

Geopolitics & Industrial Policy
in International Trade (I):
How to (Un-) Regulate Subsidies

ASEAN Trade Law Academy
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Government Money, Is That a Problem?

Global Market, Global Competition

Unfair to Whom?

Market Distortion → **Inefficiency**

Market **Concentration** (Cf. EU Competition Law)

What Is a Subsidy? (SCM)

Financial Contribution / Benefit

(Art. 1)

+

Specificity

(Art. 2)

Financial Contribution

- A Financial Contribution By a Government or Any **Public Body** (“an entity that possesses, exercises or is vested with governmental authority”)
- A direct transfer of funds (e.g. grants, **loans**, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)
- Government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as **tax credits**)

- A government provides goods or services other than general infrastructure, or purchases goods
- A government makes payments to a funding mechanism, or entrusts or directs a **private body**
- Any form of income or price support

Specificity

- Specific to an **enterprise** or **industry** or **group** of enterprises or industries
- **Explicitly limits access** to a subsidy to certain enterprises
- 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 (*de facto* subsidies)

Geneva, We Have a Problem!

Should We Prohibit **All** of Them?

GATT

- **Countervailing** Duties (Article VI:3)
- **Export** Subsidies → Notification & Consultation (Article XVI:1) (**No Teeth**)

Discrimination?

GATT Art. III (Nat'l Treatment),

Para. 8 (b)

“The provisions of this Article shall not prevent the payment of subsidies **exclusively to domestic producers, (...)**”

Italian Tractors (1958)

: Consumer Loans

Inflation Reduction Act of 2022

: \$7,500 EV Tax Credits

Subsidies and *GATT Article II* (**Non-Violation**, Art. XXIII:2 (b))

“[B]enefits accruing to the United States under Article II of the General Agreement in respect of the **zero tariff bindings** for oilseeds in the Community Schedule of Concessions were **impaired** as a result of the introduction of production subsidy schemes which operate to **protect** Community producers of oilseeds completely from the movement of prices of imports and thereby prevent the **tariff concessions** from having any impact on the **competitive** relationship between domestic and imported oilseeds.” (*EC-Oilseeds*, 1989, para. 156)

EC – Oilseeds (Cont’d)

“[T]he United States may be assumed **not to have anticipated** the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent **tariff concessions** from having any impact on the **competitive relationship** between domestic and imported oilseeds.” (*EC – Oilseeds*, 1989, para. 148)

What If a WTO Member **Discontinued**
a Subsidy Only against a **Foreign**
Producer?

Non-Violation Claims

(Article XXIII:2(b))

(e.g.) *Ammonium Sulphate* (1950)

The Traffic Light System (SCM)

Red

Yellow

Green

Red Light (Prohibited)

Export Subsidy

Countervailing Duties

(Material **Injury** or Threat)

Should Withdraw Immediately

Yellow Light (Actionable)

“Adverse Effects”

(Injuries; N or I; **Serious Prejudice**)

Countervailing Duties
(Material Injury or Threat)

Withdrawal or Compensation

Green Light (Non-Actionable)

R&D / Regional Development /

Environment

Terminated!

(As of January 1, 2000)

Have Failed to Extend!

Should **Extend**?

(Cf. Climate Change)

Who Can Sue Whom (**WTO**)?

Suppose that the **United States** (Exporting Country) **Subsidizes** the **Ford** Company and Injures **Volkswagen** in the **European Union** Market (Importing Country).

1. The EU May **Countervail** US' Subsidization.
2. Then, the US May Sue the EU's Countervailing Measures.
3. The EU (and **All Other** WTO Members) May Also Sue the US, if the Subsidy Is **Contingent** upon Export (**Export Subsidy**).

What If the EU Is Not an Importing Country? (If Ford Exports to **Korea**, and Competes with Volkswagen in the Korean Market.)

The EU May Still Sue the US to Eliminate the Adverse Effect (**Serious Prejudice**)

What If the **EU Subsidizes** Volkswagen
and **Ford Exports** to the EU Market?

Nullification or Impairment

(**Non-Violation** Claim;

GATT Article XXIII:2 (b))

Who Can Sue Whom (**Domestic**)?

Ford Can Sue the EU for the EU's Countervailing Duties in the EU's Regional Court (such as the European Court of Justice) Based on the EU's Own Subsidy Regulations.

Challenges

1. PUBLIC BODY

: “State-Owned Banks/Enterprises”

→ **Function** (WTO) v. **Ownership** (US)

2. GLOBAL VALUE CHAINS

: “**Transnational** Subsidies” (EU)

(Jushi & Hengshi Egypt)

New Industrial Policy?

The Inflation Reduction Act of 2022 (USA)

The Green Deal Industrial Plan of 2023 (EU)

The CHIPS and Science Act of 2022 (US)

Subsidies to Re-Shoring Companies (Japan)

North v. South

Whether (How) to (**Un-**) **Regulate**?

Negotiation

(e.g., Fisheries Subsidies)

Litigation

(e.g., Airbus v. Boeing)

Peer Review

(Energizing “SCM **Committee**”!)