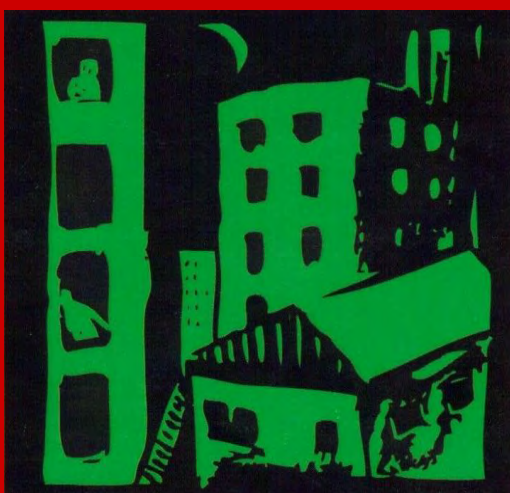


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Fiscal incentives in Kenya's free zones: To what extent are they consistent with the WTO rules on subsidies?

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ABSTRACT

In Kenya, free zones take the form of Special Economic Zones (SEZs) and Export Processing Zones (EPZs) and are offered a myriad of fiscal and non-fiscal incentives. At the same time, Kenya, as a member of the World Trade Organization (WTO), is a signatory to the Agreement on Subsidies and Countervailing Measures (ASCM), which prohibits subsidies that are contingent on export performance or use of domestic over imported products. Although free zones are not mentioned specifically, fiscal incentives constitute subsidies since they are financial contributions, incomes or price supports given by the government or their agencies which confer benefits. In this regard, the article examines whether

the fiscal incentives offered in Kenya's free zones meet the specificity test and are therefore consistent with the provisions on prohibited and actionable subsidies under the ASCM. The conclusion is that though the fiscal incentives offered in Kenya's free zones constitute financial contributions, they meet the specificity test and are consistent with ASCM rules on subsidies contingent on export performance and use of domestic over imported products, given that Kenya is allowed to grant export subsidies and none of the subsidies offered under the EPZs Act and SEZs Act require the use of domestic over imported products.

Keywords: actionable subsidies; fiscal incentives; free zones; prohibited subsidies; Kenya

1 INTRODUCTION

In general, a free zone is a part of a territory considered as being outside the customs territory in so far as import duties and taxes are concerned.¹ In Kenya, free zones are Special Economic Zones (SEZs) and Export Processing Zones (EPZs). They are geographically designated areas where benefits not limited to policies, land use, infrastructure, and utilities are provided.² EPZs are covered under the Export Processing Zones Act (EPZs Act) and have existed since 1990.³ The EPZs' primary objective is to promote the manufacture of goods and production of services for export. In achieving this objective, EPZs limit their activities to manufacturing, commercial, or service activities.⁴

On the other hand, SEZs were established in 2015 under the Special Economic Zones Act (SEZs Act) in view of EPZs' shortcomings, including the stagnation witnessed over the years. The SEZs Act was enacted to promote and facilitate investment in order to attract local and foreign direct investment (FDI) in the hope that SEZs would create job opportunities and promote export diversification. Most importantly, SEZs have been created to attain the economic goals of Kenya Vision 2030. Vision 2030 aims to improve the country's prosperity through an economic development programme that will sustain the economic growth of ten per cent per annum over 25 years.⁵

¹ World Customs Union International Convention on the Simplification and Harmonisation of Customs Procedures (as amended) (The Revised Kyoto Convention) Specific Annex D Chapter 2. Kenya is a contracting party pursuant to an Instrument of Accession lodged on 23 June 2010 through the Ministry of Foreign Affairs.

² Section 4(4) of SEZs Act 16 of 2015 and the first schedule; see also section 2 of EPZs Act. The SEZs Act does not repeal the EPZs Act but complements it. The authors believe, however, that consolidation is necessary.

³ See EPZs Act generally.

⁴ Sections 2, 15(1) and 17 of EPZs Act.

⁵ Klynveld Peat Marwick Goerdeler (KPMG) "Analysis of the Special Economic Zones Act, 2015" available at <https://bit.ly/3RPWIUL> (accessed 13 May 2019). See also "Kenya Vision 2030: The popular version" available at <http://vision2030.go.ke/publication/kenya-vision-2030-popular-version/> (accessed 13 May 2019).

The SEZs Act allows for the creation of various SEZs, which include free trade zones where goods are offloaded for transshipment and storage with the exclusion of manufacturing and processing;⁶ agricultural zones created to facilitate the agricultural sector, its services and associated activities;⁷ business service parks created to facilitate the provision of services that include regional headquarters, business processing outsourcing centres, call centres, shared service centres, and management consulting and advisory services;⁸ a free port zone where the goods introduced are regarded as being outside the customs territory in so far as import duties are concerned;⁹ industrial parks created to facilitate the needs of manufacturing and processing industries;¹⁰ information communication technology parks created to facilitate the information communication technology sector, its services and associated activities;¹¹ livestock zones created to facilitate livestock marshalling and inspection, livestock feeding or fattening, abattoirs and refrigeration, deboning, value addition, the manufacture of veterinary products, and related activities;¹² and, lastly, science and technology parks created to facilitate the science and technology sector, its services, and its associated activities.¹³

Kenya's free zones offer an array of fiscal and non-fiscal incentives. These include full repatriation of all capital and profits; protection of property rights, including industrial and intellectual property rights; freedom to enter into contracts and conduct business with a non-free zone enterprise; the right to determine prices of goods; and free, open, and competitive investments.¹⁴ Of relevance to this article are fiscal incentives that are not limited to stamp duty exemption for free zone enterprises related documents; income tax exemptions; exemptions from advertisement and business service permits fees; manufacturing, filming, and trade in unwrought precious metals, general liquor, and hotel liquor licences exemptions; value-added tax exemptions; corporate tax at the rate of ten per cent for the first ten years and 15 per cent for the next ten years; work permits of up to 20 per cent of their full-time employees; exemption from duties and taxes under the East African Community Customs Management Act of 2005 and Customs and Excise Act; exchange controls waivers for repatriation of profits and capital to the parent country; investment deduction of up to 100 per cent of capital

⁶ Sections 2 and 4(6)(a) of SEZs Act 16 of 2015. Activities such as bulk breaking, repacking, sorting, mixing, trading, or other forms of handling may be included.

⁷ Sections 2 and 4(6)(f) of SEZs Act.

⁸ Sections 2 and 4(6)(h) of SEZs Act.

⁹ Sections 2 and 4(6)(c) of SEZs Act.

¹⁰ Sections 2 and 4(6)(b) of SEZs Act.

¹¹ Sections 2 and 4(6)(d) of SEZs Act.

¹² Sections 2 and 4(6)(i) of SEZs Act.

¹³ Sections 2 and 4(6)(e) of SEZs Act. Tourist and recreational zones, along with zones for and convention and conferences facilities, are also created.

¹⁴ Section 34 of SEZs Act; see also section 29 of EPZs Act.

expenditure; and withholding tax rates on payments made to non-residents and entitlements to dividends paid to non-residents by the free zone entity.¹⁵

As a member of the World Trade Organization (WTO), Kenya is a signatory to the Agreement on Subsidies and Countervailing Measures (ASCM) and the Agreement on Agriculture (AOA).¹⁶ Although free zones are not mentioned specifically in either of these agreements, “fiscal incentives,” as explained in the ensuing sections, constitute subsidies because they are financial contributions, incomes or price supports given by the government or their agencies that result in the conferment of benefits.¹⁷ It is, however, important to state that the focus of this article will be on the ASCM.

Against this backdrop, this article examines whether the fiscal incentives granted within Kenya’s free zones meet the specificity test or are otherwise non-actionable under the ASCM. Secondly, it examines whether these subsidies constitute prohibited subsidies under the ASCM. The article consists of five sections. While section one summarises the topic, section two provides additional information and sets the context. Section three examines whether the fiscal incentives offered in Kenya’s free zones meet the specificity test and are otherwise non-actionable and whether they constitute prohibited subsidies under the ASCM. Section four explores the remedies for granting prohibited and actionable subsidies. Lastly, in section five, the conclusion is drawn. The next section explores the context of the research problem.

2 THE CONTEXT

The World Bank has on numerous occasions stressed the role of free zones in economic development and in enhancing the competitiveness of industries through foreign direct investment.¹⁸ Job creation, piloting new policies and approaches, diversification of exports, and attraction of domestic and foreign direct investments are touted as the reasons for establishing free zones.¹⁹ Scholars have also argued for the importance of governments’ subsidies to industries. For instance, Coppens posits that subsidies are offered in response to market failures that require government intervention; to shift

¹⁵ See generally Foreign Investments and Protection Act, Chapter 518, Laws of Kenya; Kenya Statistics Act 4 of 2006; Kenya Alcoholic Drinks Control Act 4 of 2010; Tea Act, Chapter 343, Laws of Kenya; Trading in Unwrought Precious Metals Act, Chapter 309, Laws of Kenya; Films and Stages Plays Act, Chapter 222, Laws of Kenya; and Landlord and Tenant (Shops, Hotels and Catering establishments) Act, Chapter, 301 Laws of Kenya; see also Kenya Revenue Authority “Investing in Kenya” available at <https://www.kra.go.ke/en/ngos/incentives-investors-certificate/investing-in-kenya/incentives-investors> (accessed 10 May 2019). See also sections 35 and 29 of SEZs Act.

¹⁶ WTO “Kenya and the WTO” available at <https://bit.ly/3S7bPUv> (accessed 13 May 2019); Kenya has been a WTO member since 1 January 1995.

¹⁷ Article 1(1) of ASCM; article XVI: 1 of GATT.

¹⁸ See generally Akinci G & Crittelle J (eds) *Special economic zone: Performance, lessons learned, and implication for zone development* The World Bank (2008). See also The World Bank “Foreign Investment Advisory Service (FIAS) Occasional Paper” available at <https://bit.ly/3POGe7M> (accessed 24 May 2019).

¹⁹ See Akinci & Crittelle (2008).

profit from foreign competitors to domestic firms; to redistribute income among regions as a political tool, and for political-economy reasons.²⁰

However, WTO members are of the view that subsidies are not only trade-distorting but a protectionist form of support – hence their call for the elimination of subsidies.²¹ When the ASCM took effect on 1 January 1995, it accorded countries with a gross national product (GNP) of below USD 1,000, such as Kenya, exemptions on export-subsidy prohibitions under special and differential treatment.²² Kenya was required to phase out export subsidies over eight years once it reached export competitiveness. It would also be deemed to have graduated from the exemption once its gross national income (GNI)²³ reached USD 1,000 in constant 1990 dollars for three consecutive years.²⁴ In anticipation of graduating from this exemption, Kenya requested the WTO for an extension in 2001.²⁵

In July 2007, the Committee on Subsidies and Countervailing Measures granted an extension of the transition period for the elimination of export subsidies to 31 December 2013. In addition, it sanctioned a final two-year phase-out period, which ended on 31 December 2015.²⁶ Kenya has not, however, graduated from the export-subsidy prohibition exemption since its GNI remains below USD 1,000 in constant 1990 dollars.²⁷ It thus continues to enjoy the exemption. In the Bali Ministerial Conference in 2001, WTO members agreed to eliminate all forms of export subsidies and constraints on export measures and keep subsidies below members' export-subsidy commitments.²⁸ Additionally, at the Nairobi Ministerial Conference in 2005, developing countries committed to eliminating export subsidies on farm exports by the end of 2018.²⁹ Specifically, they agreed not to provide export subsidies in excess of export

²⁰ Coppens *WTO disciplines on subsidies and countervailing measures: Balancing policy space and legal constraints* Cambridge University Press (2014) at 5–17.

²¹ See Coppens (2014) at 5–7.

²² Article 27 and Annex VII of ASCM. The exemption took effect after five years of entry into force of the Agreement (counted from 1 January 1995); Creskoff S & Walkenhorst P “Implications of WTO disciplines for special economic zones in developing countries” (2009) International Trade Department, The World Bank Policy Research Working Paper 4892 at 10.

²³ GNI is the sum of the value added by all resident producers, plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad (World Bank national accounts data and OECD National Accounts data files).

²⁴ WTO “Analytical Index: Subsidies and countervailing measures (SCM) Agreement – Annex VII (Practice)” para 2.

²⁵ WTO “Subsidies: Request pursuant to art 27.4 of the ASCM & request pursuant to the procedure in document G/SCM/39 by Kenya” (2001) Committee on Subsidies and Countervailing Measures G/SCM/N/74/KEN.

²⁶ See WTO General Council “Article 27.4 of the Agreement on Subsidies and Countervailing Measures: Decision of 27 July 2007” (2007) WT//691.

²⁷ WTO Committee on Subsidies and Countervailing Measures “Subsidies” G/SCM/110/Add.16 (14 May 2019).

²⁸ WTO Export Competition: Ministerial Declaration (2013) Document WT/MIN(13)/40 and WT/L/915.

²⁹ See generally WTO “WTO members secure ‘historic’ Nairobi package for Africa and the world” available at https://www.wto.org/english/news_e/news15_e/mc10_19dec15_e.htm (accessed 20 May 2019).

subsidy commitments.³⁰ Developing countries pledged to maintain marketing costs and internal transport subsidies exemptions until the end of 2023.³¹

Least-developed countries and net-food importing developing countries (NFIDC) such as Kenya were allowed to enjoy these exemptions until the end of 2030.³² WTO members agreed to adopt a permanent solution on public stockholding for food security purposes.³³ As a WTO member, Kenya is obligated to eliminate all trade-distorting measures such as subsidies (including export subsidies). Besides the exemptions it enjoys under Special and Differential (S&D), Kenya is mandated to eliminate all other forms of export subsidies.³⁴

The next section analyses the fiscal incentives and their consistency with the ASCM.

3 ANALYSIS OF THE SUBSIDIES OFFERED IN KENYA'S FREE ZONES

An analysis of the subsidies granted in Kenya's free zones is necessary for determining whether they are consistent with the ASCM. For the purpose of this study, a subsidy is a financial contribution given by a government or public body by foregoing government revenue that is otherwise due and resulting in the conferment of a benefit.³⁵ Footnote 1 of the ASCM excludes the exemption from duties or taxes borne by like products of an exported product destined for domestic consumption or non-excessive remission of accrued amounts of such duties or taxes from the definition of a subsidy.³⁶ While concerning itself with specific subsidies,³⁷ the ASCM proscribes subsidies contingent upon export performance and the use of domestic over imported goods.³⁸

To understand whether a subsidy is contingent on exports or the use of domestic over imported products, this section will identify subsidies offered in Kenya's free zones – EPZs and SEZs – beginning with those offered in EPZs. EPZs are developed under the EPZs Act of 1990 to provide an enabling environment to facilitate and promote export-oriented investments.³⁹ All licenced industries within an EPZ enjoy numerous fiscal

³⁰ WTO Export Competition: Ministerial Decision of 19 December 2015 WT/MIN(15)/45(WT/L/980) 1.

³¹ WTO Nairobi Ministerial Decision on Export Competition, para 8.

³² WTO Nairobi Ministerial Decision on Export Competition, para 8; see also Committee on Agriculture “WTO list of net food-importing developing countries for the purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (‘the Decision’)” Revision, G/AG/5/Rev.10, 23 March 2012.

³³ WTO Public Stockholding for Food Security Purposes: Ministerial Decision of 19 December 2015 (2015) WT/MIN(15)/44(WT/L/979).

³⁴ See WTO “Special and differential treatment provisions” available at <https://bit.ly/3ze8YjF> (accessed 8 April 2022).

³⁵ Article 1(1)(a) and (1)(ii) of ASCM; see also Coppens (2014) at 39–100.

³⁶ See also article XVI of GATT.

³⁷ Article 1(2) of ASCM.

³⁸ Article 3 of ASCM; Torres RA “Free zones and the World Trade Organization Agreement on Subsidies and Countervailing Measures” (2007) *Global Trade and Customs Journal* at 2.

³⁹ Kenya Export Processing Zones Authority “EPZ Program” available at <https://epzkenya.com/epz-program/> (accessed 13 August 2019). There are over 131 operational EPZs in Kenya, and negotiations are under way with some Kenyan county governments to set up more EPZs in the country.

incentives, including a corporate tax holiday for the first ten years and 25 per cent tax thereafter (EPZ commercial licences are, however, excluded from enjoying this benefit);⁴⁰ withholding tax holidays for a period of ten years on remittances to non-residents (similarly, EPZ commercial licences are excluded from enjoying this benefit); investment deduction up to 100 per cent over 20 years on new investment in EPZ buildings and machinery; perpetual exemption from payment of stamp duty on legal instruments; perpetual exemption from VAT and customs import duty on inputs;⁴¹ and VAT exemption on local purchases of goods and services supplied by companies in the Kenyan customs territory or domestic market.⁴²

The Kenya Export Processing Zones Authority (EPZA) has also established EPZ small and medium-sized enterprises (SMEs) under the EPZ SME Development Programme. The programme, with Kenyans as majority shareholders, aims to foster SME exporters who wish to set up their businesses within an EPZ. EPZ SMEs receive similar tax incentives as other EPZs. They also receive a rent rate and service charge reduction of two USD per square feet per annum and a ten per cent service charge for the first five years of operation. To allow for setting up, they receive a four-month rent-free period.⁴³

Similarly, the SEZs Act of 2015 was enacted to create an enabling environment for developing all aspects of SEZs, including developing integrated infrastructure and removing any business-related impediments.⁴⁴ Licensed industries operating within SEZs receive various fiscal incentives, including value-added tax exemptions; stamp duty exemption for documents related to free zones enterprises; income tax, advertisements and business service permits fees, filming, manufacturing, trade in unwrought precious metals, general liquor, and hotel liquor licences exemptions; corporate tax at the rate of ten per cent for the first ten years and 15 per cent for the next ten years; work permits of up to 20 per cent of their full-time employees; exemption from duties and taxes under the East African Community Customs Management Act of 2005 and Customs and Excise Act; exchange controls waivers for repatriation of profits and capital to the parent country; investment deduction up to 100 per cent of capital expenditure; and withholding tax rates on payments made to non-residents and entitlements to dividends paid to non-residents by the free zone entity.⁴⁵

Given this overview of the subsidies granted in Kenya's free zones, the task in the next section is to examine whether fiscal incentives granted within Kenya's free zones meet

⁴⁰ Section 2 of EPZs Act defines a commercial activity as "trading in, breaking bulk, grading, repacking or relabelling of goods and industrial raw materials".

⁴¹ Inputs referred to are raw materials, machinery, office equipment, certain petroleum fuel for boilers and generators, building materials, and other supplies.

⁴² Section 29 of EPZs Act.

⁴³ Section 29 of EPZs Act.

⁴⁴ Section 3 of EPZs Act.

⁴⁵ Section 35 of SEZs Act; see also Kenya Ministry of Industry, Trade and Cooperatives "Kenya to roll out special economic zones in first quarter of 2016" available at <http://www.industrialization.go.ke/index.php/media-center/blog/310-kenya-to-roll-out-special-economic-zones-in-first-quarter-of-2016> (accessed 13 August 2019).

the specificity test or are otherwise non-actionable and whether they constitute prohibited subsidies under the ASCM.

3.1 Specificity test

The ASCM stipulates that an analysis of whether a subsidy is prohibited or actionable is conditional on its specificity.⁴⁶ The WTO Appellate Body in *United States – Countervailing Duty Measures on Certain Products from China*⁴⁷ was of the view that specificity focuses on whether access to a subsidy is limited to specific recipients.⁴⁸ The ASCM identifies principles applicable to subsidies specific to certain enterprises or industries. First, a subsidy is specific if its access is limited to a particular industry.⁴⁹ Secondly, it is specific if the eligibility criteria or conditions are clearly spelled out in law or regulation. The eligibility should be automatic, and criteria strictly adhered to.⁵⁰ Thirdly, subsidies limited to industries operating within a geographically designated area are considered specific.⁵¹ Fourth, all forms of prohibited subsidies are specific.⁵² Finally, a subsidy is also considered specific when other factors are considered, such as [the] 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 ...⁵³

To substantiate the specificity of fiscal incentives offered in Kenya's free zones, a reading of the legislation or regulations spelling out the incentives is necessary. EPZs are designated parts of Kenya that are considered outside the customs territory in terms of import duties and taxes.⁵⁴ The parts are duly restricted by controlled access, and benefits apply therein. The EPZA is mandated to ensure an adequate enclosure of an EPZ to separate it from the customs territory.⁵⁵ Enterprises that operate within an EPZ must obtain a valid licence from the EPZA.⁵⁶ The EPZs Act expressly states that it shall

⁴⁶ See article 1(2) of ASCM; see also Coppens (2014) at 100–114.

⁴⁷ Appellate Body Report (WT/DS43728); see article 2 (Jurisprudence) of WTO Analytical Index on SCM Agreement.

⁴⁸ See Coppens (2014) at 101. See also the WTO Panel in *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to article 21.5 of the Dispute Settlement Unit by Canada*, WT/DS277/AB/RW, which held that the specificity of a subsidy should be determined at the industrial or enterprise level rather than the product level.

⁴⁹ Article 2(1)(a) of the Dispute Settlement Unit by Canada, WT/DS277/AB/RW.

⁵⁰ Article 2(1)(b) of the Dispute Settlement Unit by Canada, WT/DS277/AB/RW. Footnote 2 indicates that the criteria or conditions should be neutral and economic in nature.

⁵¹ Article 2(2) of the Dispute Settlement Unit by Canada, WT/DS277/AB/RW.

⁵² Article 2(3) of the Dispute Settlement Unit by Canada, WT/DS277/AB/RW; see also generally article 3; see also Torres (2007) at 2.

⁵³ Article 2(1)(c) of the Dispute Settlement Unit by Canada, WT/DS277/AB/RW. In the application of this definition, the extent of diversification of economic activities within the jurisdiction of the granting authority and the length of time for the operation of the subsidy shall be considered.

⁵⁴ Section 2 of EPZs Act.

⁵⁵ Section 16(1) of EPZs Act.

⁵⁶ See also sections 9(2)(f) and 19 of EPZs Act.

extend benefits to an enterprise that has a valid licence.⁵⁷ The eligibility criteria for the enterprises are: first, the industry should be incorporated in Kenya for the sole purpose of operating within an EPZ; secondly, the proposed activity should be eligible to be undertaken within an EPZ; thirdly, the activity should be environmentally friendly, should not prove to be a health hazard and should not be a threat to national security; and, fourth, the business should be conducted in accordance with the law.⁵⁸ These requirements apply verbatim to SEZs.⁵⁹

In addition to the above-stated specificity criteria for EPZs, which apply *mutatis mutandis* to SEZs, the SEZs Act obligates the cabinet secretary for industrialisation and enterprise development to gazette a clearly defined area as an SEZ on the recommendation of the Special Economic Zones Authority (SEZA) and in consultation with the cabinet secretary for national treasury and planning.⁶⁰ That said, in the next section, the prohibited subsidies contingent on exports come under the lens of this paper.

3.2 Prohibited subsidies contingent on exports

3.2.1 Export subsidies

The Appellate Body in *United States – Conditional Tax Incentives for Large Civil Aircraft*⁶¹ made it clear that the ASCM does not on its own proscribe the granting of subsidies. Subsidies, excluding agricultural export subsidies contingent upon export performance, are prohibited under the ASCM.⁶² To establish the existence of export subsidies, it must first be demonstrated that a subsidy exists and, secondly, that the subsidy is conditional on export performance.⁶³ Export subsidies could be based on law or fact. In law, the subsidy contingent on export should be expressed in a legal instrument. The WTO Panel in *Canada – Aircraft*⁶⁴ held that export credits granted directly or indirectly to support and develop export trade are in law contingent on export performance. The WTO Appellate Body in *United States – Upland Cotton* believed that those payments made on proof of exportation are sufficient to establish that they are conditional on export performance.⁶⁵

⁵⁷ Section 23(1) of EPZs Act.

⁵⁸ Section 23 (2) of EPZs Act. Hundred per cent foreign ownership of a company incorporated in Kenya is permitted.

⁵⁹ Sections 5, 11(f), 26, 27 and 29 of SEZs Act; see also regulations 25 and 26 of Special Economic Zones Regulations.

⁶⁰ See generally section 4 of EPZs Act; see also regulations 12 and 13 of SEZ Regulations.

⁶¹ Appellate Body report and Panel report (WT/DS487/11).

⁶² Article 3(1)(a) (Jurisprudence) of WTO Analytical Index: SCM Agreement, para 1. Agricultural export subsidies are covered under the WTO Agreement on Agriculture.

⁶³ Article 3(1)(a) (Jurisprudence) of WTO Analytical Index, para 4.

⁶⁴ Panel Report *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the Dispute Settlement Unit* WT/DS70/RW, adopted 4 August 2000.

⁶⁵ Appellate Body Report *United States – Subsidies on Upland Cotton* WT/DS267/AB/R, adopted 21 March 2005.

Export subsidies based on fact need not necessarily be expressly stated in a legal instrument: the latter's availability is based on the fulfilment of certain conditions of export performance. In such instances, therefore, the existence of export subsidies is implied as being conditioned on export performance. Export performance could be the sole condition or one of many other conditions for granting subsidies.⁶⁶ The Appellate Body in *Australia – Automotive Leather II* called for a case-by-case analysis of whether a subsidy is in fact contingent on export performance.⁶⁷ The Appellate Body in *EC and certain member States – Large Civil Aircraft* ruled that

[t]he existence of de facto export contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, which may include the following factors: (i) the design and structure of the measure granting the subsidy; (ii) the modalities of operation set out in such a measure; and (iii) the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation.⁶⁸

Basing his analysis on *Brazil – Aircraft (Article 21.5 – Canada)*, Coppens argues that a complaint based on the illustrative list is sufficient to demonstrate that a subsidy is contingent on export performance.⁶⁹ This illustrative list is set out under Annex I of the ASCM.⁷⁰ Of importance to this study are direct subsidies contingent on exports given by a government body to an industry; currency retention schemes; government provision of internal transport and freight charges on export shipments on more favourable terms than domestic shipments; domestic or imported goods or services provision by the government to industries producing imported products on more favourable terms than those given to industries producing goods for local consumption; full or partial direct tax exemptions; special deductions on exports in excess of those granted for production of products for local consumption; indirect tax exemptions on the production and distribution of exported products in excess of those granted to products produced or distributed for local consumption; exemption, deferral or remission of prior-state cumulative indirect taxes on goods and services used in the production of products for exports in excess of those granted for the production of goods for local consumption;⁷¹ drawback of import charges in excess of those levied on imported inputs used the production of products for exports; provision of export credit guarantee or insurance

⁶⁶ Article 3(1)(a) (Jurisprudence) of WTO Analytical Index, paras 5 and 11.

⁶⁷ Article 3(1)(a) (Jurisprudence) of WTO Analytical Index, para 29.

⁶⁸ Article 3(1) (a) (Jurisprudence) of WTO Analytical Index, para 18.

⁶⁹ See Coppens (2014) at 117; see also Report of the Panel *Brazil – Export Financing Programme for Aircraft* WT/DS46/R, adopted 20 August 1999.

⁷⁰ See generally ASCM; see also the Multi-Donor Investment Climate Advisory Service of the World Bank “Special economic zones performance, lessons learned, and implications for zone development” (April 2008) The World Bank Group.

⁷¹ While exemption, remittance and deferral apply when there is no exemption, remittance or deferral on the sale of products for local consumption, prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of products for exports are exempted. See Annex I(h).

premiums at rates inadequate to cover the full operation costs; and grants of export credits at below-market rates.

3.2.2 Exemptions under special and differential treatment

In formal recognition of the importance of subsidies in developing countries' economic development, the ASCM accorded developing countries such as Kenya exemptions from prohibited subsidies contingent on exports under special and differential treatment of developing countries members, given that Kenya's GNP per capita was below USD 1,000.⁷² All developing countries not listed under Annex VII⁷³ were expected to phase out export subsidies within eight years but could ask for an extension based on their development needs.⁷⁴

Export subsidies for products that reached export competitiveness were expected to be phased out by developing countries for two years. Countries such as Kenya listed under Annex VII (b) were expected to gradually phase out over eight years from the date of export competitiveness.⁷⁵ The Doha Ministerial Decision on Implementation-Related Issues and Concerns explained that Kenya and other countries listed under Annex VII (b) would be deemed to have graduated from export subsidy prohibitions exemptions once their GNI reached USD 1,000 in constant 1990 dollars for three consecutive years. They were also expected to gradually eliminate export subsidies over a period of eight years or less if export subsidies were inconsistent with their development needs once a product reached export competitiveness.⁷⁶ No developing country has made any notification so far of having reached export competitiveness.⁷⁷

In compliance with the Procedures for Extension under Article 27.4 for Certain Developing Country Members, which extended the transition period for certain limited programmes based on annual reviews,⁷⁸ Kenya, in December 2001, sought an extension of the transition period for the exemption from the export subsidies prohibition in the light of its economic, financial and development needs and as an anticipatory measure in the event that it graduated from exceptions that were then in existence.⁷⁹ Kenya specifically sought the extension of three programmes, including export processing zones, the export promotion programme under the Customs and Excise Regulations,

⁷² Article 27(1)(a) and (2)(b) of ASCM; see also Annex VII.

⁷³ Other countries that were granted the exemptions include Cameroon, Côte d'Ivoire, Bolivia, Congo, Nicaragua, Dominican Republic, Ghana, Egypt, Guatemala, Guyana, India, Senegal, Zimbabwe, Indonesia, Sri Lanka, Morocco, Philippines, Nigeria and Pakistan (ASCM Annex VII). Honduras was added later.

⁷⁴ Articles 27(1)(b) and 27(4) of ASCM.

⁷⁵ Article 27(5) of ASCM. Export-competitiveness exists if exports of a product reach 3.25 per cent in world trade of that product for two consecutive calendar years (see article 27(6)); see also article 27 (Practice), February 2019 of WTO Analytical Index: SCM Agreement, para 11.

⁷⁶ Paragraph 10.1 and 10.5 of WT/MIN(01)17, adopted 20 November 2001; see also Annex VII (Practice) para 2 of WTO Analytical Index: SCM Agreement.

⁷⁷ Article 27 (Practice), February 2019, para 7 of WTO Analytical Index: SCM Agreement.

⁷⁸ WTO Committee on Subsidies and Countervailing Measures "Procedures for extensions under article 27.4 for certain developing country members" G/SCM/39, 20 November 2001.

⁷⁹ Annex VII (Practice) para 4 of WTO Analytical Index: SCM Agreement; see also WTO Committee on Subsidies and Countervailing Measures 'Subsidies' G/SCM/N/74/KEN, 21 December 2001. This was in line with paragraph 1(a) of the G/SCM/39 that had been arrived at in November of that year.

and manufacture under bond.⁸⁰ Following the request for an extension, Kenya became eligible for a five-year extension with a two-year phase-out period.⁸¹

In July 2007, the General Council⁸² adopted procedures for the continuation of extensions of the transition period under article 27(2)(b) for certain developing countries, including Kenya, following its anticipatory request for extension. Similar to the previous extension procedures, the programmes covered included ones that provided partial or full exemptions from internal taxes and import duties. The extension that terminated in 2012 was subject to an annual review from 2008. The last authorised period was 31 December 2013, and a final two-year phase-out period which ended on 31 December 2015.⁸³ Following the extensions, concerned countries were required to take internal steps to eliminate export subsidies and provide an action plan for the elimination of export subsidies under the programme.⁸⁴ The procedures allowed countries, such as Kenya, that previously reserved extension rights to request an extension of the transition period if their GNI reached USD 1,000 in constant 1990 dollars for three consecutive years between 2008 and 2015.⁸⁵

Kenya's GNI per capita figures at current dollars were 736 in 2009; 791 in 2010; 800 in 2011; 939 in 2012; 1,238.6 in 2013; 1,351.0 in 2014; 1,335.5 in 2015; 1,441.2 in 2016 and 1,578.3 in 2017.⁸⁶ This was the threshold when the ASCM took effect in 1995. Based on these figures, Kenya would not have been able to avail itself of the exemptions in 2013. However, this is no longer the threshold since the calculation is currently based on GNI per capita at constant 1990 dollars. The figures for Kenya were 410 in 2007; 407 in 2008; 403 in 2009; 415 in 2010; 421 in 2011; 427 in 2012; 453 in 2013; 469 in 2014;

⁸⁰ See WTO Committee on Subsidies and Countervailing Measures "Subsidies" (G/SCM/N/74/KEN; see also Coppens (2014) at 259.

⁸¹ See Creskoff S & Walkenhorst P "Implications of WTO disciplines for special economic zones in developing countries" (2009) Policy Research Working Paper 4892 International Trade Department, World Bank at 22 available at <https://openknowledge.worldbank.org/handle/10986/4089?show=full> (accessed 14 April 2022). This period was scheduled to end on 31 December 2007 and 31 December 2009, respectively.

⁸² World Trade Organization "Article 27.4 of the Agreement on Subsidies and Countervailing Measures" WT/L/691, 31 July 2007.

⁸³ WTO General Council Decision "Article 27.4 of the Agreement on Subsidies and Countervailing Measures" WT/L/691, 31 July 2007, para 1 (d).

⁸⁴ WTO General Council Decision, para 1(e) and (f).

⁸⁵ WTO General Council Decision, para 5(b).

⁸⁶ WTO Committee on Subsidies and Countervailing Measures "Subsidies: Annex VII (b)" G/SCM/110/Add.8 (16 June 2011); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.9 (20 June 2012); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.10 (11 July 2013); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.11 (23 June 2014); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.12 (6 July 2015); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.13 (19 May 2016); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.14 (11 July 2017); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.15 (20 April 2018); WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.16 (14 May 2019).

474 in 2015; 490 in 2016 and 501 in 2017.⁸⁷ These figures show that, according to the Committee on Subsidies and Countervailing Measures (SCM Committee) update on GNP per capita for countries listed under Annex VII (b) of 14 May 2019, Kenya still enjoys exemptions from export subsidies prohibitions granted under Annex VII (b), given that its GNI is below USD 1,000 in constant 1990 dollars and that this has been the case for three previous consecutive years. Other countries that are still listed are Côte d'Ivoire, Ghana, Honduras, Nicaragua, Nigeria, Pakistan, Senegal, and Zimbabwe.⁸⁸

In 2018, the Central African Republic, on behalf of Least Developing Countries (LDCs) that had graduated from the exemption, requested that a decision be adopted by the General Council for Trade in Goods for an extension of the exemptions.⁸⁹ This request was first introduced in the agenda of the Council for Trade in Goods meeting in June 2018, and discussions are currently ongoing.⁹⁰ Despite the exemptions on export subsidies, Kenya is mandated to submit a notification not later than 30 June each year that it has not maintained or granted any subsidies warranting a notification.⁹¹ Other WTO members are obligated to submit notifications on specific subsidies granted by stating the form of subsidy granted, the annual amount budgeted for the subsidy, the purpose and duration of the subsidy, and statistical data for assessment of the trade effects of the subsidy.⁹² According to a 2018 WTO report, Kenya had not provided any notification on the status of its subsidies since 1998.⁹³ In 2013, Kenya notified the SCM Committee that it had not taken any countervailing action and was not anticipating such action in the future.⁹⁴

In the light of this discussion of prohibited subsidies contingent on exports, the focus now shifts to subsidies contingent on the use of domestic over imported products.

3.3 Subsidies contingent on use of domestic over imported products

3.3.1 Import substitution subsidies

In addition to the export subsidies prohibition exemptions that Kenya enjoys pursuant to article 27(2)(a) and Annex VII (b) of ASCM, it was exempted from prohibited subsidies contingent on the use of domestic over imported products (import

⁸⁷ WTO Committee on Subsidies and Countervailing Measures "Subsidies: Annex VII (b)".

⁸⁸ WTO Committee on Subsidies and Countervailing Measures "Subsidies" G/SCM/110/Add.16 (14 May 2019).

⁸⁹ Annex VII (Practice) para 4 of WTO Analytical Index: SCM Agreement, para 2.

⁹⁰ WTO Council for Trade in Goods "Proposed agenda" G/C/W/754, 28 June 2018, Agenda 8; see WTO Council for Trade in Goods "Minutes of the meeting of the Council for Trade in Goods 3 and 4 July 2018" G/C/M/132, adopted 13 March 2019, Agenda 8.

⁹¹ Article 25(6) of ASCM.

⁹² Articles 25(1), 25(2) and 25(4).

⁹³ WTO "Report (2018) by the Committee on Subsidies and Countervailing Measures" G/L/1272, G/SCM/152, adopted on 23 October 2018 at 8-18.

⁹⁴ WTO Committee on Subsidies and Countervailing Measures "Notification under Articles 25.11 and 25.12 of the Agreement on Subsidies and Countervailing Measures: Kenya" G/SCM/N/202/KEN, 27 June 2013; see 2018 Report, para 37 and at 19.

substitution subsidies) for five years after entry into force of the Agreement establishing the WTO on 1 January 1995.⁹⁵ This period terminated on 31 December 1999.⁹⁶ The ASCM does not prohibit subsidisation of domestic production but the granting of subsidies contingent upon the use of domestic over imported products.⁹⁷ The WTO Analytical Index, while referring to the Appellate Body's decision in *United States – Conditional Tax Incentives for Large Civil Aircraft*, observed as follows:

We recall that, by its terms, Article 3.1(b) does not prohibit the subsidisation of domestic “production” per se but rather the granting of subsidies contingent upon the “use”, by the subsidy recipient, of domestic over imported goods. Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement. We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidised domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.⁹⁸

Coppens argues that it is the only domestic subsidy that is prohibited. He argues that these subsidies “focus on the trade distortion in the input industry and not in the market of the industry receiving the beneficial financial contribution by the government.”⁹⁹ According to Coppens, an import substitution subsidy exists when it is demonstrated that there is a subsidy; secondly, the subsidy must be contingent on the use of domestic over imported products.¹⁰⁰ In analysing the Appellate Body decision in *Canada – Autos*, Coppens argues that these forms of subsidies, just like export subsidies, are contingent on law or fact.

From the above, it is clear that import substitution subsidies are discriminatory and should be eliminated. The paragraphs below unpack the meaning of actionable subsidies.

3.4 Actionable subsidies

Actionable subsidies are subsidies that are not prohibited but which may cause injury to other countries' domestic industry; result in the nullification or impairment of benefits accruing to other members, particularly concessions benefits bound under the General Agreement on Tariffs and Trade (GATT);¹⁰¹ or seriously prejudice the interests of other

⁹⁵ Article 27(3) of ASCM. Least-developed country members were exempted for rights of entry into force of the WTO Agreement.

⁹⁶ See Annex VII (Practice) para 3 of WTO Analytical Index SCM Agreement.

⁹⁷ Article 3(1)(b) of WTO Analytical Index SCM Agreement – Article 3 (Jurisprudence), para 2.

⁹⁸ *Ibid.*

⁹⁹ See Coppens (2014) at 141.

¹⁰⁰ See Coppens (2014) at 141.

¹⁰¹ Article 5 of ASCM; see also GATT article II. Agricultural products provided for under article 13 of AoA are not covered.

members.¹⁰² Any subsidy given by a government or public body should not cause injury to the domestic industry of another WTO member. Coppens argues that a material injury to a domestic industry during the reference period must be demonstrated in the first instance; secondly, it must be shown that the causation element is not subsidies but subsidised imports.¹⁰³

A subsidy should not impair the benefits of concessions accruing to other WTO members. For an impairment of benefits to exist, it must first be shown that a subsidy exists; secondly, a benefit must exist; and, thirdly, there must be an impairment of the benefit resulting from the application of a subsidy.¹⁰⁴ According to the ASCM, serious prejudice is deemed to result when the total product *ad valorem* subsidisation exceeds 5 per cent when a subsidy covers industry operating losses;¹⁰⁵ or government debts are directly forgiven.¹⁰⁶

The ASCM further expressly states that the interest of another WTO member is prejudiced if a subsidy results in the displacement of the member's imported products. There could be actual serious prejudice or a threat of serious prejudice. The burden of proving serious prejudice lies on the complaining party. The latter has to demonstrate that the effect of a subsidy is to displace or impede the imports of its like product into the market of the subsidising country; the subsidy has displaced or impeded exports of a like product of another WTO member from a third country market; the subsidy has resulted in significant price undercutting by the subsidised product in comparison with prices of like products in another country, or the subsidy has resulted in an increase in the world market share of the subsidising country in a particular commodity compared to the average share it had in three previous years.¹⁰⁷

Relative market-share variance results when there is an increase in the market share of the subsidised product; when the subsidised product market value remains constant following the provision of a subsidy; or the subsidised product value declines at a slower rate following the introduction of a subsidy.¹⁰⁸ Price undercutting is demonstrated by comparing prices of subsidised and non-subsidised products while considering any factor affecting price compatibility. Export unit values can be adopted when a direct comparison is impossible.¹⁰⁹ Importantly, products alleged to have been

¹⁰² Article 5 of ASCM.

¹⁰³ Coppens (2014) 145; see also article 27(9) of ASCM.

¹⁰⁴ Article 5 of ASCM; see also Coppens (2014) at 146.

¹⁰⁵ Article 6(1)(c) of ASCM. One-time non-recurrent measures given to provide time for the development of long-term solutions and to avoid acute social problems are excluded.

¹⁰⁶ Article 6(1). A decrease of actual sales below the level of forecast sales resulting in non-repayment of royalty-based financing for a civil aircraft programme does not constitute serious prejudice.

¹⁰⁷ Article of 6(3) of ASCM; see also Coppens (2014) 148. Displacement resulting in serious prejudice does not result when there is a restriction on imports of like products; force majeure; existence of arrangements limiting exports from the complaining member; failure to conform to set standards; voluntary decrease in availability for concerned product from the complaining member; and state monopolisation in the concerned products trade. See also article 6(7) of ASCM.

¹⁰⁸ Article 6(4) of ASCM.

¹⁰⁹ Article 6(5) of ASCM.

seriously prejudiced must be produced in the complaining party's territory.¹¹⁰ Effects on other members' products can be adduced as evidence only in support of the complaining member's case. Furthermore, the injury should be caused by a like product. Article 27(8) of the ASCM refutes the presumption of serious prejudice by a subsidy granted by a developing country unless evidence to the effect is submitted.

In *Indonesia – Autos*, the European Union, and the United States argued that subsidies granted to the Indonesian automotive industry undercut their prices and impeded or displaced their imports into the Indonesian market.¹¹¹ The case was clear evidence of price undercutting, although there was no proof of volume effects. Similarly, the complainants failed to demonstrate a loss of market-share value in significant terms.

The next section discusses the remedies available for a WTO member who has reason to believe that subsidies granted within another member state constitute prohibited subsidies and are actionable under the ASCM.

4 REMEDIES FOR GRANTING PROHIBITED AND ACTIONABLE SUBSIDIES

The first recourse given to a WTO member with reason to believe that a prohibited or actionable subsidy is granted is consultation.¹¹² Consultation aims to ascertain facts and possibly reach a mutually agreed-upon solution. If no mutually agreed-upon solution is arrived at within 30 days for prohibited subsidies and 30 days, for an actionable subsidy, of requesting a consultation, the matter may be referred to the WTO Dispute Settlement Body (DSB) for the establishment of a panel unless a DSB decision is reached by consensus that a panel would not be established.¹¹³ While the panel for prohibited subsidies is established immediately, a panel for actionable subsidies is composed within 15 days of its date of establishment.¹¹⁴

Once a panel is established, it may request a panel of experts to establish whether a subsidy is prohibited. In the process, the subsidising country will be given an audience to substantiate that the measure is not prohibited.¹¹⁵ The panel is required to give a report to the disputants and circulate it among WTO members within 90 days and 120 days of the date of establishment of the panels for prohibited and actionable remedies, respectively.¹¹⁶ If the measure is found to be prohibited, the subsidising country is required to withdraw the subsidy without delay. The reports are then adopted within 30 days unless an appeal is lodged or the DSB opts not to adopt them.¹¹⁷ In case there is

¹¹⁰ Article 6(5) of ASCM; see also Coppens (2014) at 151.

¹¹¹ See Coppens (2014) at 175; Panel Report *Indonesia – Certain Measures Affecting the Automobile Industry* WT/DS54,55,59,64/R, adopted 23 July 1998.

¹¹² Articles 4(1) and 7(1) of ASCM. Remedies on actionable subsidies exclude domestic measures and export subsidies that conform to the provisions of the AoA. This is provided for under article 13 of the AoA.

¹¹³ Articles 4(4) and 7(3) of ASCM.

¹¹⁴ Articles 4(4) and 7(4) of ASCM.

¹¹⁵ Articles 4(5) and 7(5) of ASCM.

¹¹⁶ Articles 4(6) and 4(7) of ASCM.

¹¹⁷ Articles 4(8) and 7(6) of ASCM.

an appeal, the appellate body is obligated to give its findings within 30 days of formal notification of intention to appeal.¹¹⁸ The appellate body report shall be unconditionally accepted by the disputants and the report adopted by the DSB unless it decides in 20 days by consensus not to adopt the report.¹¹⁹

If the recommendation of the DSB is not followed, the complaining member shall be given authorisation by the DSB to take appropriate countervailing measures.¹²⁰ In the case of actionable subsidies, where it is shown that a subsidy has resulted in adverse effects on the interest of another member, the subsidising member shall take appropriate steps to either withdraw the subsidy or remove the adverse effects.¹²¹ If the adverse effects are not removed or the subsidy withdrawn within six months, and in the absence of a compensation agreement, the complaining member shall be authorised to introduce a countervailing measure commensurate to the nature and degree of the adverse effects caused unless the DSB rejects the request by consensus.¹²² A disputant has an option of requesting arbitration that leads to a determination of whether a countermeasure is appropriate or commensurate with the nature and degree of the existing adverse effects.¹²³ In *Brazil – Aircraft*, the arbitrator opined that in the case of prohibited export subsidies, a countermeasure is appropriate if its amount corresponds to the total amount of subsidy.¹²⁴

A complaining member is allowed to impose a provisional countervailing measure before the termination of a countervailing duty investigation if an investigation has been instituted at least 60 days before and an opportunity accorded to other interested members for consultations. The countervailing measures should be necessary to prevent injury caused by an actionable subsidy.¹²⁵ Article 19(4) of the ASCM stipulates that a countervailing measure should not exceed the subsidy amount.

5 CONCLUDING REMARKS

Given the objectives of this article, which are to examine whether fiscal incentives granted within Kenya's free zones meet the specificity test or are otherwise non-actionable and whether they constitute prohibited subsidies under the ASCM, two inferences can be deduced from the preceding analyses.

¹¹⁸ Articles 4(9) and 7(7) of ASCM.

¹¹⁹ Articles 4(9) and 7(7) of ASCM. The periods set for the multilateral approach may by mutual consent be extended (footnotes 6 and 20).

¹²⁰ Article 4(10) of ASCM. Disproportionate countermeasures are disallowed since the subsidies are prohibited.

¹²¹ Article 7(8) of ASCM.

¹²² Article 7(9) of ASCM.

¹²³ Articles 4(12) and 7(10) of ASCM. Disproportionate countermeasures in case of prohibited subsidies are prohibited (see ASCM footnote 10).

¹²⁴ Coppens (2014) at 204; see also the decision by the Arbitrators *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil and Article 4.11 of the ASCM* WT/DS46/ARB, 28 August 2000; see also decision by the Arbitrator *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the Dispute Settlement United and Article 4.11 of the ASCM* circulated 17 February 2003.

¹²⁵ See Coppens (2014) at 245.

In the first instance, fiscal incentives offered in Kenya's free zones are consistent with WTO rules on export subsidies. The justification is that since 1995, when the ASCM took effect, Kenya has been exempted from export subsidy prohibition since its GNI per capita has remained below USD 1,000 in constant 1990 dollars. This was reaffirmed in the 14 May 2019 list of developing countries that still enjoy the exemption. Kenya is therefore allowed to impose export subsidies. In addition, fiscal incentives offered in Kenya's free zones are consistent with the rules on import substitution subsidies. Kenya is prevented from granting import substitution subsidies following the termination of exemptions granted under the ASCM on 31 December 1999. Analysis of the fiscal incentives offered shows that Kenya is not maintaining any export substitution subsidy since it is not conditioning any subsidy on the use of domestic over imported products. It is also important to note that no case has been lodged against Kenya at the WTO on an alleged violation of this obligation.

AUTHOR CONTRIBUTIONS

The lead author wrote the abstract, introduction, and conclusion and attended to some other technical matters. The co-author conducted the research and wrote the initial draft under the supervision of the lead author.

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