

A faint, light gray world map is visible in the background, centered on the Pacific Ocean. The map shows the outlines of continents and major islands.

ARTICLE 2 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES: SPECIFICITY

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2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions⁽²⁾ governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy⁽³⁾. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

(2) Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

(3) In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

Article 2.1: The Chapeau

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

Article 2.1 (a): *De Jure* Subsidies

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

- What is an industry?
- What is an enterprise?
- Why is there a requirement of “within the jurisdiction of the granting authority”?
- What is the difference between a “principle” and, for example, a “rule” or “obligation”?
- What does “explicitly” mean?
- What are examples of “limits access to a subsidy to certain enterprises”?

ARTICLE 2.1 (b): AUTOMATIC ELIGIBILITY AND OBJECTIVE CRITERIA OR CONDITIONS

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions⁽²⁾ governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(2) Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

- Is it enough that a subsidy is automatically applied after filling out a form, for example?
- Does the NATURE of the subsidy matter? For example, would a subsidy that benefits all businesses with 10 or fewer employees, or fills 60% of its staffing needs with female employees meet this exception?
- Would a program that benefits the steel industry, specifically, but is directed only to companies employing 50 or fewer employees meet this exception?

ARTICLE 2.1 (c): DE FACTO SUBSIDIES

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.

Such factors are:

- use of a subsidy programme by a limited number of certain enterprises,
- predominant use by certain enterprises,
- the granting of disproportionately large amounts of subsidy to certain enterprises, and
- the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy⁽³⁾.

In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

- The opening sentence of Article 2.1 (c) does not mean that an investigating authority must go through Articles 2.1 (a) and (b) before one can get to Article 2.1 (c). The Appellate Body, for its part, stated its belief in DS437 that some subsidies, by their nature, are *de facto* specific and therefore there is no reason for such additional analysis. The “notwithstanding” language refers only to those programs which appear at first as if they may be “explicitly limited,” and therefore are *de jure* specific under Article 2.1 (a), but after an investigating authority analyzes the program and determines otherwise, it might still be determined to be *de facto* specific under Article 2.1 (c).
- These factors “may be considered,” but are not mandated.
- The Appellate Body has stated its belief that use of a subsidy “programme” differs from the use of a subsidy. A “programme” is defined in Oxford’s Dictionary as a “systematic activity or series of activities.” The Appellate Body stated that under its interpretation, a subsidy programme can be evidenced by a mix of these two types of programmes: “a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. *US-Countervailing Measures (China) (AB)(DS437)*, para 4.141.
 - Could a single bag of cash, handed over by a government official to a particular business owner, with no words spoken, meet the requirement of a “subsidy programme?”
 - What differentiates a subsidy from a *de facto* “subsidy programme?”

ARTICLE 2.1 (c): DE FACTO SUBSIDIES (CONT.)

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.

Such factors are:

- use of a subsidy programme by a limited number of certain enterprises,
- predominant use by certain enterprises,
- the granting of disproportionately large amounts of subsidy to certain enterprises, and
- the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy⁽³⁾.

In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

- A limited number of enterprises means a list of users less than enterprises and industries throughout the economy as a whole. This is evidenced, in part, by the requirements listed at the end of 2.1 (c) in which the investigating authority is required to review the diversification of the economy of the investigated country.
 - Would a tax deduction provided to all home owners be considered *de facto* specific?
 - Would a subsidy geared toward purchasers of LED lights be considered *de facto* specific?
 - In the context of purchases of goods for less than adequate remuneration, the evidence of the subsidy programme comes from the transactions themselves, and not from external evidence of a program. If the inherent characteristics of the subsidized good limit the possible use of the subsidy to a certain industry, the Appellate Body is of the belief that such evidence is sufficient for the programme to be specific (AB in DS436).
- With respect to predominant use – the definition of “predominant” is “constituting the main or strongest element; prevailing.” The Panel in EC-Large Civil Aircraft (DS316) stated its belief that this factor “may be simply understood to be a situation where a subsidy programme is mainly, or for the most part, used by certain enterprises.”
 - In a small country, the biggest employer is the steel production plant and it uses the greatest amount of electricity of any single user in the country. If the investigating authority determined that electricity was being sold to that plant for less than adequate remuneration, would that provision be considered specific under this scenario?

- If an investigating authority determines that there has been a grant of a disproportionately large amount of subsidy to a certain enterprise, it must make such a consideration in light of the overall economy. Thus, if there is what would otherwise be a generally-available subsidy, but in fact, only a handful of enterprises benefited from that subsidy, such proportionality would be significant to the analysis.
- Likewise, if a subsidy was generally available on paper, but the evidence indicated that the government exercised discretion to only provide the subsidy to certain enterprises, an investigating authority might determine, based in part on the frequency in which applications for the subsidy were refused or approved, that the subsidy is, in fact, specific.
- In determining if a subsidy program is *de facto* specific, an investigating authority must take into account “the extent of diversification of economic activities within the jurisdiction of the granting authority.”
- The Panel suggested in DS437 that the economic diversification test is significant if a given country’s economy is limited to a very limited subset of industries. In that situation, an investigating authority would have to consider if a subsidy really was limited or disproportionate in fact, or if that limitation of provision was in fact a result of the nature of the economy as a whole at issue.
- In determining if a subsidy program is *de facto* specific, Article 2.1 states that an investigating authority shall also take into account “the length of time during which the subsidy programme has been in operation.”
- One can imagine that this requirement becomes important if a subsidy has only been in existence for a short period of time. Under that scenario, it might appear at first that the number of users is *de facto* limited because the number of users is small, but in fact it may be small only because the subsidy has not existed for a long enough period of time to provide benefits to a larger group of users.

ARTICLE 2: REMAINING PROVISIONS

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

- Geographic specificity can be *de jure* or *de facto* specific. If it is *de facto* specific, an investigating authority cannot merely show that users within the geographic region received benefits. It must also be shown that the same granting authority did not provide the same benefits outside of the geographic region, and that there is a difference between the benefits provided inside and outside of the geographic location based on positive evidence.
- Positive evidence is evidence based on facts before the investigating authority.