

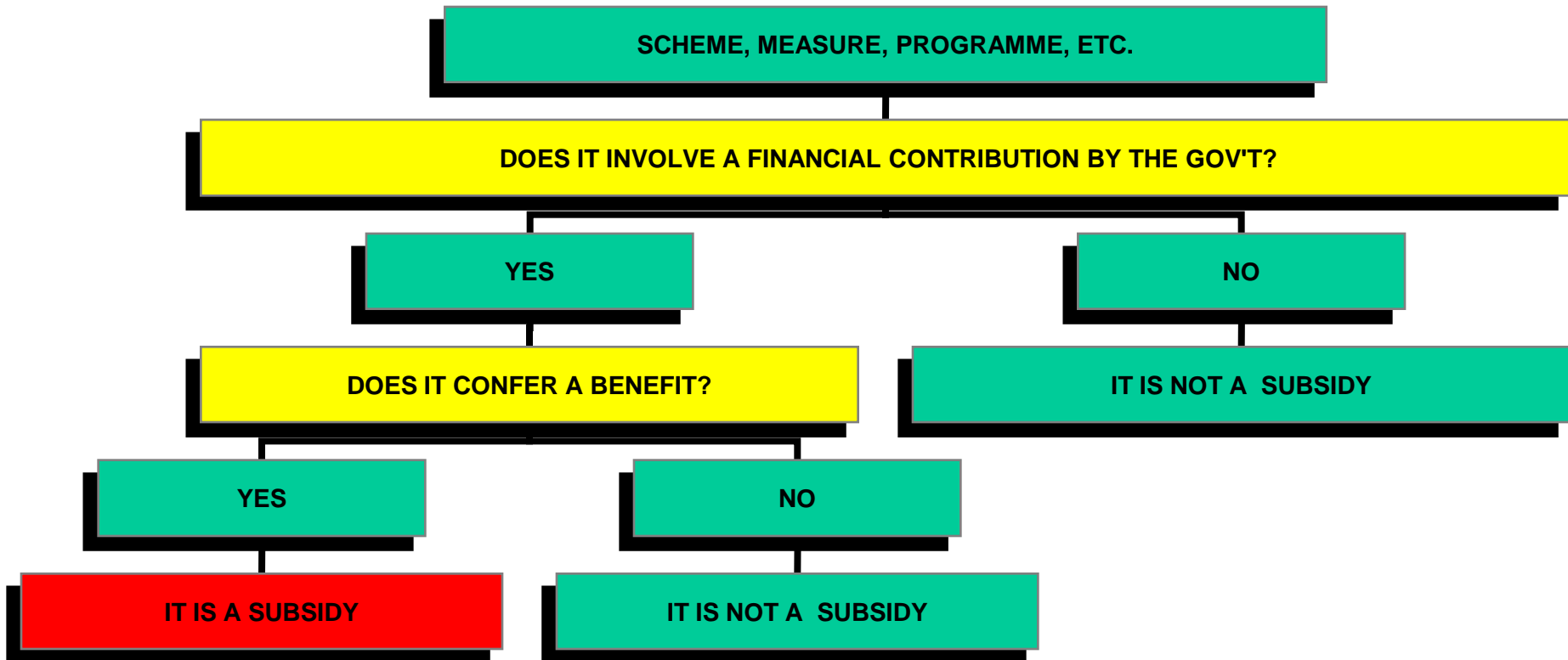
Countervailing Duty Investigations

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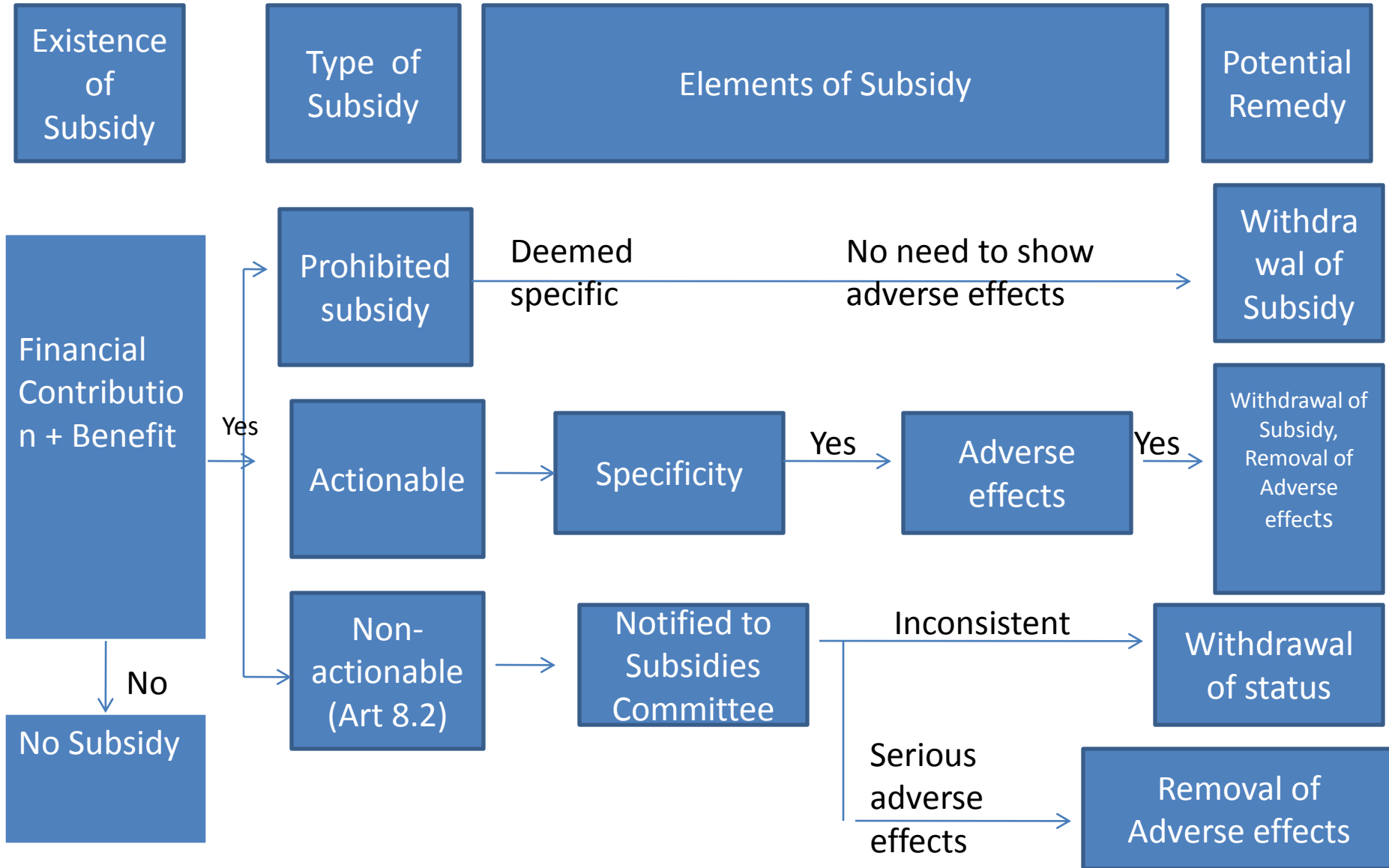
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ELEMENTS OF A SUBSIDY



Recap: Multilateral Remedies



- *MAIN STEPS IN CVD INVESTIGATIONS*

Countervailing Duty Investigation

- Legal basis – GATT Article VI and ASCM Articles 10-23
- Objective- to determine the existence and degree of alleged subsidisation
- Basics of injury and causality are similar to those in anti-dumping investigation.
- However, pre-initiation consultations with the exporting country provided for in Article 13.1.
- Govt. of the exporting country actively involved

CVD Investigations - Framework

- A measure covered by Agreement?
 - ❖ Subsidy?
 - ❖ Specificity?
- If a specific subsidy, what type?
 - ❖ Enterprise, industry, regional, or Article 3 prohibited subsidies?
- *Ad valorem* subsidization > *de minimis*?
 - ❖ Special and differential treatment?
- Injury and Causation?

CVD investigation: 2- fold evidence gathering

- Evidence on subsidisation, specificity and amount of subsidy
 - ❖ Mainly from questionnaire response for the exporting country, exporters and during verification visit of the exporters.
 - ❖ Objective- to determine the existence and degree of alleged subsidisation
- Evidence on injury and causality
 - ❖ Mainly from questionnaire response of the domestic industry

Concept of Specific Subsidy

Specific Subsidies – de-jure

- A subsidy is de-jure specific if
 - ❖ Access to the subsidy explicitly limited to “certain enterprises” (covers enterprise, industry and regional specificity)
 - If access is limited based on objective criteria then it may not be a specific subsidy – **conditions apply**
 - Prohibited subsidies are deemed specific
 - Specificity to be determined with reference to the jurisdiction of the granting authority.

De-facto Specificity -2.1(c)

- Notwithstanding any appearance of non-specificity, the subsidy may in fact be specific. Following factors may be considered
 - ❖ Use by a limited number of enterprises
 - ❖ Predominant use by certain enterprises
 - ❖ Granting of disproportionately large amounts to certain enterprises
 - ❖ Manner in which discretion has been exercised.

CALCULATING AMOUNT OF SUBSIDY

Calculations must be done programme-by-programme/subsidy-by-subsidy

- **Determine** amount of subsidy provided to/received by company in question under a given programme
- **Calculate** rate of subsidization during POI: Subsidy amount in POI / relevant sales (vol. or value)
- **Calculate** the rate of subsidisation during POI for each programme
- **Calculate** the total rate of subsidisation during POI for all programmes
- **Determine** if the total rate of subsidisation exceeds de minimis

CALCULATION OF TOTAL SUBSIDY AMOUNT

- **Agreement foresees two bases to calculate total subsidy amount in CVD context**
 - **Benefit to recipient** (how much advantage to the recipient, compared with what it could obtain on the market) (Art. 14 Guidelines)
 - **Cost to government** (how much did it cost the government to provide the subsidy) (no guidance in Agreement)

SCM SUBSIDY CALCULATION RULES

SCM Agreement tells only part of the story

- **Article 14 Guidelines** - only relevant for determining (total) amount of benefit
 - Establish principle of market as comparator for determining and measuring benefit
 - Provide specific guidance in this respect for four kinds of financial contribution
- **No guidance** on how to translate total benefit amounts into per unit or *ad valorem* subsidization rates

Calculation of benefit: Requirements in Article 14

- "The chapeau of Article 14 sets out three requirements. The first is that "any method used" by an investigating authority to calculate the amount of a subsidy in terms of benefit to the recipient shall be provided for in the national legislation or implementing regulations of the Member concerned. The second requirement is that the "application" of *that* method in each particular case shall be transparent and adequately explained. The third requirement is that "any such method" shall be consistent with the guidelines contained in paragraphs (a)-(d) of Article 14.

Japan- DRAMS CVDs (AB)

ARTICLE 14 GENERAL REQUIREMENTS

- **If benefit to the recipient approach chosen**, methodology must be provided for in legislation or regulations
- **Application in each individual case** of benefit to recipient methodology must be transparent and adequately explained
- **Agreement contains no similar rules** in respect of use of cost-to-government methodology

Calculation of amount of the subsidy

Steps in Calculating the Subsidy

- A. Calculation should reflect the amount of subsidy found to exist during the period of investigation and not simply the face value of the financial contribution.
- B. Check whether benefit is expensed during period of investigation. Otherwise allocate
- C. Calculate per unit subsidy (Article 19.4) during the period of investigation for each scheme
- D. Arrive at the total per unit subsidy for all schemes.

Calculation of Certain Types of Subsidy

- Grant
- Provision of equity capital
- Loans
- Loan guarantees
- Provisions of goods and services by the government
- Purchase of goods by government

Grants

- Direct Transfer of funds :Amount received
- Tax exemption: Amount of tax payable at applicable rate
- Tax reduction: Amount of tax payable at applicable rate – tax paid
- Accelerated depreciation: Amount of tax payable under normal depreciation schedule – amount actually paid
- Interest rate subsidies: Amount of interest saved by the recipient
- In all above cases add an amount for interest during period of investigation.

Equity infusion: Article 14 Guidelines

Equity infusions - Do not confer a benefit unless:

- “the investment decision can be regarded as **inconsistent with the usual investment practice . . . of private investors** in the territory of *that Member*”
 - share price, if available
 - risk / return
- Subsidy = Price paid by the government for the shares – normal market price for the shares

Loans: Article 14 Guidelines

Loans - Do not confer a benefit unless:

- “there is a *difference* between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a **comparable commercial loan ... on the market**”

Loans from the Government Art 14 (b)

- Subsidy = Interest normally payable on comparable commercial loan during period of investigation – amount of interest paid
- Comparable commercial loan: a loan of a similar amount with similar repayment period obtainable by the recipient from a representative private bank operating on the domestic market
- Commercial interest rate
- ❖ Preferably established on the basis of the rate actually paid by the concerned company on comparable loan from private bank.
- ❖ If not, then interest paid on comparable loans to companies in similar financial situation in the same sector/in any sector

Loan Guarantees: Article 14 Guidelines

Loan guarantees - Do not confer a benefit unless

- “there is a *difference* between the amount the firm receiving the guarantee pays on a loan guaranteed by the government and the amount the firm would pay on a **comparable commercial loan** absent the government guarantee”
- Adjust for any difference in fees

Loan Guarantee Art. 14 (c)

- If no guarantee fee paid
- ❖ Subsidy= amount of interest payable for comparable loan in absence of government guarantee – amount of interest paid on the guaranteed loan.
- If guarantee fee paid
- ❖ No subsidy if fee is sufficient to enable the guarantee program to cover all its costs and earn a reasonable profit margin
- ❖ If fee is not sufficient to enable operation on a commercial basis then treat as if no guarantee fee paid.

Government Provision of Goods and Services: Article 14 Guidelines

- Government provision of goods and services does not confer a benefit unless:
 - ❖ For *less* than adequate remuneration
 - ❖ Based on **prevailing market conditions** in the country of provision
- Jurisprudence - 3 exceptions permitting out of country benchmarks
 - ❖ Government monopoly supplier
 - ❖ Predominant role of the government in the market
 - ❖ Government determines the market price

Provision of Goods and Services by the Government- Art. 14(d)

- Subsidy = Adequate remuneration for the product/service in relation to prevailing market conditions in the domestic market – price paid by the firm
- Adequacy of remuneration
- ❖ Establish that same goods/services provided both by government and private operation

Government Purchase of Goods: Article 14 Guidelines

Government purchase of goods does not confer a benefit unless:

- For *more* than adequate remuneration
- Based on **prevailing market conditions** in country of purchase

Purchase of Goods by Government

- Subsidy = Price paid for the like product by government – highest price offered for a comparable purchase of the same goods by the private sector
- If concerned company makes no comparable sales to private operators, then
 - ❖ Subsidy = Price paid for the like product by government – price paid by private operators to comparable companies in the same sector / in the economy as a whole

PERSISTENCE OF BENEFITS OVER TIME

- Benefits from certain subsidies can be viewed to persist beyond the period in which received.
 - For **purchase of fixed assets** - benefits over full useful life of the assets.
 - **Large, non-recurring** subsidies - analogous.
 - **Subsidized loans** - benefits over life of loan.
- Benefits from other subsidies can be viewed as fully used/exhausted during the period in which received (certain tax subsidies; **small, non-recurring** subsidies)

HOW MUCH SUBSIDY BENEFIT IN POI?

- For subsidies with **persistent** effect, **ALLOCATE** total subsidy amount over multi-year period.
- For subsidies with **non-persistent** effect, **EXPENSE** total subsidy amount in POI

SCM Agreement contains no rules on this

Expense Vs. Allocation

- Under what circumstances should subsidies be allocated over some multi-year period, versus expensed during a single year?
- In absence of allocation
 - ❖ A large subsidy would have no effects beyond the year in which granted
 - ❖ Subsidization amount would be overstated in certain cases.

Three presumptions for Allocation

- Subsidies linked to purchase of fixed assets to be allocated.
- R&D subsidies to be presumptively allocated except, when demonstrated that doing so is inappropriate.
- Non-recurring subsidies should be presumptively allocated, except when demonstrated that doing so is inappropriate.

B. General Principles for Allocation

- Affirmative answers to any one of the following would normally point towards allocation
 - ❖ Whether the purpose of the subsidy was for purchase of fixed assets
 - ❖ Whether non-recurring and / or large
 - ❖ Whether oriented towards future production
 - ❖ Whether consisting of equity infusion
 - ❖ Whether carried forward in recipients accounting records.

Allocation of Subsidy to per unit of Like Product

- If export subsidies, then amount attributed to POI may be divided by export volume during POI
- For non-export subsidies domestic plus export sales in POI to be used as denominator
- If benefit of subsidy not limited to a particular product, total recipient sales to be used as denominator.

Total per unit subsidy

- Add per unit subsidy for all schemes to arrive at the total per unit subsidy

Pass through of benefit

- The benefit of a subsidy may pass through from the recipient of the financial contribution to other entities.
- Even if the ultimate recipient of benefit has not received the financial contribution, a subsidy would exist if in fact some one has received it
- Recipient of financial contribution and recipient of benefit could be different.
- Establish pass through before countervailing indirect subsidies

Definitive Countervailing Duty

- Imposed after all requirements fulfilled
- Imposed on products from all sources found to be subsidized and causing injury
- No duty:
 - ❖ in excess of amount of subsidy.
 - ❖ if the total per unit subsidy is below de minimis level 1%. (2% – S&D)
 - ❖ if volume of subsidised imports less than 4 % (individually) / 9% (cumulatively) of total imports – S&D
- Restriction on double remedy to address the same situation of dumping and subsidisation

Duration and Review

- Duty to remain in force as long as and to the extent necessary to counteract injurious subsidization.
- Review possible for examining whether continued imposition of duty is necessary to offset subsidization, whether injury would be likely to continue or recur if the duty were removed or varied
- Sunset review not later than 5 years from impositions.

THANK YOU