

WTO Rules on Subsidies

Mukesh Bhatnagar
Professor
Centre for WTO Studies

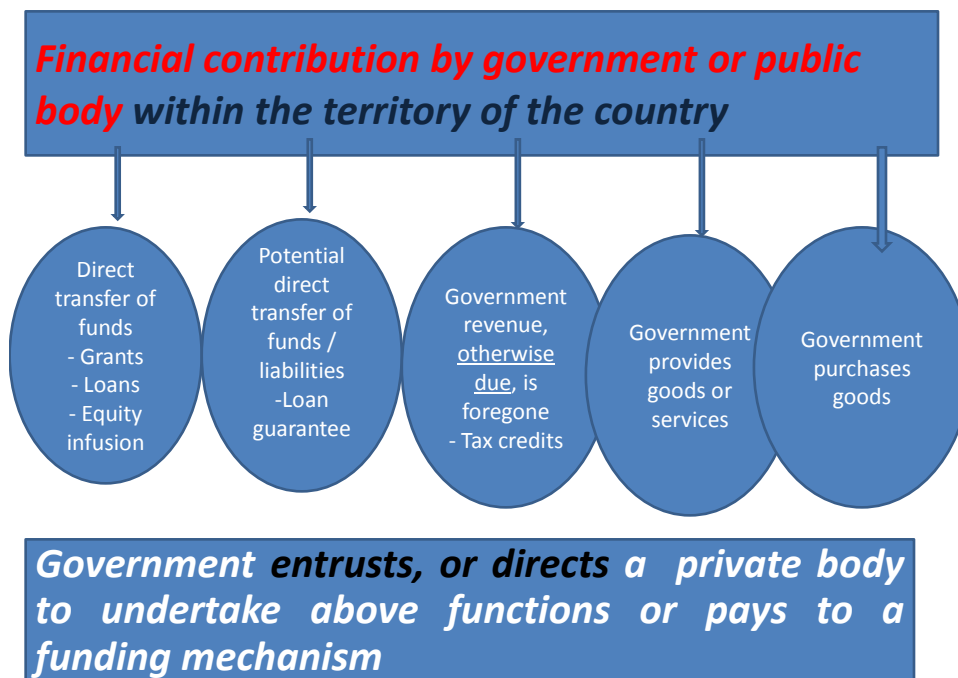
Subsidies...

- Very sensitive matter in international trade relations
 - On one hand, subsidies evidently used by governments to pursue legitimate objective of economic and social policy.
 - On the other hand, subsidies may have adverse effects on the interests of trading partners, whose industries may suffer from unfair competition
- Subsidies: can distort trade flows if they give an artificial competitive advantage to exporters or import competing industries.
- Example of subsidies: aid to the poor, aid for technological development, special aids for education, aid to disadvantaged groups and regions etc.

ASCM text

- Definition of subsidy Article 1 ASCM
- Financial Contribution
 - Grants, loans, equity
 - Government revenue due is foregone
 - Government provides goods or services other than general infrastructure
- Benefit is conferred

3



Concept of Benefit

- Cost to government v. benefit to recipient

Benefit = advantage (to recipient), not cost to government

Issue: "whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."

Basis for comparison = marketplace

Issue: Is the financial contribution "provided on terms which are more advantageous than those that would have been available to the recipient on the market."

5

Concept of Benefit (Contd.)

- **Govt. equity infusions** do not confer a benefit unless: "the investment decision can be regarded as inconsistent with the usual investment practice (including ...risk capital) of private investors in the territory of that Member"
- **Govt. loans** do not confer a benefit unless: "there is a difference between the amount that the firm receiving the loan pays on the Govt. loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market."

6

Concept of Benefit (Contd.)

- **Govt. 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 Govt. and the amount the firm would pay on comparable commercial loan absent the Govt. guarantee.
- **Govt. provision of goods or services** does not confer a benefit unless for less than adequate remuneration based on prevailing market conditions

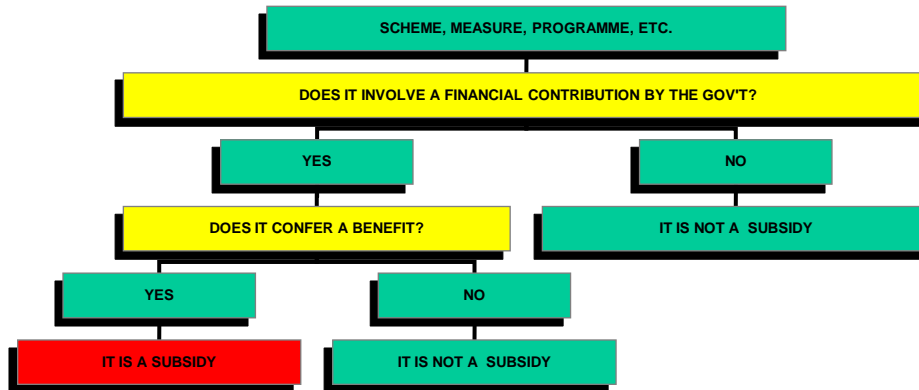
7

Concept of Benefit (Contd.)

- **Govt. purchase of goods** does not confer a benefit unless: for more than adequate remuneration based on prevailing market conditions.

8

ELEMENTS OF A SUBSIDY



9

Concept of Specific Subsidy

- Specificity
 - Certain enterprises,
 - industry or
 - regions
 - De facto
- OR
- De jure

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.

11

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.

12

Categorisation of subsidies

- **Non-actionable subsidies:** Non specific subsidies
- **Prohibited Subsidy:** – Art. 3: Local content and exports subsidies.
- **Actionable subsidies:** specific subsidies that cause adverse effects

13

Non- actionable Subsidies

14

Non-actionable subsidy

- No action can be taken against subsidies that are non-specific - determined on the basis of
 - ❖ Eligibility based on objective criteria or conditions
 - ❖ Eligibility automatic, criteria strictly adhered to
 - ❖ Criteria are neutral, economic in nature and horizontal in application
 - ❖ No predominant use by certain enterprises

- Up to 1999 specific given for R &D, assistance to disadvantaged regions and for environmental purposes were non-actionable. Now lapsed

Prohibited Subsidies

Prohibited Subsidies

- **Local content** subsidies: subsidies contingent upon use of domestic goods over imported goods
- **Export subsidies** prohibited "except as provided in the Agreement on Agriculture" (Article 3 SCM Agreement)
- ❖ *Subsidies contingent upon export performance, including those illustrated in Annex I*
- ❖ *Subsidy is tied to actual or anticipated exportation or export earnings*

17

Export subsidies

- General prohibition
- Exceptions
- Developing countries
 - LDCs
 - Developing countries
 - - Annex VII (21 countries including India)
 - - non-Annex VII

Domestic content subsidies

- Subsidies contingent upon use of domestic over imported goods

Prohibited Subsidies: Remedy

- Remedy through DSU
- Complaining country needs to establish that prohibited subsidy is being granted
- PGE may assist the panel – existence and nature of the subsidy
- Defaulting member required to ***withdraw the subsidy without delay*** or face counter-measures

Actionable Subsidies

21

Actionable subsidy – link with specificity

- ASCM provides that a subsidy shall be actionable only if such a subsidy is **specific and causes adverse effects**

22

Adverse effects of the subsidy – 3 examples

- Serious prejudice
- Injury to domestic industry
- Nullification and impairment

23

Adverse effects – SERIOUS PREJUDICE

- Serious prejudice – effect of subsidy is:
 - ❖ Imports of like product displaced or impeded in the market of subsidising member
 - ❖ Exports displaced or impeded in third country market
 - ❖ Significant price undercutting, price suppression, price depression or lost sales of another member
 - ❖ Increase in world market share for the subsidised primary product of the subsidising country

24

Adverse Effects: NULLIFICATION OR IMPAIRMENT OF BENEFITS

- **“Benefits”** are those from multilateral market access concessions (esp. tariff concessions)
- **Nullification or impairment:** a subsidy is given to offset the value of a concession, thereby eliminating or reducing the market access the exporter expected

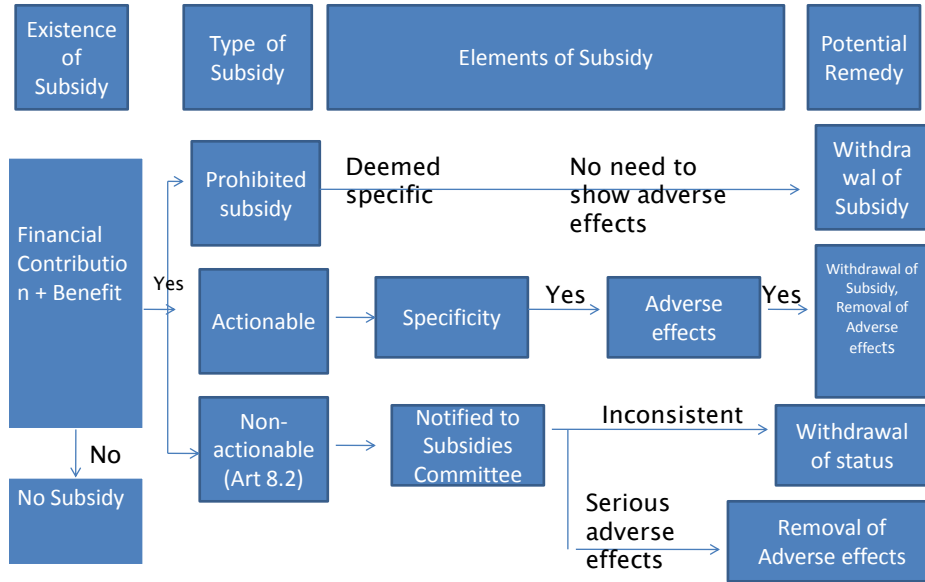
25

Adverse Effects: INJURY

- Locus of competition - market of importing country
- Injury in this context has identical meaning to that in countervail context
- Three kinds of injury
 - Current material injury
 - Threat of material injury
 - Material retardation of the establishment of a domestic industry

26

Recap: Multilateral Remedies



Countervailing Duty

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

29

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?

30

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

31

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

32

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)

33

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

34

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)

35

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

36

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

37

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**”

38

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

39

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

40

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

41

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

42

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

43

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

44

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

45

Total per unit subsidy

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

46

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

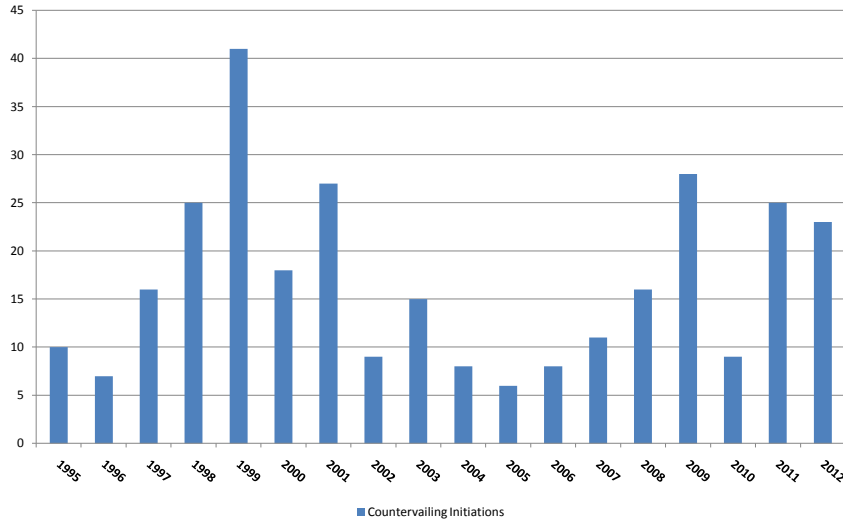
47

Duration and Review

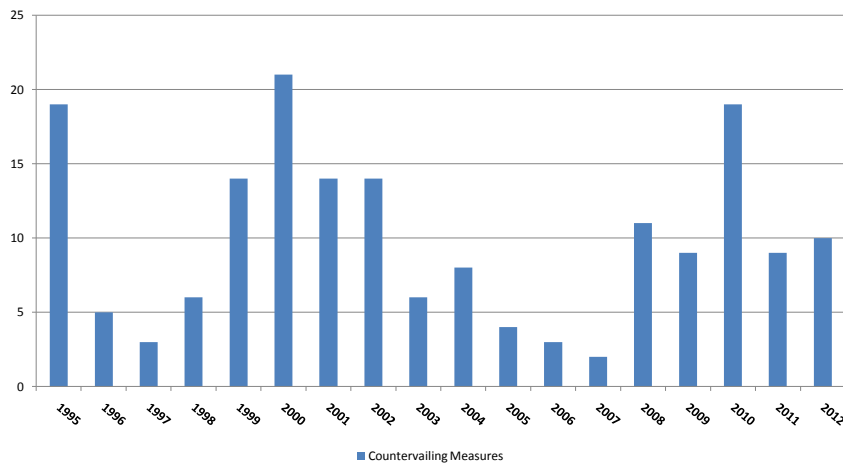
- Duty to remain in force as long as and to the extent necessary to counteract injurious subsidization.
- Review possible for examining whether continued imposition of duty is necessary to offset subsidization, whether injury would be likely to continue or recur if the duty were removed or varied
- Sunset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

48

Countervailing Initiations (1995-2012): (302)



Countervailing Measures (1995-2012): (177)



CVD Measures taken by Members from 1-1-1995 to 30-06-2013

Country	Number of Measures imposed
Canada	21
EU	31
Mexico	10
Brazil	7
Australia	6
Peru	5
South Africa	5
US	79
Total	182*
*Above are main users of CVD Measures. India has not imposed any CVD Measure	
Source: WTO	

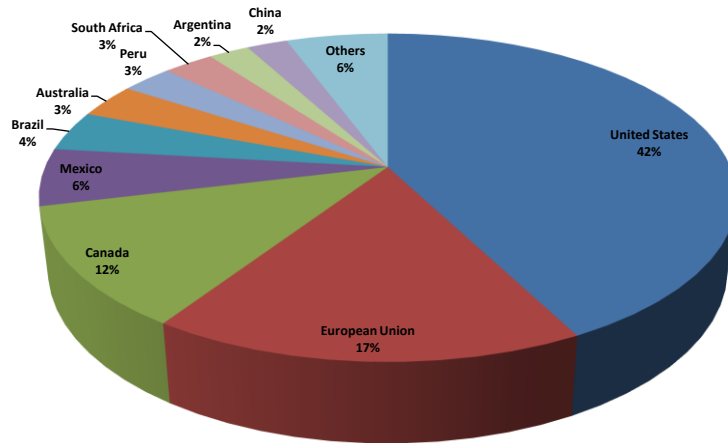
51

CVD Measures imposed against exporting countries from 1-1-1995 to 30-06-2013

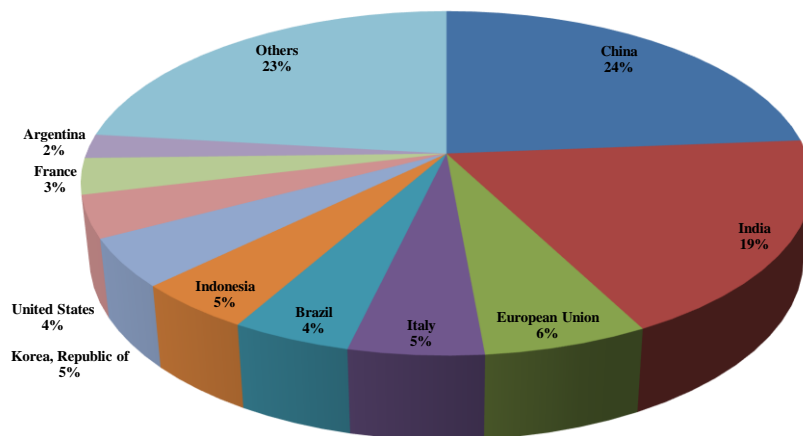
Exporting Country	Number of Measures
China	45
Brazil	8
EU	11
India	33
Indonesia	8
Canada	3
US	7
Italy	9
South Korea	9
(Out of total 182)	Source: WTO

52

Share in Countervailing Measures : By Reporting Member



Share of exporting countries in Countervailing measures



THANK YOU