

**The WTO Doha Round Negotiations on  
Subsidies and Countervailing Measures:  
Issues for Negotiators**

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In Light of the Doha Development Round  
Negotiations on Rules**

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## I. INTRODUCTION

Developing and administering disciplines on the use of subsidies is one of the most difficult areas of international economic policy and rule making. It is also one of the most pervasive problems in international trade. All governments intervene in some way in their domestic economies in order to achieve certain industrial or social policy goals. In the broadest sense, government subsidization includes everything from the provision of police and security services, health care services, social welfare measures, and programmes for low income or unemployed persons to specific fiscal and economic incentives for less-developed regions and grants to specific companies for specific purposes.

International trade policy, generally, and the WTO, in particular, are not concerned with all forms of subsidization or government intervention in the marketplace. The WTO is properly concerned only with subsidies that distort trade. We should not underestimate the difficulty and complexity of developing effective multilateral disciplines on the use of subsidies. The first major difficulty lies in determining which types of subsidies are trade distorting and, therefore, should be subjected to multilateral rules. Not all subsidies are trade distorting. On this question, we must rely on the work of the economists. However, as most economists who have studied this issue would tell you, this is not an exact science. Even if the economists agreed on which subsidies are trade distorting, another major challenge is for trade negotiators to develop clear, simple, justiciable rules that are capable of being understood by Members of the WTO and applied by them.

In light of these difficulties, the *Agreement on Subsidies and Countervailing Measures* (the “*SCM Agreement*”) that emerged from the Uruguay Round negotiations is a masterful achievement. It contains a delicate balance of subsidy definitions and disciplines that were intended to be clear, predictable and

enforceable. The application and enforcement of the *SCM Agreement* since 1995, however, has not been a resounding success. The major way that this *Agreement* has been enforced has been through the use of domestic countervail measures. Although one of the objectives of the *SCM Agreement* was to increase the *multilateral* disciplines and dispute settlement relating to subsidies, that has not happened, except with export subsidies to a limited extent. Since 1995, there have been 183 requests for consultations in the WTO relating to subsidies under the *SCM Agreement*, but in only approximately 17 cases were panels established (as well as another 4 Article 21.5 proceedings). Seven of those have involved claims relating to prohibited export subsidies and 10 have involved challenges to domestic countervailing duty measures. From 1995 to June 2002, definitive countervailing measures were imposed in 84 cases in various countries around the world.<sup>1</sup>

## II. THE SCM AGREEMENT

The *SCM Agreement* contains multilateral disciplines regulating the use of subsidies as well as rules and procedures governing the use of countervailing measures by WTO Members. There are eleven Parts of the *SCM Agreement* - five of which I will describe briefly below.

Part I contains “General Provisions” circumscribing the scope and coverage of the *Agreement*. It defines what is a “subsidy” for the purposes of the *Agreement* as well as precise rules on “specificity”. Part II contains strict disciplines on “Prohibited Subsidies”, which are subsidies contingent upon export performance and subsidies contingent upon the use of domestic over imported goods. Part III provides multilateral disciplines on “Actionable Subsidies”, which are subsidies that cause adverse effects to the interests of other WTO Members. Finally, Part V stipulates the substantive and procedural conditions that must be

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<sup>1</sup> See note 17 for more information on the countervail cases.

satisfied in order for countervailing duties to be imposed by a Member on subsidized imports that are causing injury to a domestic industry.

A. *Definition of Subsidy*

Perhaps the most important achievement of the Uruguay Round negotiations was the inclusion in the *SCM Agreement* of a definition of “subsidy”. The definition in Article 1 contains two elements: (1) a financial contribution by a government or public body within the territory of a Member, (2) which confers a benefit on a recipient.

B. *Financial Contribution*

The *SCM Agreement* contains an exhaustive list of measures that are deemed to be a “financial contribution”. The list identifies government practices that range from grants and loans to equity infusions, loan guarantees, fiscal incentives, the provision of goods or services and the purchase of goods. The *SCM Agreement* covers such measures even if they are carried out by a private entity, provided that a government has “entrusted” or “directed” the private entity to carry out one of the enumerated practices normally followed by governments. One of the most significant aspects of Article 1 is what is not included in that definition. “Any government practice that does not meet one the four criteria laid out therein cannot be considered a subsidy for the purposes of the *Agreement*.”<sup>2</sup>

C. *Benefit*

A financial contribution by a government does not constitute a subsidy unless it also confers a benefit on a recipient. The *SCM Agreement* does not provide extensive guidance on the question of what constitutes a “benefit”. In

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<sup>2</sup> Terry Collins and Gerry Salembier, “International Disciplines on Subsidies: The GATT, The WTO and the Future Agenda”, Vol. 30, No. 1, *Journal of World Trade*, 1996, 10.

*Canada – Measures Affecting the Export of Civilian Aircraft*, the WTO Appellate Body decided that the existence of a “benefit” has to be determined by comparison with the market, that is to say, by comparing what the recipient of the financial contribution received from the government with what it would have received on the market. The Appellate Body stated:

We also believe that the word “benefit”, as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no “benefit” to the recipient unless the “financial contribution” makes the recipient “better off” than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a “benefit” has been “conferred”, because the trade-distorting potential of a “financial contribution” can be identified by determining whether the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market.<sup>3</sup>

For the purpose of countervailing duties, Article 14 of the *SCM Agreement* provides some guidelines on the calculation of the amount of a subsidy in terms of the benefit to the recipient.

#### *D. Specificity*

A measure that is deemed to be a “subsidy” within the meaning of Article 1 of the *SCM Agreement* must also be determined to be “specific” before the provisions of Part III on Actionable Subsidies or Part V on Countervail apply to it. It is acknowledged that government subsidies that distort the efficient allocation and utilization of resources within an economy should be subject to multilateral disciplines. When a subsidy is available on a wide basis to a broad group of enterprises or industries, such distortions are not considered to exist. “Specificity” can be determined from the wording of the law or from the facts

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<sup>3</sup> Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

surrounding the measure. Article 2 of the *SCM Agreement* sets forth principles for determining the following types of specificity: (1) enterprise specificity (a government targets a particular company or companies for subsidization); (2) industry specificity (a government targets a particular sector or sectors for subsidization); and (3) regional specificity (a government targets producers in specified parts of its territory for subsidization).

#### *E. Categories of Subsidies*

The *SCM Agreement* contains disciplines relating to three categories of subsidies: prohibited, actionable and non-actionable. This is commonly referred to as the “traffic light” approach to classification of subsidies. This approach is based on the understanding that certain subsidies are trade distorting *per se*, while others are either potentially trade distorting and still others are not trade distorting at all or are even “noble”.<sup>4</sup> Accordingly, the “red light” category corresponds to prohibited subsidies, “yellow light” to actionable subsidies, and “green light” to non-actionable subsidies. However, the non-actionable category in Part IV of the *Agreement* lapsed on 31 December 1999. It covered a very restricted list of subsidies for research and development, environment, and regional development.

The *SCM Agreement* identifies two types of prohibited subsidies: subsidies contingent upon export performance (export subsidies) and subsidies contingent upon the use of domestic over imported goods (local content or import substitution subsidies). These disciplines apply not only to developed country Members but also to developing country Members. However, developing country Members benefited from special and differential treatment in Article 27 for a transitional period, and least developed countries Members still benefit from it.

<sup>4</sup> Negotiating Group on Rules, *WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures: Proposal by the European Communities*, TN/RL/W/30, 21 November 2002, p. 1 (hereinafter the EC Proposal).

The actionable subsidy category targets subsidies that cause “adverse effects” to the interests of other Members. Part III of the *SCM Agreement* lists three types of “adverse effects”. The first type is injury caused to the domestic industry of another Member by subsidized imports in its territory. The second type of “adverse effects” is nullification or impairment of benefits accruing under the GATT 1994. It happens most typically where the improved market access reasonably expected to be obtained from a bound tariff is nullified or impaired by subsidization of the product. The last type of adverse effects is “serious prejudice”: it usually arises as a result of adverse trade effects (for example, export displacement) in the home market of the subsidizing Member or in a third country market. Until 31 December 1999, the *SCM Agreement* contained a presumption of serious prejudice with respect to certain specified types of actionable subsidies. This presumption, like the non-actionable category in Part III of the *Agreement*, expired on that date.

#### *F. Countervailing Measures*

Part V of the *SCM Agreement* contains substantive requirements for the imposition of countervailing measures by a Member on subsidized imports that are causing injury to a domestic industry. It also contains detailed procedural rules regarding countervailing duty (“CVD”) investigations.

### **III. DOHA ROUND PROPOSALS**

There are a number of proposals in play in the Doha Round negotiations on subsidies. The proposals are wide-ranging and divergent. There is no apparent consensus emerging. Rather, there is a distinct polarization of positions between developed and developing country Members of the WTO.

Probably the most important achievement of the Uruguay Round negotiations on subsidies is the definition of subsidies contained in Article 1 of the *SCM Agreement*. That Article requires, first, that there be a financial contribution from a government in order for a subsidy to exist, and, second, that the financial contribution must confer a benefit on the recipient. Article 1 provides an exhaustive list of government practices that can constitute a financial contribution. That list includes traditional types of subsidies, including grants and loans, but it also includes preferential government procurement of goods or provision of goods or services. The definition also applies to situations where the government “entrusts” or “directs” private entities to carry out practices that would normally be considered subsidies. The exhaustive list of types of subsidies that can constitute financial contributions by a government is important because it provides a high degree of certainty and predictability about what types of government practices will be considered to be subsidies. By definition, any type of practice or activity not captured by one of the four subparagraphs in Article 1 will not be considered to be a subsidy for the purposes of the *SCM Agreement*.

It is perhaps not surprising that both the United States and the European Communities have proposed that the last type of financial contribution, i.e., situations where a government “entrusts” or “directs” private entities to carry out subsidy-type practices, should be clarified and expanded. The United States, in particular, highlights “situations involving direct government intervention in bankruptcy or near bankruptcy proceedings, and industry restructuring.”<sup>5</sup> It emphasizes that “the determination of government control is a standard worthy of further development” and mentions that it would like to clarify the definition of “public body” as that term is used in Article 1 of the *SCM Agreement*. The European Communities highlights the issue of “disguised” subsidies in situations in which the link between the subsidy and the recipient of the product is often

<sup>5</sup> Negotiating Group on Rules, *Subsidies Disciplines Requiring Clarification and Improvement: Communication from the United States*, TN/RL/W/78, 19 March 2003, p. 3 (hereinafter the US Proposal).

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concealed, and, therefore, is difficult to establish.<sup>6</sup> The European Communities also raises the situation of private entities that may be providing a subsidy under “the covert direction of governments”, such as “the granting of loans and other financial supports through financial institutions which are acting on non-commercial terms”.<sup>7</sup> Under the present exhaustive list of financial contributions in Article 1, the European Communities notes that the rules require a clear and unambiguous showing of “direction” by a government. This is difficult to prove, and therefore the European Communities would like to clarify and expand Article 1 of the *SCM Agreement* “so that entities which are effectively controlled by the state and acting on non-commercial terms are covered by this provision” and, therefore, by the disciplines in the *SCM Agreement*.<sup>8</sup>

My own view is that the United States and the European Communities are asking too much at this stage in the life of the *SCM Agreement*. One of the very positive features of the *Agreement* is that there is a high degree of certainty and predictability in the exhaustive list of types of government practices and activities that can constitute a financial contribution under Article 1. By expanding the scope of the concept of “direction” by a government, a wide range of “grey area” activity, which is fundamentally private sector activity in nature, could be captured by the disciplines of the *SCM Agreement*. This would be a mistake, as the *SCM Agreement* is meant to deal only with the activities and practices of governments.

#### A. *Definition of Subsidy*

The concept of whether or not a benefit has been provided to the recipient in the definition of subsidy under Article 1 of the *SCM Agreement* is one of the most difficult concepts in the entire *Agreement*. For the purposes of countervailing duty actions under Part V of the *Agreement*, Article 14 provides a

<sup>6</sup> EC Proposal, *supra*, note 4, p. 2.

<sup>7</sup> EC Proposal, *supra*, note 4, p. 3.

<sup>8</sup> EC Proposal, *supra*, note 4, p. 3.

number of guidelines for calculating the amount of a subsidy in the terms of the benefit to the recipient conferred pursuant to paragraph 1 of Article 1. However, for the purposes of other Parts of the *SCM Agreement*, such as Part II dealing with prohibited subsidies or Part III dealing with actionable subsidies, the guidelines contained in Article 14 do not apply. The Appellate Body has stated, in cases involving allegations of prohibited subsidies under Article 3, that the benchmark against which to measure whether or not a financial contribution confers a benefit upon a recipient is the marketplace. In other words, the financial terms provided to a recipient by a government must be measured against the financial terms that the recipient otherwise could have obtained in the marketplace. Obviously, selection of a particular benchmark to make this comparison is critical in determining whether or not the recipient has received a benefit from the financial contribution provided to it by a government.

The United States takes issue with paragraph (a) of Article 14 which states that in a countervailing duty proceeding, “government provision of equity capital shall not be considered as conferring 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”. The United States asks: why should governments be investing in private sector companies at all? However, the United States does recognize that “certain lesser developed countries”, because of the nature of their capital markets, should be given special consideration when it comes to investing in private sector companies.<sup>9</sup>

With respect to countervailing duty actions, it could be asked whether investigating authorities are faithfully applying the guidelines set forth in Article 14 of the *Agreement*. These guidelines provide methods for calculating the amount of a subsidy in terms of the benefit to the recipient for four types of subsidies: government provision of equity capital, government loans, government loan

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<sup>9</sup> US Proposal, *supra*, note 5, p. 4.

guarantees and the provision of goods or services or purchase of goods by a government. In all of these cases, the benchmark is “the usual investment practice”, “a comparable commercial loan”, “a comparable commercial loan absent the government guarantee”, or “prevailing market conditions for the good or service in question in the country of provision of purchase”. In many domestic countervailing determinations, it could be questioned whether the benchmark established by the investigating authority was established on the basis of the correct facts pertaining to the exporting country’s market. Given that this is an important part of the definition of subsidy, it would be beneficial to develop further precise guidelines relating to calculation of the benefit to the recipient for other types of subsidies.

To date, no proposals have been made with respect to Article 2 of the *Agreement* dealing with “specificity”. This may be because the provisions are sufficiently clear, particularly when applied in domestic countervailing duty investigations, that they do not pose problems. Or, it may be because the provisions are so incomprehensible that no WTO Member wants to tackle them. I suspect that the former is the case.

#### *B. Prohibited Subsidies*

The rules on prohibited subsidies in Article 3 of the *SCM Agreement* are not significantly different from previous GATT practice. The major change was that these disciplines, after the transition periods in Article 27 have expired, will also apply to developing country Members of the WTO.<sup>10</sup> There have been a number of export subsidy cases in the WTO since 1995. The panel and Appellate Body reports in these cases have helped to clarify the meaning, in

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<sup>10</sup> Except that Article 3(1)(b) - the prohibition on domestic content subsidies - will not apply to the least developed countries.

particular, of Article 3(1)(a) of the *SCM Agreement* dealing with prohibited export subsidies.

The United States has proposed that the existing category of prohibited subsidies be expanded to include a wider range of trade-distortive subsidies, suggesting that the “dark amber” category of subsidies listed in Article 6.1 of the *Agreement* (which has lapsed) might provide a useful starting point.<sup>11</sup> The United States has also suggested that for prohibited subsidies, it should not be necessary to demonstrate injury in domestic countervailing duty investigations.<sup>12</sup>

The European Communities has recommended that the prohibition on subsidies contingent on the use of domestic products should be clarified and strengthened. The current rules, it suggests, do not provide appropriate disciplines particularly with respect to “value-added” requirements. The European Communities would expand Article 3(1)(b) such that “any subsidy linked to the use or purchase of domestic industrial products, and thus in breach of Article III:4 of the GATT 1994, is covered by the prohibition.”<sup>13</sup>

A number of WTO Members, both developed and developing, have highlighted the need to establish clear, consistent and fair rules for all types of export financing. Under the current provisions of the *SCM Agreement*, as interpreted by panels and the Appellate Body, the “safe harbour” provisions of item k of Annex I - the Illustrative List of Export Subsidies - apply only to the interest rate provisions of the OECD Arrangement on Export Credits, but not to export guarantees, risk premia and “matching” arrangements.

Some developing countries, most notably India, have also proposed major reforms to Article 27 of the *SCM Agreement* that would provide special and

<sup>11</sup> US Proposal, *supra*, note 5, p. 2.

<sup>12</sup> US Proposal, *supra*, note 5, p. 2.

<sup>13</sup> EC Proposal, *supra*, note 4, p. 3.

differential rules on subsidies for developing countries. In particular, India has proposed that:

- Countervailing duties not be imposed on imports from developing countries where the total volume of imports is negligible, i.e. less than 7 per cent of total imports;
- Countervailing duties on imports from developing countries be restricted to only that amount by which the subsidy exceeds the *de minimis* level, which should be raised to 3 per cent;
- The prohibition on export subsidies in Article 3(1)(a) should not apply to export subsidies granted by developing countries where they account for less than 5 per cent of the f.o.b. value of the product; and
- The prohibition on subsidies contingent on the use of domestic over imported goods in Article 3(1)(b) should not apply to developing countries.<sup>14</sup>

It is in the category of prohibited subsidies where the positions of the developed and developing countries diverge the most. And, yet, the subsidies in this category are there because they are commonly viewed by economists and trade policy analysts to be the most clearly trade distorting. Many developing countries, led by India, view the use of export and domestic content subsidies as crucial to their industrialization and development. The developed countries, on the other hand, have for many years viewed such subsidies as inherently trade distorting. As a result, export and domestic content subsidies have long been prohibited in the GATT and in the *Tokyo Round Agreement on Subsidies*, although these rules were not effectively enforced in the past.

There is not much hope that the developed countries will agree to allow developing countries a broad “safe harbour” to freely use export and domestic

<sup>14</sup> Negotiating Group on Rules, Proposals on Implementation Related Issues and Concerns, Agreement on Subsidies and Countervailing Measures / Anti-Dumping Agreement: Submission by India, TN/RL/W/4, 25 April 2002, p. 2 (hereinafter India’s Proposal).

content subsidies. However, there may be some scope for negotiation on the issue of export credits by developing equitable rules that allow for a limited “safe harbour” for certain types of export credit financing that would apply equally to developing and developed countries. There is a problem with the current rules – they do tilt in favour of the developed countries under the provisions of item k of Annex I, and this inequality should be remedied in the Doha Round.

### C. Actionable Subsidies

A major effort in the Uruguay Round negotiations on subsidies was to develop meaningful and effective *multilateral* subsidy disciplines, as an alternative to *unilateral* countervailing duty actions. Negotiations recognized that countervail is limited to dealing only with *imports* that are subsidized. It does not deal with subsidies that have adverse trade effects in either the home market of the subsidizing country or in third-country markets. Thus, the negotiators developed *multilateral* rules for domestic subsidies that would be “actionable” under WTO dispute settlement procedures.

The result was Part III of the *SCM Agreement*. It creates a category of “actionable subsidies”, defined as those which cause “adverse effects” to the interests of other WTO Members. “Adverse effects” can be caused by: (a) injury to the domestic industry of another Member; (b) nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994; or (c) “serious prejudice” to the interests of other Members. Article 6 of the *SCM Agreement* contains detailed and complex rules governing the circumstances for determining whether or not “serious prejudice” exists. Paragraph 1 of Article 6 originally provided four explicit types of subsidies that were deemed to cause serious prejudice. However, that provision is no longer in effect.

Although the objectives behind the development of multilateral disciplines for actionable subsidies were laudable, in fact, Part III of the *SCM Agreement*

has not proved to be operational and effective in practice. The United States has suggested adding the list of subsidies deemed to cause serious prejudice in Article 6.1 to Part II of the *Agreement* where they would become prohibited subsidies.<sup>15</sup> Canada has also noted the expiry of the deemed serious prejudice provisions as a “shortcoming” of the *Agreement*, and has suggested that the importance of access to third country markets, especially for Members with relatively small markets and for certain specialized industries, highlights “a need to consider a more viable serious prejudice remedy.”<sup>16</sup>

Assessing the trade effects of subsidies is not an easy task even with the detailed rules and procedures contained in Part III of the *SCM Agreement*. These rules are complicated to administer, and the expiry of Article 6.1 makes the task even more difficult. The advantage of the latter provision was that it enumerated four types of subsidies deemed to cause “serious prejudice”. In a WTO dispute settlement case, once the complainant had proved that such a subsidy existed, the burden of proof would have shifted to the subsidizing Member to demonstrate that the subsidy had not caused adverse trade effects. This would have made Part III more workable, because the information about the subsidy would likely be in the hands of the subsidizing country. It is difficult, particularly in cases involving *de facto* subsidies, for a complaining Member to prove the existence of the subsidy. In such cases, it would be even more difficult to demonstrate that such subsidies have adverse effects on trade. Therefore, WTO Members should actively consider reinstating a provision similar to Article 6.1 of the *SCM Agreement*.

Priority also should be given to developing a workable multilateral mechanism for enforcing the principles established in Part III of the *Agreement*. This is important for several reasons. First, countervailing measures simply

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<sup>15</sup> US Proposal, *supra*, note 5, p. 2.

<sup>16</sup> Negotiating Group on Rules, *Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement: Communication by Canada*, TN/RL/W/1, 15 April 2002, p. 1.

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cannot address the adverse trade effects of subsidies in third-country markets or in the subsidizing country's home market. Second, countervail is a blunt, unilateral instrument. Its application is skewed and uneven - not all WTO Members impose countervail measures, and not all Members are the recipients of definitive CVDs.<sup>17</sup> In the period from 1995-2001, approximately 74 per cent of all definitive CVDs were imposed by developed country Members; and during that same period, approximately 67-70 per cent of the recipients of CVD measures (depending upon whether Korea is considered a developed or a developing country) were developing country Members.

Third, the application of subsidy disciplines through the use of countervailing measures depends upon the actions of domestic industries filing and supporting complaints in the importing countries. This can lead to random enforcement by private firms in failing or economically-challenged industries. Subsidies, however, are measures or actions taken by governments. Therefore, disputes relating to subsidies are, first and foremost, disputes between governments. Moreover, governments have an interest in effectively disciplining subsidies that have adverse effects on trade. At the same time, governments, because they use subsidies themselves as instruments of industrial and social policy, are more likely to appreciate the need for striking a balance between the use of subsidies for the purposes of economic and social development and the adverse effects on trade that may result from developing and maintaining such programmes. Private firms and domestic industries cannot be expected to have the same perspectives or sensitivities as governments when it comes to regulation of the use of subsidies.

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<sup>17</sup> The major users of countervail measures from 1995-2001 were: United States – 31; EC – 15; Canada – 7; Mexico – 7; Brazil – 5; New Zealand – 4; Argentina – 4; Peru – 2; South Africa – 2; and Australia – 1. Approximately 74 per cent of CVD measures were imposed by developed countries. During that same period, the major recipients of CVD measures were: EC – 24; India – 13; Brazil – 6; Indonesia – 5; Argentina – 4; South Africa – 4; Venezuela – 4; Thailand – 4; Malaysia – 3; Korea – 3; and ASEAN – 13. Approximately 67-70 per cent of all definitive CVD measures were imposed against imports from developing countries; the remainder were imposed against imports from the EC. Source: WTO Secretariat.

There were excellent reasons for developing multilateral disciplines on domestic subsidies causing adverse effects on trade. Part III of the *SCM Agreement* is a vast improvement over Track II of the *Tokyo Round Agreement on Subsidies*. In the Doha Round, negotiators should focus serious and dedicated efforts, once again, on strengthening and improving the multilateral rules and mechanisms relating to actionable subsidies.

#### *D. Non-actionable Subsidies*

Part of the delicate balance of the *SCM Agreement*, as it was negotiated, was the “green-light” category of non-actionable subsidies contained in Part IV. Clear and predictable rules providing a “safe harbour” for certain types of subsidies considered not to cause adverse trade effects was an essential condition for some Uruguay Round participants, including the European Communities and Canada. Once again, the reasons for such a category appear to make good sense. This was a very difficult aspect of the negotiations - in the end, only a very restrictive list of certain types of subsidies for research and development, environmental protection and regional development was agreed. The European Communities has observed recently that the non-actionable category has proved to “be of very limited use since the definitions and procedures were so complicated that no Member could make serious use of it.”<sup>18</sup> Pursuant to Article 31 of the *SCM Agreement*, Articles 8 and 9 dealing with non-actionable subsidies expired on 1 January 2000.

Although it will be difficult to achieve a multilateral consensus on which subsidies should be classified as non-actionable, a serious effort should be made to reinstitute such a category. The focus should be on developing generic rules which apply to all WTO Members. The search should be to identify certain types of subsidies that do not cause adverse trade effects. The European Communities has raised the issue of subsidies to protect the environment in this

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<sup>18</sup> EC Proposal, *supra*, note 4, p. 2 (footnote 2).

Round. It is worth noting that at the end of the Uruguay Round, it was a developing country, Mexico, that insisted that certain environmental programmes be included in the non-actionable category and thus insulated from domestic countervail investigations as well as from multilateral challenge.

### *E. Countervail Measures*

Several proposals have been made in the Doha Round dealing with countervailing duty investigations and measures. They can be separated into two main types: (1) proposals to prevent abuses in the administration of countervailing duty laws (or to constrain the use of them), and (2) proposals to strengthen countervailing duty laws (or to make them easier to use). Proposals to constrain the use of countervail measures have been made by developing country Members but also by the European Communities (which often finds itself the recipient of such measures). Proposals to strengthen and expand the application of the countervailing duty rules have been made by the United States.

Proposals in the first category include: increasing the threshold for standing to initiate investigations; clarification of the rules relating to the product under investigation; increasing the thresholds for *de minimis* subsidization and negligible subsidized import volumes; clarifying and expanding the guidelines for calculating the benefit to the recipient under Article 14 of the *SCM Agreement*; improving the rules relating to cumulation; making the provisions relating to undertakings more workable; developing improved procedures for administrative reviews and sunset reviews; ensuring that measures are not continued longer than necessary; and making “lesser duty” rules or “public interest” provisions mandatory.

India has also proposed a number of amendments to Article 27 that would apply only to developing country Members. These include: raising the *de minimis* level of subsidization for developing countries to 3 per cent; increasing

the negligible level of subsidized imports in the case of imports from developing countries to 7 per cent of total imports; providing that countervailing duties on imports from developing countries must be restricted only to that amount by which the subsidy exceeds the *de minimis* level; rendering the prohibition on subsidies contingent on the use of domestic over imported goods inapplicable for developing countries; and ensuring that the prohibition on export subsidies does not apply to export subsidies granted by developing countries where they account for less than 5 per cent of the f.o.b. value of the product.<sup>19</sup>

Proposals to strengthen the mechanisms for imposing countervailing duty measures include: eliminating the requirement for an injury test for export subsidies; expansion and clarification of the concept of government “direction” of private action in the definition of subsidy; anti-circumvention procedures and measures; rules and procedures for “persistent” subsidization; expanding the prohibited subsidy category to include the “dark amber” category in Article 6.1; improving and clarifying the provisions dealing with sampling methods and verification procedures; expanding the scope for retroactive application of duties; improving and clarifying the mechanisms for dealing with perishable, seasonal and cyclical products; and adding procedures to deal with large, fragmented industries.

A number of countries have emphasized the need for clearer and more effective rules and procedures for sampling techniques, verification methods, conducting reviews - both administrative and sunset, large and fragmented industries, application of duties and undertakings.

These issues are technical and the positions are divergent. It is difficult to see, at this point, any consensus emerging on these issues. I would urge negotiators to try to avoid becoming submerged in the technical detail of improving and clarifying the rules and procedures for countervail investigations

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<sup>19</sup> India's Proposal, *supra*, note 14, p. 2.

and measures. Important as these provisions are, they are not where the real challenges lie in the *SCM Agreement*.

#### **IV. CONCLUSION**

What are the conclusions of this paper for negotiators in light of the economic restructuring that has been taking place within Korea since the financial crisis of 1997?

It is unfortunate that domestic industries in certain countries have decided to proceed with countervailing duty investigations against imports of certain products from Korea, failing to take into account the serious economic and financial crisis that Korean financial institutions and private enterprises faced in 1997-98. This is one of the unfortunate and unpredictable consequences of having a multilateral agreement on subsidy disciplines that is effectively enforced primarily by means of domestic countervailing duty actions. Rather than governments enforcing the provisions of the *SCM Agreement* through the WTO dispute settlement system, the subsidy disciplines are largely implemented through the application of countervailing duties on imports. Thus, decisions on whether or not to challenge certain government programmes or private sector activities are not made, as they should be, by governments sensitive to the policy issues at stake, but rather, these decisions are made by private firms in failing or uneconomic industries in certain developed countries.

Recognizing that countervailing measures continue to be used extensively by industries in developed countries against imports from developing countries, it is important to make and support proposals aimed at constraining the use of, or preventing the abuse of, countervailing measures. The proposals seeking: to increase the standing requirements for initiating investigations, to develop better sampling techniques and verification methods, to increase the *de minimis* subsidization and the negligible import volume levels, to provide clearer rules and

procedures governing the acceptance of undertakings, to elaborate more detailed rules for administrative reviews and sunset reviews, to limit the application of duties for only as long as necessary to remedy the injury - should all be actively endorsed.

However, the focus of the Doha Round negotiations on subsidies should not be only on countervail investigations and measures. There are other issues, in particular, those relating to the definition of subsidy and the rules and procedures on actionable subsidies that call for particular attention. On the definition of subsidy, the attempt by the United States and the European Communities to expand the definition of “financial contribution” to extend to private sector activity not necessarily “directed” by a government should be resisted. This could lead to unpredictable and unintended consequences. One of the beauties of the current definition of subsidy in Article 1 of the *SCM Agreement* is that it is exhaustive and finite. By definition, any programme or activity that does not fall within its scope is not covered by the disciplines of the *Agreement*. Another important definitional issue is determining whether there is a “benefit” conferred upon a recipient. This is not elaborated in Article 1 of the *Agreement*, although there is some language in Article 14 on calculating the amount of subsidy in terms of the benefit to the recipient for the purposes of countervail. Perhaps some thought should be given to developing definitions of “benefit” similar to those outlined in Article 1 for “financial contribution”.

On the subject of prohibited subsidies, it does not appear likely that the developed country Members of the WTO will agree to modify the prohibitions on export subsidies and domestic content subsidies contained in Article 3 of the *Agreement*. These types of subsidies have been viewed, in WTO and GATT practice for a long time, as inherently trade distorting. Indeed, the European Communities has proposed that the provisions in Article 3(1)(b) on domestic content subsidies should be strengthened. I would not, therefore, spend much effort trying to modify those provisions. Where there is some room for

negotiation is on the language contained in specific items of Annex I - the Illustrative List of Export Subsidies. There is some scope for negotiating improved, more balanced provisions relating to the use of export credit financing and indirect vs. direct taxation systems. How much scope there is on these issues remains to be seen, but it is worth making an effort.

One of the most important areas for improvement in the *SCM Agreement* is Part III on actionable subsidies. The rules are complicated and difficult for WTO Members to understand and apply. An attempt should be made to develop more clear and simple rules for these types of subsidies. In addition, effective multilateral procedures for enforcing these provisions must be developed. The current provisions of Part III fail in that respect. Some creative thinking is required to develop workable rules and effective multilateral compliance mechanisms for actionable subsidies.

Finally, it would be worthwhile at least exploring the idea of reinstating a non-actionable category of subsidies to replace Articles 8 and 9 that have lapsed. Some of the balance of the *Agreement* has been lost with the expiry of Part IV. It was a category that helped to guarantee predictability and security from arbitrary and unwarranted challenges, especially with respect to countervail actions. That protection and certainty is now gone. Whether or not it will be possible to get agreement on the types of subsidies that should come within this category, an attempt should nevertheless be made.