crisis and no other alternatives for food production exists in accordance with the new environmental requirements imposed by law and/or regulations that restrict the use of genetically modified corn since there is lack of scientific certainty about the consequences of such harvest when interconnects with other plants. Then the genetically modified corn could be grown under conditions which would secure the safe utilization of such corn for human health, protect workers and prevent accidental plant of genetically modified corns outside certain area and under regulations that would prevent deliberate plant of such corns for commercial or other than the defined purpose. In such cases the social need would have main importance, but still it inevitably need to be balanced with environmental concerns. Here it will suffice the society to pay for the costs of such research and ultimately production and not the producer.

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[66] The Convention for the Protection of the Ozone Layer (Vienna, Mar. 22, 1985) is a framework convention which provides rules for cooperation among states parties in order to ensure the continued existence of stratospheric ozone; and the Montreal protocol on Substances that deplete the Ozone Layer (Montreal, Sept. 16, 1987).

[67] UN Convention on Biological Diversity, 1992

In the following Chapter the environmental subsidies will be reviewed in connection to the substantive principles and the equitable principle of Common but Differentiated Responsibilities of IEL.

5 Controversy or coherence between the Trade law goals designed through utilization of environmental subsidies and the substantive principles and the equitable principle of Common but Differentiated Responsibilities of the International Environmental law?

Environmental subsidies are just one part of the whole range of subsidies most of which is likely to have adverse effects on the environment, since they are not designed with the primary goal of environmental preservation and protection.

The subsidization of production of goods may have injurious effects on the trade interests of other State/s, since the industry of latter may suffer from unfair competition "disguised" under the legitimate 'environmental protection'.

The comparison of the substantive principles and the equitable principle of Common but Differentiated Responsibilities of the International Environmental law[68] and the aims of the International Trade law through environmental subsidization will be of use in this thesis, since some of the principles of the IEL have significant importance and influence in the realm of the International Trade Law (ITL). This discussion is considered to be helpful to answer the research question did the environmental subsidies have to be continued or not from perspective of the principles of IEL, taking into account the fact that the latter are extremely important in the realm of IEL ?

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[68] Kiss, Alexander; Shelton. Dinah (2007) " Guide to International Environmental Law" - Principles are widely used in IEL, they can indicate the essential characteristics of legal institutions, designate fundamental legal norms, or fill gaps in positive law, pp.89-90, Martinus Nijhoff Publishers Leiden / Boston

5.1 The Polluter pays principle.

The principle of Polluter pays of IEL has been discussed several times in this paper. In short and in relation to the topic here it guides who has to bear the costs for the environmental externalities and to what extent environmental subsidies lead to the fulfillment of this principle. The principle polluter pays was formulated by the organization of Economic Cooperation and Development (OECD)[69] as one of the economic principles to govern the allocation of the costs of pollution of the environment in the country Members to the organization. This principle is motivated by the idea to encourage the reasonable and rational use of the scarce environmental resources without compromising the economic processes connected with the international trade and investment. This principle is stated later on in the Rio Declaration on Environment and Development, 1992, Principle 16 :

"National authorities should endeavor to promote the internationalization of environmental costs…taking into account the approach that the polluter should, in principle, bear the cost of pollution,…without distorting international trade and investment. "

As it has been discussed above the environmental subsidies would be an exemption from the Polluter Pays Principle since the subsidization is made by government or any public body and not by the producer that pollutes. Hence the relevant question in the context of environmental subsidies would be whether and why such exemption should be accepted? To my view it may be defended that in cases where there is a high importance of a given product

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[69] The first recommendation about Polluter pays principle was adopted by the OECD in 1972, Recommendation ofthe Council on guiding principles concerning international economic aspects of environmental policies, 26th May, 1972.

to the State and/or the society like in the examples with the economy situation in a country – Norway; glass production in Chapter 1; 1.2.2. and food crisis in Chapter 4 it is justified environmental subsidies to be utilized, since such cases usually involve expensive research activities and if the importance is so high then some exemptions of the polluter pays principle might be accepted.

5.2 Principle of Sustainable Development.

The development of the principle of sustainable development went through perceiving it as a general objective[70] of the policy dealing with environmental problems. In the jurisprudence it has received attention by the International Court of Justice for first time in the jurisprudence of the Court in Gabickovo/Nagimaros case[71]. In its separate opinion the Vice –President Weeramantry pointed out that he considers Sustainable development more as a principle than as a concept and that it will be of great importance in future environmental cases, since in planned schemes like the Gabcikovo/Nagimaros case there is a need to weight considerations of development against environmental considerations. The fact that the International Court of Justice discussed the Sustainable development as a concept meant that it was not attributed with any normative value.

Even though there is still no general agreement on whether Sustainable development is a legal principle or not here it will be discussed as a legal

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[70] Fauchald, Ole Kristian, (1996) " Environmental taxes and trade Discrimination", pp16-19.

[71] Gabcikovo-Nagimaros Project (Hungary/Slovakia), ICJ, 1997

principle[72]. It has a great importance for all activities related with the preservation and protection of the environment[73].

In the preamble of WTO Agreement one of the stipulated objectives is: "…while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment…" or in short to enhance the optimal and efficient exploitation of natural resources.

Prior the establishment of the WTO and since the end of 1980s the principle of Sustainable Development was defined in the 1987 Report of the World Commission on Environment and Development in the following way:

"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

This definition gives two very important perspectives, one is the short term perspective – 'the needs of present generation' and the other is the long term perspective 'the needs of future generations'. Later the principle of Sustainable Development is reaffirmed in 1992 UN Conference on Environment and Development (UNCED), the 1997 United Nations General Assembly Special Session on Sustainable Development and the 2002 World Summit on Sustainable Development. The development that is sustainable is

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[72] This principle is important in the realms of the International Trade law and the International Environmental law, for example all of the texts adopted at Rio include some formulation of the principle for example Principles 6 and 7 afford priority to the needs of the least developed and most environmentally vulnerable states.

[73] It has many aspects, since the very nature of the idea is multifaceted. It is concerned with the education and training of people, with the sustainable use and utilization of natural resources, with the preservation of the environment. These many aspects of sustainable development are rationalized for a long period of time.

in practice concerned with much more than a mere economic growth[74]. The subsidization of adaptation of existing facilities to new environmental requirements would not fully contribute to sustainable development, since through the subsidization of process and production the use of environmental sources will be increased, as in the case with oil and gas production- the CO2 emissions will be reduced through CCS facilities, but the depletion of oil and gas will not be prevented. But still there would be preservation and protection of the environment through ensuring the functioning of the existing facilities in conformity with the new environmental requirements. If a country has a very strict requirements to the existing facilities and does not subsidizes their adaptation to them this would force the producers to move out their production in other country/ies where there are not such strict requirements, in case the market will still exist and there will be demand of these products, and of course if in the other country the production of the like product is possible, e.g. there are the same environmental resources. So the principle of sustainable development will be observed to some extent when environmental subsidies are utilized, since subsidization will increase the use of environmental resources and thus their optimal use might not always be assured. The argumentation done in the polluter pays principle above would be used here by weighting the importance of the production to the State and/or the society.

[74] "…sustainability critique was initially brought forward by developed country scientists, economists and environmentalists…They were quickly countered by developing countries. As states hold sovereignty over their own natural resources, most developing countries were unwilling to accept internationally imposed limits on the exploitation of these resources. …In some UNGA debates, it has been described as a "right to development" " , Bugge, Hans Christian [et al] , Sustainable Development in International and National Law, Groningen 2008, Chapter2.1, p.91

5.3 The equity principle of Common But Differentiated Responsibilities.

The principle of Common but Differentiated Responsibilities (CBDR) is one of the cornerstones of Sustainable development and here is a trial the relation of environmental subsidies and their conformity with it to be traced . It has emerged as a principle of International Environmental Law in the context of the 1992 Rio Earth Summit, Principle 7 of the Rio Declaration provides the first formulation of the CBDR, and it states:

"...In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. The CBDR has two aspects the first one is the common responsibility for the common heritage and common concern of humankind, and reflects the duty of States to bear the burden of environmental protection for the commons; the second is the differentiated responsibility, which addresses substantive equality: unequal material, social and economic situations across States; different historical contributions to global environmental problems and thus different possibility to benefit from the utilization of environmental resources; the financial, technological and structural capacity as well as the different stage of the knowledge how to tackle those global problems. The principle of CBDR establishes a general rule for equitable allocation of the costs of global environmental protection. All negative consequences deriving from the deterioration of the environment are considered to harm most severely the developing and least

developed countries[75]. The subsidization of environmentally friendly projects could appear to be an effective way for dealing of environmental problems and it can be done in accordance with the principle of CBDR, when the developed countries take the burden of the costs for environmental subsidization under Art. 8, §2 litra c) of the SCM Agreement. Hence the answer of the research question of whether these texts needed to be continued will be positive. Hence if environmental subsidization is done by developed country in accordance with the standards of Art. 8§2,litra c), notwithstanding the fact that it is not in force, in process production in a developing country this would create a win-win situation, as in the made up example with subsidized by Norway investment in cotton production in India in Chapter 4. In addition comes the question of the property rights on environmentally friendly technologies that would be developed by developed countries and used in developing countries. If these rights are reserved only for developed countries then the CBDR principle would not be observed, and social equity would not be achieved. If the developing countries would have property rights on such technologies or they are common property then the social equity would be achieved.

5.4 The Precautionary principle .

It would be of importance in the case of environmental subsidies when

[75] As for example dumping of wastes (chemical or nuclear) in their territories by developed countries, since it is much more cheaper to do it there than on the territory of whatever developed country; overfishing in their sea waters or restricting indigenous people to fish; petrol production without taking care for the CO_2 emissions or without observing other fundamental legal principles connected to Human Rights (as an example the production of petrol by Shell in Nigeria).

there is no absolutely certain scientific knowledge about the environmental consequences from the subsidized activities. As in the example given in Chapter 4 in this thesis with the global food crisis, where a scientific uncertainty exists about the consequences from the use of genetically modified corn. The scientific uncertainty is due to the lack of well established practice and is connected to consequences that this corn would have on the nature corn or other plants in the area where they will be grown. Other consequences that are of interest will be the impact these genetically modified corn would have on the human health. Hence the emphasis seems to be rather on the society at large, and the important for the society results such subsidies would provide, so therefore they could be regarded as justified. In such cases environmental subsidization will be of use for research activities so that any negative consequences be foreseen and neutralized to the best possible extent. Thus environmental subsidization for research will serve the precaution required by the precautionary principle of the IEL.

5.5 The Prevention of harm.

The environmentally adverse effects produced on the territory of one State do not respect boundaries. From this starting point the considerations of whether the regulation of environmental subsidies needed to be extended or not will be made. The prevention of extra-territorial harm of the environment has its origin in the arbitration of the Trial Smelter case, 1937.[76] The principle

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[76] **1937 Trail Smelter** – The consolidated mining and smelting company limited of Canada operated zinc and lead smelter along the Columbia river at Trail, British Columbia, about 10 km North of the international boundary with the State of Washington. In the period between 1925 and 1935 the US Government objected to the Canadian Government that sulfur dioxide emissions from

to prevent harm of the environment was stated in the Stockholm Declaration on the Human Environment, 1972 "Principle 21" , and later in the Rio Declaration on Environment and Development, 1992 :

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own natural resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". This principle is further expressed in many multilateral environmental agreements.[77]

5.5.1 Sovereignty and Territorial integrity.

The cornerstone principles in the Public International Law are Sovereignty and Territorial integrity of states. They are clearly stated in Art. 2 of the UN Charter. In the realm of the International Environmental law they have importance from the point of view of extra-territoriality of environmental harm and the possibility measures taken from one state to have importance for other state/s.

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the operation were causing damage to the Columbia river valley in an 30 km stretch from the international boundary to Kettle Falls, Washington. It was this increase of sulfur dioxide that was detected through the rains. On March 11, 1941 the Tribunal decided that the smelter should refrain from causing any future damage to the State of Washington and to ensure this it mandated that the smelter maintain equipment to measure wind velocity and direction, turbulence, atmospheric pressure, barometric pressure and sulfur dioxide concentrations at Trial.

[77] The United Nations Convention on the Law of the Sea (UNCLOS), Art. 194"Measures to prevent, reduce and control pollution of the marine environment", Convention on Biological Diversity (CBD), Art.3 which states that "States have,…the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States…".

The principle of State sovereignty in the realm of the International Environmental Law is applied to guarantee the sovereign right of the States to exploit their own natural resources.[78] States have right to freely dispose and use their natural resources. What would be of interest in connection with the environmental subsidies would be in what way countries dispose their natural resources. Do they use all measures, including environmental subsidies, in order to reduce the harmful effects on the environment? Do they internalize environmental externalities so that desirable state of the environment to be ensured?

If a State has oil and natural gas resources how it produces these products, does it use such facilities that produce low CO2 emission or not.

The environmental subsidies can be used for adaptation of the existing facilities for production of oil and gas that leads to reduction of CO2 emissions in the atmosphere, so to ensure reduction of the CO2 emissions locally and globally.

It is appropriate to have a constant assessment of the effectiveness and efficiency of such subsidization weighting the benefits for the environment and the economic costs. And if the environmental benefits are not sufficient then such subsidization could be stopped and subsequently there is no need of the regulation of environmental subsidies as it was adopted in Art. 8§2, litra c) of the SCM Agreement.

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[78] The 1966 International Covenants on Economic, Social and Cultural Rights (ECSCR) and Civil and Political Rights (CCPR): Art. 1 (2) “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

The territorial integrity serves to guarantee the State's exclusive jurisdiction over its territory or in the field of the IEL, to guarantee the freedom of the State to form and apply its own environmental policy. However, the right to form and apply its own environmental policy of a State would not be without limits. Environmental subsidies are one opportunity for the States which deserves attention to the extent they help the prevention and protection of harm to the environment. The traditional attitude in the International Law for exclusive jurisdiction of the States over their territory is shifted when there is need for prevention of damage of the environment of other states or areas beyond the limits of national jurisdiction. It is conferred with an aspect of extraterritorial action of the principle for the prevention of harm on the environment. Thus even the States enjoy their sovereignty and territorial integrity this does not mean that they are allowed to cause environmental damage through the activities in their territory in the territories of other States or areas beyond the limits of their national jurisdiction. This hardly could be interpreted as a permission to cause environmental damage on their own territories and is likely to impose obligation to respect the environment and to secure its protection and preservation elsewhere in and out of their territory, when activities under their jurisdiction and control are concerned.

Subsidizing the production in order to be made in environmentally friendly manner is an application of the principle of prevention of harm when the production process is to harm the environment of other states or the environment of the state where the production is made, so from this point of view the environmental subsidies texts deserved to be renewed.

There is no absolute and undisputable coherence between the trade law goals pursued by the environmental subsidies and the above stated principles of the IEL. Moreover the same environmental purposes might be achieved through other measures such as environmental taxes, BTAs, the subsidization through fiscal incentives such as tax credits.

6 Conclusion.

Some short conclusive remarks are to be made here. The environmental subsidies appeared to be a controversial measure in internalization of environmental externalities, since they are not providing an overall result. They are an economic tool that might be used for achieving protectionists goals and for creating distortions on the market by adversely affecting the trade and investment interests of the trading partners. However the very demanding standards implicated in the text of Art. 8, §2, litra c) most probably served as a guarantee against such misuse. The country Members did not used this form of subsidization, but during the discussion in the Committee on Subsidies and Countervailing Measures there were many voices in favour of the continuance of the text of environmental subsidies. However , the texts regulating the environmental subsidies are no longer in force and the environmental subsidization might be made in accordance with the texts of actionable subsidies where no specific environmental purpose is stated, but nevertheless can be pursued. The subsidization made with environmental purposes will need to meet the standards of the general texts concerning the subsidization in the SCM Agreement, and in addition will need to have a clearly stipulated environmental purpose, so, to my opinion, to be classified as 'environmental'. The standards stated in Art. 8,§2, litra c) might be a guiding line, or they might even be fulfilled, but they are not *a conditio sine qua non* according to *de lege lata* since the text is no longer in force.

Environmental subsidies will be useful in cases where the products have big importance for the State and / or the society and when there is no other more environmentally protective process and production method as was

shown with the examples of energy production or glass production in Chapter 1, subsection 1.2.2. or with the growing of genetically modified corn in case of major food crisis in Chapter 4 of this thesis.

The complexity of the standards and the reduced cost of production result from environmental subsidies makes difficult the observation of the non – discrimination principles and the rule of market access of the WTO law market to be observed, since through subsidization are created comparative advantage for the product and competitive advantage for the producer. In addition the same environmental purposes might be successfully achieved through other economic tools such as environmental taxes under the Art. III:2 of GATT, 1994 or even through other form of subsidization under the Art. 1 of the SCM Agreement. One of the forms of subsidization resembles environmental taxes in the context of Art. III:2, GATT, 1994 and this is the subsidization under Art. 1,§1.1 (a), 1. ii) government revenue that is otherwise due is foregone in connection with the special texts of Annex I and II to the SCM Agreement.

There is no need the environmental subsidies to be in force and this answer is reaffirmed by the lack of practical use of the text of Art. 8, §2, litra c) of the SCM Agreement when it was in force (from 1994 till 1999).

7 References:

Barg, Stephan (1996) "Eliminating perverse subsidies: What's the problem?",OECD Documents, Subsidies and Environment Exploring the Linkages, (1996), p. 28-39.

Brawnlie, Ian (2001), "Principles of Public International Law", Oxford University Press, fifth edition, pp105-120.

Cassesse, Antonio (2005), "International Law", Oxford University press, second edition, pp.481-527.

Committee on Subsidies and Countervailing Measures, (1999) Minutes of the RegularMmeeting held on 3 May, 1999, (under the Chairmanship of Mr. Carlos Antonio da Rocha Paranhos (Brazil).

Committee on Subsidies and Countervailing Measures, Minutes of the Special meeting held on 20 December, 1999 (1999) , (under the Chairmanship of Mr.Jan Söderberg (Sweden). Both minutes are available at: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm, under the title Minutes.

Fauchald, Ole Kristian (1996) "Environmental Taxes and Trade Discrimination".

Fauchald, Ole Kristian (2003) " Flexibility and Predictability Under the World Trade Organization's Non-Discrimination Clauses", Journal of World Trade 37(3): 443-482, 2003.

Fullerton, Don; Leicester, Andrew, and Smith, Stephen NBER Working Paper No. 14197 July 2008, JEL No. H23,Q28, pp.2-8, available at: http://scholar.google.no/scholar?hl=no&lr=&cluster=4567571473910010886&um=1&ie=UTF-8&ei=bbJySoXoLNGH_Ab0q4HnAQ&sa=X&oi=science_links&resnum=1&ct=sl-allversions.

Goleman, Daniel (2009) "Ecological Intelligence Knowing the Hidden Impacts of What We Buy", Allen Lane, Penguin Group.

International Centre for Trade and Sustainable Development (2008) " EU Climate Strategy: Border Measures Remain an Option, Bridges Trade Biores, vol. 8, No. 1 , 25th January 2008.

International Centre for Trade and Sustainable Development (2009) " China , India Lash out at Talk of 'Carbon Tariffs', Bridges Weekly Trade News Digest, vol. 13, N.25, 8th July 2009.

Hoerner, J. Andrew (1998), Working Paper "The Role of Border Tax Adjustments in Environmental Taxation: Theory and U.S. Experience, presented at the International Workshop on Market BasedInstruments and International Trade o f the Institute for Environmental Studies Amsterdam, The Netehrlands.

Howse, Robert & Regan, Donald , " The Product/Process Distinction-An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy, European Journal of International Law(2000), Vol.11 No. 2, pp.249-289.

Intergovernmental Panel on Climate Change Synthesis Report (2007), available at: http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm.

Kiss, Alexander& Dinah Shelton (2005), "Guide to International Environmental Law", Leiden/Boston, (Martinus Nijhoff Publishers)

OECD (1972), Recommendation of the Council on guiding principles concerning international economic aspects of environmental policies, 26 th May 1972.

OECD (1989), Recommendation of the Council concerning the Application of the Polluter– Pays principle to Accidental Polllution, 7 th july 1989.

Report (1999) of the Committee on Subsidies and Countervailing Measures, available at: http://www.wto.org/english/tratop_e/scm_e/scm_e.htm , under the title Annual Reports.

Schwartz, Jason " 'Whose Woods These are I Think I Know': How Kyoto May Change Who Controls Biodiversity", New York University Environmental Law Journal, vol. 14 (2006) at pp.421-480.

Toman, Michael "Analysing the Environmental Impacts of Subsidies: Issues and research Directions", OECD Documents, Subsidies and Environment Exploring the Linkages, (1996), pp.43-51.

Report of the World Commission on Environment and Development, 1987.

Trade and Climate Change, available at:
http://www.wto.org/english/res_e/publications_e/trade_climate_change_e.htm

World Trade Organization, Ministerial Declaration, Ministerial Conference Fourth Session, Doha, 9-14 November, 2001

List of Judgements/Decisions:

Canada – Measures Affecting the Export of Civilian Aircraft, AB R, adopted 4 August 2000.

Korea – Measures Affecting Trade in Commercial Vessels, Panel Report, adopted 11 April 2005.

US-TunaI (Mexico), GATT, Panel Report, United States- Restriction on Imports of Tuna, 3 September 1991, unadopted.

US-Shrimp, Panel Report, United States-Import of Certain Shrimp and Shrimp Products, adopted 6 November 1998, as modified by the Appellate Body Report.

US – Section 337, GATT Panel Report, United States Section 337 of the Tariff Act of 1930, adopted 7 November 1989.

Treaties/Statutes:

Agreement Establishing the World Trade Organization (WTO Agreement), 1994.

Charter of the United Nations, 1945.

Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),1992.

General Agreement on Tariffs and Trade (GATT), 1947.

General Agreement on Tariffs and Trade (GATT),1994.

Subsidies and Countervailing Measures Agreement (SCM Agreement), 1994.

The Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, Mar. 22, 1989).

The Stockholm Declaration on the Human Environment, 1972.

The Stockholm Convention on Persistent Organic Pollutants, 2001 (POPs).

United Nations Framework Convention on Climate Change (UNFCCC), 1992.

Kyoto Protocol to the UNFCCC, 1997.

Rio Declaration on Environment and Development, 1992.