WTO DISCIPLINES
ON SUBSIDIES AND
COUNTERVAILING
MEASURES

Balancing Policy Space and Legal Constraints

DOMINIC COPPENS
CONTENTS

List of figures page xx
List of tables xxi
Acknowledgements xxii
Foreword by Petros C. Mavroidis xxv
Table of WTO and GATT dispute settlement reports xxvii
List of abbreviations xlvii

General introduction 1

1 Rationales for offering subsidies 5
  1.1 The absence of a rationale for subsidization 6
  1.2 The market failure rationale for subsidization 8
  1.3 The profit-shifting rationale for subsidization 10
  1.4 The redistribution rationale for subsidization 12
  1.5 The political-economy rationale for subsidization 13
  1.6 Conclusion 16

PART I Legal disciplines on subsidization and the imposition of countervailing measures 19

2 Historical overview 21
  2.1 GATT 1947 21
  2.2 The 1954–1955 Review Session and the 1960 Declaration 24
  2.3 The Tokyo Round: the Subsidies Code 27
  2.4 The Uruguay Round: the SCM Agreement and the Agreement on Agriculture 30
  2.5 The Doha Round negotiations 35
CONTENTS

3 The scope of the SCM Agreement 39

3.1 Financial contribution by a government or income or price support 39

3.1.1 Financial contribution 39

3.1.1.1 The (potential) direct transfer of funds and liabilities 40

3.1.1.2 The provision of goods or services or purchase of goods other than general infrastructure 42

3.1.1.3 The government forgoes revenue which is otherwise due 45

3.1.2 By a government 50

3.1.2.1 Direct financial contribution: by a government in the narrow sense or a public body 50

3.1.2.2 Indirect financial contribution: entrustment or direction of a private body 53

3.1.3 Income or price support 57

3.2 Benefit 59

3.2.1 Determination of the relevant benchmark when private prices are distorted and when the government creates a market 63

3.2.1.1 Determination of the relevant benchmark when private prices are distorted 65

3.2.1.1.1 Alternative benchmarks in the case where the government provides goods or services 65

3.2.1.1.1.1 When could alternative benchmarks be used? 68

3.2.1.1.1.2 How should alternative benchmarks be constructed? 70

3.2.1.1.2 Alternative benchmarks in the case where the government transfers (potential) direct funds 72

3.2.1.1.3 Doha Round negotiations 74

3.2.1.2 Determination of the benchmark when the government creates a market 75

3.2.1.2.1 Introduction to the Canada - Renewable Energy / Feed-in Tariff Program case 76

3.2.1.2.2 When could an alternative benchmark be used? 79

3.2.1.2.3 What is the alternative benchmark in a market created by the government? 82

3.2.1.2.4 Through which types of financial contribution could a market be created? 85

3.2.1.2.5 Conclusion 87

3.2.2 Determination of the recipient 88

3.2.2.1 Pass-through of benefit 90

3.2.2.1.1 Countervailing duty cases 90

3.2.2.1.2 Actionable subsidy cases 96

3.2.2.2 Privatization of a subsidized enterprise 97
3.3 Specificity 100

3.3.1 Subsidies deemed to be specific 100

3.3.2 Specificity de jure and de facto 101

3.3.2.1 De jure specificity 103

3.3.2.2 Non-specificity resulting from objective eligibility criteria 106

3.3.2.3 De facto specificity 107

3.3.3 Regional subsidies 111

4 Disciplines on subsidies 115

4.1 Prohibited subsidies 116

4.1.1 Export subsidies 116

4.1.1.1 Export subsidies in the meaning of Article 1 in conjunction with Article 3 of the SCM Agreement: subsidies 'contingent' on exportation 119

4.1.1.2 Export subsidies in the meaning of one of the items of the Illustrative List 124

4.1.1.2.1 The provision of goods or services favourable to exporters 125

4.1.1.2.2 Border tax adjustments and duty drawback systems 127

4.1.1.2.2.1 Border tax adjustments 127

4.1.1.2.2.1.1 Introduction 127

4.1.1.2.2.1.2 Direct taxes 129

4.1.1.2.2.1.3 Indirect taxes 130

4.1.1.2.2.2 Duty drawback systems 132

4.1.1.2.3 The (potential) direct transfer of funds: export credit support 135

4.1.1.3 Export subsidies not prohibited under the Illustrative List 136

4.1.2 Local content subsidies 140

4.2 Actionable subsidies 143

4.2.1 Injury to the domestic industry 144

4.2.2 Nullification or impairment of benefits 146

4.2.3 Serious prejudice 147

4.2.3.1 The need to demonstrate present adverse effects 149

4.2.3.2 The origin and likeness of products under a serious prejudice claim 151

4.2.3.3 The delineation of the relevant product market under a serious prejudice claim 153

4.2.3.4 Types of market phenomena 154

4.2.3.4.1 Volume effects 154

4.2.3.4.1.1 Displacement or impedance of exports to the market of the subsidizing member or a third country 154
4.2.3.4.1.1 Contextual support to show displacement or impedance to third-country markets 156
4.2.3.4.1.2 Circumstances in which no displacement or impedance of trade would arise 160
4.2.3.4.1.2 Significant lost sales in the same market 161
4.2.3.4.1.3 Increase in the world market share of primary product or commodity 161
4.2.3.4.2 Price effects 163
4.2.3.4.2.1 Significant price undercutting 163
4.2.3.4.2.2 Significant price suppression or depression 164
4.2.3.5 Causation 165
4.2.3.5.1 Causation standard 165
4.2.3.5.2 Methodology: unitary or bifurcated analysis 166
4.2.3.5.3 The nature of the causation analysis: quantitative and/or qualitative? 169
4.2.3.5.4 Collective assessment of subsidies and their effect 172

4.2.4 Analysis of relevant case law 174
4.2.4.1 Indonesia - Autos 174
4.2.4.2 US - Upland Cotton 176
4.2.4.3 EC - Large Civil Aircraft 178
4.2.4.3.1 Displacement and significant lost sales 179
4.2.4.3.2 Causation 180
4.2.4.4 US - Large Civil Aircraft 182
4.2.4.4.1 Serious prejudice resulting from product effects caused by R&D subsidies 183
4.2.4.4.2 Serious prejudice resulting from price effects caused by tied tax subsidies 184
4.2.4.4.3 Collective assessment of subsidies and their effects 186

4.3 Non-actionable subsidies 187

4.4 The applicability of the GATT with regard to subsidies 189
4.4.1 The national treatment obligation stipulated in Article III of the GATT 189
4.4.2 The general exceptions stipulated in Article XX of the GATT 192

5 Remedies 196
5.1 Multilateral remedies: the WTO dispute settlement system 197
5.1.1 Time frame 198
5.1.2 Information gathering 199
5.1.3 Implementation standards and remedies in case of non-implementation 200
  5.1.3.1 Prohibited subsidies 200
    5.1.3.1.1 Implementation 200
    5.1.3.1.2 Remedy in case of non-implementation 203
  5.1.3.2 Actionable subsidies 211
    5.1.3.2.1 Implementation 211
    5.1.3.2.2 Remedy in case of non-implementation 211
  5.1.3.3 Non-actionable subsidies 219

5.2 Unilateral remedies: countervailing measures 220
  5.2.1 Procedural requirements 220
    5.2.1.1 Initiation and duration 221
    5.2.1.2 Consultation of alleged subsidizing member 222
    5.2.1.3 Gathering of evidence 223
      5.2.1.3.1 Due process rights in the gathering of evidence 223
      5.2.1.3.2 The evidentiary standard 225
  5.2.2 Substantive requirements 227
    5.2.2.1 Specific subsidy 227
    5.2.2.2 Injury or threat of injury 228
      5.2.2.2.1 Positive evidence and objective examination 229
      5.2.2.2.2 Volume and/or price effect 232
      5.2.2.2.3 The impact of volume and/or price effect on the state of the domestic industry 233
      5.2.2.2.4 Definition of domestic industry 234
    5.2.2.3 Causation 237
  5.2.3 The prohibition on double remedies 242
  5.2.4 Imposition of countervailing measures 245
  5.2.5 Duration of countervailing measures 247
    5.2.5.1 Administrative review 248
    5.2.5.2 Sunset review 249
  5.2.6 The standard of review 250

6 Differential treatment 253
  6.1 Ratione personae: special and differential treatment for developing countries 253
    6.1.1 Special and differential treatment for prohibited subsidies 254
      6.1.1.1 Export subsidies 254
        6.1.1.1.1 Annex VII developing countries: least-developed countries and low-income countries listed in Annex VII(B) 254
        6.1.1.1.2 Small trading developing countries 256
CONTENTS

6.1.1.3 Export competitiveness 260
6.1.1.2 Local content subsidies 266

6.1.2 Special and differential treatment for actionable subsidies 267

6.1.3 Special and differential treatment for countervailing duties 273

6.1.4 Conclusion 277

6.2 Ratione materiae: the Agreement on Agriculture 279

6.2.1 Export competition 280

6.2.1.1 Order of analysis 280

6.2.1.2 Disciplines on agricultural export subsidies 281

6.2.1.2.1 Listed types of export subsidy 282

6.2.1.2.1.1 Direct subsidies to agricultural producers contingent on export performance 283

6.2.1.2.1.2 Payments on the export of an agricultural product financed by virtue of government action 285

6.2.1.2.1.3 Subsidies to reduce the costs of marketing exports of agricultural products 289

6.2.1.2.1.2 Disciplines 290

6.2.1.2.1.3 Conclusion and Doha Round negotiations 296

6.2.1.2.2 Non-listed types of export subsidy 297

6.2.1.2.2.1 Scope 297

6.2.1.2.2.2 Disciplines 299

6.2.1.2.2.2.1 Actual circumvention 299

6.2.1.2.2.2.2 Threat of circumvention 301

6.2.1.2.2.2.3 Conclusion 302

6.2.1.2.3 Non-commercial transactions: international food aid 304

6.2.1.2.3.1 Disciplines on international food aid 304

6.2.1.2.3.2 The need to preserve genuine international food aid 309

6.2.1.3 The burden of proof 311

6.2.2 Domestic support 314

6.2.2.1 Green box domestic support 314

6.2.2.2 Blue box domestic support 316

6.2.2.3 Special and differential box domestic support 317

6.2.2.4 Amber box domestic support 318

6.2.2.5 Conclusion and Doha Round negotiations 321

6.2.3 The relationship between the SCM Agreement and the Agreement on Agriculture 323

6.2.3.1 Are agricultural export subsidies and local content subsidies prohibited under the SCM Agreement? 324
CONTENTS

6.2.3.2 Are agricultural subsidies actionable under the SCM Agreement? 329
  6.2.3.2.1 Agricultural domestic subsidies 329
  6.2.3.2.2 Agricultural export subsidies 331
6.2.3.3 Are agricultural subsidies countervailable? 332
6.2.3.4 Conclusion 333

PART II Case study: WTO disciplines on export credit support 335

7 Export credit support 337
  7.1 Definition 337
  7.2 Rationales for and provision of export credit support to non-agricultural products 339
  7.3 Rationales for and provision of export credit support to agricultural products 345

8 Rationale for disciplining export credit support: historical context 349
  8.1 Export credit support for non-agricultural products 349
  8.2 Export credit support for agricultural products 356

9 Main elements of the OECD arrangement 358

10 Disciplines on export credit support for non-agricultural products 361
  10.1 Is export credit support a specific subsidy under the SCM Agreement? 361
    10.1.1 Financial contribution by the government 361
    10.1.2 The benefit element 363
  10.2 Is subsidized export credit support a prohibited export subsidy under the SCM Agreement? 367
    10.2.1 Article 3.1(a) of the SCM Agreement 367
    10.2.2 Export credit support as an export subsidy pursuant to items (j) and (k) of the Illustrative List of Export Subsidies 368
      10.2.2.1 Item (j) of the Illustrative List 368
      10.2.2.2 Item (k), paragraph 1 of the Illustrative List 369
    10.2.3 The relationship between Article 3.1(a) of the SCM Agreement and the Illustrative List of Export Subsidies 372
CONTENTS

10.2.3.1 Could item (j) and paragraph 1 of item (k) be used *a contrario*? 373
10.2.3.2 The relevance of item (j) and paragraph 1 of item (k) as export subsidies per se 375

10.2.4 Export credit practices which are not prohibited: the OECD Arrangement safe haven 378

10.2.4.1 The potential and actual scope of the safe haven 379
10.2.4.2 Conformity with the safe haven 381

10.3 How safe is the safe haven? Is non-prohibited subsidized export credit support countervailable and/or actionable? 386

10.4 An exception to the export subsidy prohibition for some developing countries 391

10.5 Export credit support as local content subsidy 392

11 Disciplines on export credit support for agricultural products 398

11.1 Export credit support for agricultural products under the Agreement on Agriculture 398

11.1.1 Scope: export subsidies not listed in paragraph 1 of Article 9 of the Agreement on Agriculture 399

11.1.1.1 Is subsidized export credit support covered by Article 10.1 of the Agreement on Agriculture? 399
11.1.1.2 When is export credit support considered an export subsidy within the meaning of Article 10.1 of the Agreement on Agriculture? 404

11.1.1.2.1 Export subsidies as defined by item (j) of the Illustrative List 405
11.1.1.2.2 Export subsidies as defined by Article 1 in conjunction with Article 3 of the SCM Agreement 408

11.1.2 Disciplines: circumvention or threat of circumvention 410

11.2 Export credit support for agricultural products under the SCM Agreement 413

12 Export credit support in the light of the GATS 417

13 Negotiations on export credit support disciplines in the Doha Round 423

13.1 Negotiations on export credit support for non-agricultural products in the Doha Round 423
13.1.1 Redrafting the export subsidy standard under items (j) and (k) 423
13.1.2 Redrafting the safe haven in paragraph 2 of item (k) 425
13.2 Negotiations on export credit support for agricultural products in the Doha Round 427
13.2.1 Overview of the negotiation process 427
13.2.2 The latest draft on disciplines for agricultural export credit support 432
13.2.2.1 The scope of new disciplines on export credit support 433
13.2.2.2 The substance of new disciplines on export credit support 433
13.2.2.3 Evaluation of new disciplines on export credit support 435
14 Conclusion: normative analysis of disciplines on export credit support 438
14.1 Overview and normative analysis of disciplines on export credit support for non-agricultural products 438
14.2 Overview and normative analysis of disciplines on export credit support for agricultural products 441

PART III Normative analysis of disciplines on subsidization and the imposition of countervailing measures 445
15 The scope of the SCM Agreement: specific subsidies 447
15.1 Financial contribution element 448
15.1.1 Closed list of government interventions 448
15.1.2 Subsidization by forgoing revenue otherwise due 451
15.2 The benefit element 454
15.2.1 The market benchmark 454
15.2.1.1 The Canada – Renewable Energy / Feed-in Tariff Program case: feeding legitimate policy objectives into the benefit analysis? 454
15.2.1.1.1 The Appellate Body’s new approach to the benefit analysis 455
15.2.1.1.2 The relevance of the pursued policy objective under the Appellate Body’s new benefit analysis 458
15.2.1.1.3 Limiting the implications of the Appellate Body’s new approach to the benefit analysis 463
CONTENTS

15.2.1.1.4 Was the Appellate Body's new approach to the benefit analysis warranted? 465
15.2.1.2 The disregard of the broader regulatory framework for the benefit analysis 468
15.2.2 The impact of privatization and the distortive effect on competition 469
15.2.2.1 The impact of privatization 471
15.2.2.2 The distortive effect on competition 478
15.3 The specificity element 480
15.3.1 The rationale for the specificity test 480
15.3.2 The application of the specificity test 483

16 Disciplines on subsidization by developed countries 485
16.1 Disciplines on domestic subsidies 485
16.1.1 Substantive considerations: subsidies as a legitimate policy tool 486
16.1.1.1 Research and development subsidies 488
16.1.1.2 Environmental subsidies 492
16.1.1.2.1 Technical requirements 493
16.1.1.2.2 Support for climate-friendly goods 495
16.1.1.2.2.1 Incentives for the development of the renewable energy sector 495
16.1.1.2.2.1.1 Incentives for renewable energy production 496
16.1.1.2.2.1.2 Incentives for biofuel production 500
16.1.1.2.2.2 Normative analysis of policy space for the development of climate-friendly goods 502
16.1.1.2.2.2.1 Local content subsidies 504
16.1.1.2.2.2.2 Producer subsidies 505
16.1.1.2.2.3 Consumer subsidies 512
16.1.1.2.2.4 Conclusion 514
16.1.1.2.3 Government interventions internalizing the cost of greenhouse gas emissions 515
16.1.1.2.3.1 Border tax adjustment on carbon tax 516
16.1.1.2.3.2 Emission trading schemes 518
16.1.1.3 Assistance to disadvantaged regions 526
16.1.1.4 Multifunctionality in agriculture 527
16.1.2 Systemic considerations: the chilling effect on tariff negotiations 529
16.2 Disciplines on export subsidies 537
CONTENTS

17 Disciplines on subsidization by developing countries 553
  17.1 The rationale for policy space on subsidization 553
  17.2 Disciplines on domestic subsidies 557
    17.2.1 The prohibition on local content subsidies 557
    17.2.2 Disciplines on all other domestic subsidies 558
  17.3 Disciplines on export subsidies 563
    17.3.1 The rationale for policy space to subsidize exports 563
    17.3.2 Policy space given to some developing countries to offer export subsidies 566
    17.3.3 The prohibition on export subsidies imposed on other developing countries 571
    17.3.4 Exchange rate policies under the SCM Agreement 578
      17.3.4.1 Financial contribution analysis 580
      17.3.4.2 Benefit analysis 583
      17.3.4.3 Specificity analysis 584
      17.3.4.4 Conclusion 585
  18 Disciplines on countervailing measures 588
    18.1 The rationale for imposing and restricting CVD action 588
    18.2 The rationale for allowing CVD action under a multilateral trading system 591
      18.2.1 The deterrence justification 593
      18.2.2 The systemic justification 595
      18.2.3 The absence of any justification 599
  19 Disciplines on subsidies in the light of policy responses to the economic crisis 601
    Overall conclusion 608

Bibliography 614
Index 634