AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

OUTLINE OF THE PRESENTATION

- **PART 1:** INTRODUCTION
- **PART 2:** SUBSIDY DISCIPLINES
  - A. What is a subsidy?
  - B. Prohibited subsidies
  - C. Actionable subsidies
  - D. Non-Actionable subsidies (lapsed)
  - E. Special and Differential Treatment
- **PART 3:** NOTIFICATION OF SUBSIDIES

PART 1: INTRODUCTION

TWO TRACKS:

MULTILATERAL TRACK

- ESTABLISHMENT OF A MULTILATERAL PANEL IN THE WTO
- ADOPTION OF THE PANEL/APPELLATE BODY REPORT BY THE DSB
- IF THE DECISION IS FAVOURABLE TO THE APPLICANT:
  1. RED SUBSIDY: WITHDRAW THE SUBSIDY
  2. YELLOW SUBSIDY: REMEDIES: WITHDRAW THE SUBSIDY OR ELIMINATION OF ITS EFFECTS

NATIONAL TRACK

- IMPORTING COUNTRY INITIATES INVESTIGATION
- 1.EVIDENCE THAT THE SUBSIDY RATE IS ABOVE DE MINIMIS
  2.EVIDENCE OF INJURY TO THE DOMESTIC INDUSTRY
  3.CAUSAL LINK
- IMPORTING COUNTRY IMPOSES COUNTERVAILING MEASURES
- THE ABOVE DECISION CAN BE CHALLENGED THROUGH THE WTO DS

MULTILATERAL DISCIPLINES VERSUS COUNTERVAILING MEASURES

Multilateral disciplines

- Rules governing what subsidies WTO Members can provide
- Prohibited subsidies / actionable subsidies
- Must challenge through WTO dispute settlement for a definitive conclusion.

MULTILATERAL DISCIPLINES VERSUS COUNTERVAILING MEASURES

Countervailing duties (CVDs)

- A duty imposed on an imported product to offset a subsidy
- Measure by a WTO Member
- Subject to dispute settlement

- <u>Note the analogy between CVD and AD !</u>

PART 2: SUBSIDY DISCIPLINES

- **A. What is a subsidy?**

The three key elements when examining whether a programme, scheme, etc. constitutes a subsidy are:

1) <u>FINANCIAL CONTRIBUTION</u>

2) <u>BY A GOV'T OR ANY PUBLIC BODY</u>

3) <u>BENEFIT</u>

If any of the three elements is missing, then the programme, scheme, etc. is NOT a subsidy under the SCM Agreement

1. Financial contribution

FINANCIAL CONTRIBUTION (ARTICLE 1.1)

1. Direct transfer of funds
   – for example, grants, loans, equity infusions

2. Potential direct transfer of funds
   – for example, loan guarantees

3. Government revenue that is otherwise due is foregone or not collected
   – for example, tax credits or import duty exemption

FINANCIAL CONTRIBUTION (ARTICLE 1.1)

4. Provision of goods or services other than general infrastructure
5. Purchase of goods
6. Income or price support

2.…by a government or any public body…

BY A GOV'T OR ANY PUBLIC BODY (ARTICLE 1.1)

Financial contribution granted by **a** Gov't (e.g. Federal, Regional, or Municipal Gov't)

OR by a public body (e.g. National Bank, National Power Company, etc.)

- Or Gov't **entrusts or directs** a private body to make the financial contribution
- Within the territory of a Member

3. ... which confers a benefit

CONCEPT OF BENEFIT

"Benefit to recipient (i.e., not Cost to government)"

Canada - Measures Affecting the Export of Civilian Aircraft (DS70)
(Panel, upheld by Appellate Body):

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."

BENEFIT: ARTICLE 14 GUIDELINES (1)

<u>Government equity infusions</u> 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*"

(Cf. share price, risk / return)

6% return

12% return

GOV'T

10%return

14% return

BENEFIT: ARTICLE 14 GUIDELINES (2)

Government 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 which the firm could actually obtain on the market**"

6% (per the Govt's instructions)

10%

10%

Regulation

Benefit = difference in interest rates

BENEFIT: ARTICLE 14 GUIDELINES (3)

<u>Government loan guarantees</u> 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

GUARANTEE

SITUATION A
(commercial guarantee)

10%

SITUATION B
(guarantee from Gov't)

8%

Guarantee
10 million

Benefit = 2%

Cost to Gov't = 0 or up to 10 million, if default

BENEFIT: ARTICLE 14 GUIDELINES (4)

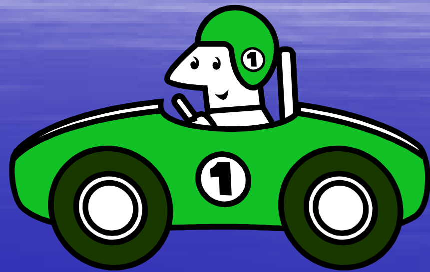
<u>Government provision of goods or services</u> does not confer a benefit unless:

– For *less* than adequate remuneration based on **prevailing market conditions**

PROVISION OF GOODS

Cars

10,000 USD/unit



PRIVATE MOTORS Co.

Cars

8,000 USD/unit

GOV’T OWNED MOTORS Co.

Benefit = 2000 USD/unit

BENEFIT: ARTICLE 14 GUIDELINES (5)

Government purchase of goods does not confer a benefit unless:

- For *more* than adequate remuneration based on **prevailing market conditions**

PURCHASE OF GOODS

SITUATION A
(price to private company)

100 USD/MT

PRIVATE STEEL Co.

SITUATION B
(price to Gov't)

120 USD/MT

PRIVATE STEEL Co.

Benefit = 20 USD/MT

SPECIFICITY

- Article 1.2

  "A subsidy … shall be subject to the provisions of Part II … Part III or V only if such a subsidy is **specific** in accordance with the provisions of Article 2."

  Part II = prohibited subsidies

  Part III = actionable subsidies

  Part V = countervailing measures

TYPES OF SPECIFICITY

1. Enterprise-specific (Art. 2.1)
2. Industry-specific (Art. 2.1)
3. Region-specific (Art. 2.2)

- Prohibited subsidies are **deemed** to be specific
  (Art. 2.3 and 3):
  - Export subsidies
  - Import substitution subsidies

De jure / de facto Specificity

De jure specificity

Government explicitly limits access, to "certain enterprises"

De facto specificity - no explicit limitation of access, **but** facts demonstrate such a limitation

- **Limited number of users,** or **predominant use** by, or **disproportionately large amounts** to, certain enterprises

B. Prohibited subsidies

PROHIBITED SUBSIDIES

- Two types (Article 3):

  (a)Contingent on **export** performance (See also Annex I of the Agreement.)

  (b)Contingent on **use of domestic** over imported **goods**
- If a panel finds that a certain measure is a prohibited subsidy, the Member shall withdraw the subsidy without delay (Article 4.7)
- Certain agricultural subsidies are subject to the Agreement on Agriculture.

C. Actionable subsidies

ACTIONABLE SUBSIDIES (Article 5)

- "No Member should cause, through the use of any subsidy ..., **adverse effects** to the interests of other Members, i.e.:

(a) **injury** to the domestic industry of another Member;

(b) **nullification or impairment** of benefits accruing directly or indirectly to other Members

(c) **serious prejudice** to the interests of another Member.

- This Article did not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture. → LAPSED END OF 2003.

“ACTIONABLE”

- Article 7.8

  If a panel report or an AB report determines that the subsidy **has resulted in adverse effects** to the interests of another Member, the Member granting or maintaining such subsidy shall take appropriate steps to **remove the adverse effects** or shall **withdraw the subsidy**.

SERIOUS PREJUDICE (ARTICLES 5 & 6)

Serious prejudice may arise in the following cases:

- Displace / impede imports of like product into **subsidizing country market** (Article 6.3(a))
- Displace / impede exports from **third-country market** (Article 6.3(b))
- Significant price undercutting, price suppression, price depression, or lost sales of like product in **same market** (Article 6.3(c))
- Increased **world market** share for primary commodity (like product by definition) (Article 6.3(d))

D. Non-actionable subsidies (lapsed)

NON-ACTIONABLE SUBSIDIES (ARTICLE 8)

Articles 8 and 9 - ***Expired*** *31 December 1999*

- Assistance for research activities
- Assistance to disadvantaged regions
- Assistance to promote adaptation of existing facilities to new environmental requirements

In line with Article 31 (Provisions regarding non-actionable subsidies to apply for five years) provisions lapsed 31 December 1999.

The Doha Decision

- In the Doha Decision on Implementation-related Issues and Concerns, Ministers took note (para 10.2):

  "of ***the proposal to treat*** measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production ***as non-actionable subsidies***...

  "During the course of the negotiations, Members are urged to exercise due restraint with respect to challenging such measures."

- Some proposals have been tabled in the negotiations

E. Special and Differential Treatment

S&D FOR IMPORT SUBSTITUTION SUBSIDIES (PHASE OUT PERIOD)

- Developed countries ("general" rule) 3 years (End-1997) (Article 28)

<u>Special and differential treatment</u>

- Least developed countries- 8 years (End-2002) (Article 27.3)
- Other developing countries (than LDCs)-5 years (End-1999) (Article 27.3)
- Countries in transformation-7 years (End-2001) (Article 29.2)

S&D FOR EXPORT SUBSIDIES (1)

- Developed countries ("general" rule)
  - Export subsidies must be eliminated in 3 years (End-1997) (Article 28)

- "Annex VII countries" (Article 27)

  (i.e. LDCs, developing countries of GNP below $1000 plus Honduras)
  - Prohibition not applicable

S&D FOR EXPORT SUBSIDIES (2)

- Other (i.e., non-Annex VII) developing country Members
  (Art. 27.4)
  - 8-year phase-out (Expired end-2002)
  - subsidy not prohibited during the above period, but can be actionable (Article 27.7)

- Such Members shall:
  - Phase-out, preferably in progressive manner
  - Not increase level of export subsidies

EXPORT SUBSIDIES: S & D - Article 27.4

- Article 27.4 provides an extension mechanism for the S&D
- Following a procedure decided at Doha, 21 countries were granted extension until 2007 (plus 2 year for phase out) in December 2002

  (Other than the above 21 countries, four Annex VII Members "reserved rights": Bolivia, Honduras, Kenya, Sri Lanka.)

  – All extensions are programme-specific and time-limited
  – stand-still and annual notification required

Implications of Extension (G/SCM/39)

– Do not affect rights and obligations under other WTO Agreements (Agreement on Agriculture)

– Do not affect prohibition under Article 3.1(b) (i.e. import substitution subsidies)

– Do not affect rules on actionability of covered subsidies

– Products that achieve export competitiveness "graduate" from extension (Arts. 27.5 and 27.6)

“EXPORT COMPETITIVENESS”

- Article 27.5 and 27.6

  If a developing country’s export of a specific product have reached “export competitiveness” i.e,

  – a share of at least 3.25% in world trade (of that product)

  – for 2 consecutive years

  that developing country must phase out its export subsidies for such products over a period of 2 years (8 years for annex VII countries)

S&D (Multilateral Disciplines)

	EXPORT SUB. DISCIPLINES	ONCE PRODUCT-SPEC EXPORT COMPET'NESS	IMPORT SUB. DISCIPLINES
ANNEX V MEMBERS	Does NOT apply	8 years phase-out	
OTHER DEVELOPING MEMBERS	Program-specific extension (27.4)	2 years phase-out	fully applicable
DEVELOPED MEMBERS	fully applicable	(N.A.)	

S&D (Remedy and Investigation)

	REMEDY ?			INVESTI – GATION ?
	PROHIBITED		ACTION-ABLE Sub	
	EXPORT Sub.	IMPORT-S Sub.		
VERSUS DEVELOPING MEMBERS	limited in certain cases (27.7)	fully applicable	ONLY nullification / impairment OR injury	will be terminated in specific cases (Art. 27.10)
VERSUS DEVELOPED MEMBERS	fully applicable		fully applicable	fully applicable

PART 3: NOTIFICATION OF SUBSIDIES

WHICH MEMBERS MUST MAKE A NOTIFICATION?

- All WTO members, without exception, must submit any notification required

PURPOSE OF NOTIFICATION REQUIREMENT

- Transparency
- No legal implications
- Article 25.7: "Notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself"
- When in doubt, err in favour of notification

WHEN ARE THEY TO BE NOTIFIED?

Article 25

- New and full notification each three years, annual updating notification (of any changes) each intervening year.

NOTE: The SCM Committee is currently following, on a trial basis, the formula to submit new and full notifications every 2 years and de-emphasize the updates.

- Notification no later than 30 June in year due, covering the previous completed calendar or fiscal year(s)

INFORMATION TO BE PROVIDED (G/SCM/6)

1. Title of the subsidy programme

2. Period covered by the notification.

3. Policy objective and/or purpose of the subsidy.

4. Background and authority for the subsidy (including identification of the legislation under which it is granted).

5. Form of the subsidy (i.e., grant, loan, tax concession, etc.).

INFORMATION TO BE PROVIDED (cont'd)

6. To whom and how the subsidy is provided

7. Subsidy per unit
   (if not possible, the total or annual amount budgeted for that subsidy)

8. Duration of the subsidy and/or any other time limits attached to it

9. Statistical data permitting an assessment of the trade effects of the subsidy.