WTO – Agreement on Subsidies and countervailing measures (SCM)

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Agreement on Subsidies and Countervailing Measures ("SCM Agreement")

- Two types of subsidies are prohibited.
- Regulates the actions Members can take unilaterally to counter the effects of subsidies.
- Note: Agricultural subsidies are governed by the Agreement on Agriculture (AG) (*lex specialis*)
Definition of subsidy

The SCM Agreement only applies to measures that qualify as “subsidies” according to its definition.

A “subsidy” comprises 3 basic elements:

- a financial contribution
- by a government or any public body
- which confers a benefit
Financial contribution

Article 1.1(a) provides an exhaustive list of the types of measures that constitute a financial contribution:

- direct transfers of funds, e.g. grants, loans, and equity infusions or potential direct transfers of funds or liabilities, e.g. loan guarantees
- revenue otherwise due that is foregone, e.g. tax credits (note exemption for indirect taxes, SCM fn 1 and GATT Article XVI)
- the provision of goods or services other than general infrastructure or the purchase of goods
A financial contribution by a Government

The financial contribution must be made "by a government or any public body" within a Member.

- An entity is a "public body" if it is "controlled" by the Government: Korea – Commercial Vessels

Note anti-circumvention device in Article 1.1(a)(1)(iv): where a government "entrusts or directs" a private body to make any of the financial contributions listed above.

- US – CVDs on DRAMS from Korea, EC – CVDs on DRAMS from Korea:
  - "entrustment" = give responsibility to; "direction" = exercise authority over
  - "threat or inducement" = evidence of entrustment or direction
A financial contribution that confers a benefit

- Test is in the marketplace
- A benefit arises if the recipient obtains an advantage which it could not obtain in the market place.
- Does not have to be a "cost to Government", but rather a "benefit to the recipient".

Question: what about a government loan with the same terms as those offered by a private bank?
Specificity

Only subsidies that are “specific” to certain enterprises or industries are subject to disciplines of the SCM Agreement.

That is, when a subsidy is explicitly limited to:

- One enterprise (for instance the subsidy is limited to Company A), or;
- To certain enterprises (for instance it is limited to companies A, B and C), or;
- To one industry (for instance it is limited to the steel industry), or;
- To certain domestic industries (for instance it is limited to the steel and to the textile industries only), or;
- To certain enterprises located within a designated region(s) in the jurisdiction of a guaranteeing authority (for instance companies located in region Z).
Importantly, if a subsidy is not limited in law but there are reasons to believe that the subsidy is **in fact** limited to one or certain enterprises, or to one or certain domestic industries, then additional factors may be analyzed including:

- [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.
Thus, even where a programme is not explicitly limited, if it is found that only a limited number of certain enterprises have used the subsidy, or if it is determined that disproportionately large amounts of subsidy are granted to certain enterprises/domestic industries, then that subsidy may be found to be specific.
What can determine whether a subsidy programme is a de facto export subsidy? – Example

In Australia – Automotive Leather, the WTO panel took into account the following factors to conclude that a grant contract with Australian Leather Holdings (ALH) constituted a de facto export subsidy:

- The grant contract provided for an aggregate sales performance target and conditions the receipt of part of the grant on achieving those targets;
- The grant was provided to the Australian producer after it ceased to receive incentives under certain programmes which were export contingent;
- The Australian market for automotive leather was too small to absorb Howe’s production, much less any expanded production that could result from the financial benefits accruing from the grant payments.
Subsidies contingent upon the use of domestic over imported goods

The ASCM prohibits subsidies contingent, upon the use of domestic over imported goods.

These are also known as import-substitution subsidies. This type of subsidy was very popular for stimulating the development of certain industries, such as auto-making. Thus, assembly lines were offered subsidies provided that they used domestic parts.
Prohibited subsidies - II

Subsidies contingent upon export performance (export subsidies)

Export subsidies are subsidies that are contingent, in law or in fact, upon export performance, including those listed in Annex I of the ASCM.
Prohibited subsidies - III

Illustrative list of export subsidies: Annex I of the ASCM

Annex I contains the “Illustrative list of prohibited export subsidies”.

This list contains 12 items. According to established WTO case-law, a subsidy coming under the purview of Annex I is ipso facto prohibited.
Prohibited subsidies - IV

Lines of ‘attack’ against prohibited subsidies

- They can opt for the multilateral track and challenge the subsidies before the WTO’s Dispute Settlement Body (DSB). If the DSB finds in favour of the plaintiff, it will ask the country concerned to remove the prohibited subsidy.

- A country can take the unilateral track and carry out a national investigation after which it can levy countervailing duties where the subsidized products are being imported into its territory.
Actionable subsidies

Subsidies covered by the ASCM, and which do not fall under the category of prohibited subsidies, may still be challenged if they have “adverse effects” on the interests of other WTO members, as defined by Article 5 of the agreement.

For example, subsidies should not cause “injury to the domestic industry of another member.”
Non-actionable subsidies

Article 8 of the ASCM initially defined some subsidies as “non-actionable” if they were intended for environmental protection, to make up for regional inequalities within a state or to promote research and development. But the provision lapsed in 1999.
Question: Would the following constitute subsidies subject to the disciplines of the SCM Agreement? Why/Why not?

1. All cars sold in Country A must meet certain pollution standards. As part of a package to assist local car manufacturers, the government exempts domestically manufactured cars from complying with these standards for 5 years.

2. A region in Country B has suffered devastating floods that have caused widespread economic damage. To assist local (non-agricultural) business rebuild, the Government has provided payments to businesses in flood-affected areas based on a range of criteria relating to the size of the enterprise and the amount of damage suffered.
Frequently used Export Promotion Schemes

1. Duty Drawback Schemes
2. Non-collection of government revenues that would otherwise be due
3. Export Credits
4. Export Guarantees
5. Free Trade Zones
Duty drawback schemes

Allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product

- Inputs consumed should be physically incorporated like energy, fuels, iron
- Drawback cannot be in excess of those actually levied on inputs that are consumed
- A system to confirm which inputs are consumed and what amounts
Not collecting government revenues otherwise due

- VAT exemptions on goods exported are allowed
- WTO Members in principle have the sovereign right to tax any particular category of revenue it wishes.
  - But the term ‘otherwise due’ imply a comparison with a defined normative benchmark
Export Credits

Export credits arise whenever a buyer or a supplier of exported goods or services is allowed to defer payment for a certain period of time.

Prohibited export credits

- Grants by governments below certain interest rates
- Payments by governments to cover costs incurred by exporters or financial institutions in obtaining export credits

Permitted export credits

- Export credits consistent with OECD arrangements on guidelines for officially supported export credits – OECD sets out permitted interest rates and maturities. The interest rates are generally lower than those prevailing in most capital markets.
Export credit guarantees

The SCM Agreement prohibits export guarantees granted at premium rates that are insufficient to cover their long term costs and losses.
Free Trade Zones

Example: Serbian Free Trade Zone

- Importers are not liable for VAT on imported goods
- Raw materials used for finished goods that are meant for export can be imported duty free
- Fixed assets, machines and construction materials can be imported duty free
- Goods from the zones can be distributed on the domestic market after customs duties have been paid on imported components
Special and Differential treatment of Developing country members

Article 27 of the ASCM provides for specific rules and disciplines for developing country members that are less strict than the general rules and conditions. The lower a Member’s level of development, the more favourable the treatment it receives with respect to subsidies disciplines.

(I) The exemption from the prohibition on export subsidies
The prohibition does not apply to three country groups:

- least developed countries (LDCs) designated as such by the United Nations [Annex VII (a)]
- Members identified in Annex VII (b) until their GDP has reached 1000 USD per year for three years
- Other developing country members were initially granted exemption until 2002
Special and Differential treatment of Developing country members

(II) import-substitution subsidies

LDCs have eight years and other developing country Members five years to phase out such subsidies.
Special and Differential treatment of Developing country members

(III) The special procedural rules concerning actions against subsidies

Articles 27.7-27.9 of the SCM provide more stringent procedural rules on dispute settlement actions against subsidies provided by developing countries raising the bar for actions by other members.

A higher threshold is set by raising the de minimis standard (Article 27.10)
Thank you!

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