

World Trade Organization, 2012 WTO Public Forum (Invited), *"Is Multilateralism in Crisis?"*,
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Since 2006, more than a quarter of the requests for consultation at the WTO have invoked the SCM Agreement more than half of which have involved China – mostly as respondent.

I think the nature of 21st century subsidy disputes that along with AD cases, are clearly on the rise – not only in terms of number but more importantly in terms of scope of government actions and regulatory areas they cover – is as much about economic conflicts as they are about ideational and at some deeper level ideological conflicts over the "proper" role of the state in a market economy.

In light of the theme of this panel, I address the changing attitude of international trade players towards the "proper role of government in the economy" in past, present and future of the debate on subsidies: *how various measures of government intervention over time were "imagined" as "subsidies" and as part of a larger vocabulary of "unfair trade"*.

As you will see what has been "perceived" and condemned as "subsidy" (in national, bilateral and multilateral settings) has not remained the same throughout history:

The meaning of the term "subsidy" had remained almost the same since 17th century all the way through 1970s: bounties (later "subsidies" in international trade context) have been **imagined as a fairly narrow and relatively clear act of state intervention**: if you see 1923 classic work of Jacob Viner, bounties were a *specific branch of "dumping" which is government-induced* and often takes a form of either excessive rebate of internal taxes or excessive rebate of duty drawbacks (refunding

duties on imported products or inputs to production at the time of exportation or re-exportation).

Two interesting historical facts:

- Russia did not join the Brussels Sugar Convention in 1902 was precisely because of its narrow focus not including broader competition issues!
- AD laws in the US on the other hand, started as an anti-trust policy but later the Canadian model spread all over the world including in the US.

Throughout the life of AD/CVD laws from 1890 until 1970s, governments almost never used administered protection against “production subsidies” although they legally could after 1922 in the US for instance, and were very hesitant to use it even against export subsidies.

My claim is that this was not because of lack of such subsidies (as we imagined them today) but a different vision that dominated the old world about unfair trade and protectionism.

This mode of consciousness survived in Post-WWII (first two decades of the GATT) while at the **ideational level there were two things running at the same time: At the international level the idea of “Embedded liberalism”** (liberal trade coupled with necessary safeguards) **and** at the national level **“Keynesian” revolution was** at full speed in the welfare states of the post world war. More specifically **domestic subsidies were politically and economically justified as “second best” to tariffs which were gradually going down through GATT Rounds.**

- Hence, **GATT’s lenient disciplines on subsidies**
 - [e.g. loans and loan guarantees, negative tax discrimination as evidenced in GATT III: 8, public procurement or purchase, let alone price regulations, mandates, etc.)
 - *As a twin—sister of dumping*: addressed in GATT VI and XVI: ITO and later GATT XVI: 4 bi-level pricing)

- *Only a handful of CVD during the 50s and 60s. (AD also used sporadically)*

The Neo-liberal turn: 1970s/80s & 90s:

- There was a new **tendency in US courts in the 1970s towards viewing every conceivable measure of government intervention as subsidy**. (Zenith Radio v United States 1978; see Hufbaer) This went against the Treasury's free trade inclination at the time; but soon Treasury Department made its way to Commerce Department in 1980 as the agency responsible for AD/CVD investigations.
- **Tokyo Code 1979 for the first time prohibited an illustrative list of export subsidies and moved away from dumping-style thinking about subsidies towards the language of "distortion and injury"**: If you look at the legal literature at the time (including Hufbaer, Jackson, etc.) this narrow illustrative list and a lack of a more comprehensive definition on the Tokyo Code was perceived and it is still perceived today as a huge "shortcoming" that needed to be rectified in the Uruguay Round.
- **The SCM** turned this around and for the very first time in history devised a definition of subsidy which although did not include every single measure of government support or government-created rent, it was by far the broadest understanding of a countervailable subsidy and the text seems by many to have further potential to be interpreted even more broadly.
- From a political ideological viewpoint, this could only be done while **Thatchersim and Reganomics** – free market, small government, so on – had replaced the orthodoxy of the past especially Keynesianism which had been perceived as a utter failure!

- Yet as we know, the government never in reality got out of the market in the way consistent with the neoliberal rhetoric. The world saw the sharpest increase in the use of CVD (along with AD) apart from VER and so on. One might argue that these were all necessary or inevitable due to the rise of the US dollar, etc. but this would NOT be seen by Margaret Thatcher's favorite libertarian economist Friedrich Von Hayek as a justification for government intervention.
- Cognizant of the potential damage of CVD laws to US-type government interventions, the US Administration (DOC) aligned the definition "specificity" with the US model of governance.
- Another though less striking instance of the role of ideology in the formation of the SCM is the story of green light category: 1993: last year of the Uruguay Round: Financial Times and Wall Street Journal refers to the US election in the year before the conclusion of the UR as representing an "ideological shift" in the US Administration with respect of subsidies: non-actionable (green light category)

PRESENT: I think TODAY the SCM is partly a reflection of the orthodoxy that I just described and that is reflected in the sweeping definition of countervailable subsidy (at least according to the AB's understanding of the text) which covers a vast array of measures that are considered even by neo-classical economists (let alone neo-Keynesian economists) as overly restrictive not taking into account the proper role of government in rectifying market failures such as environmental, coordination and information failures that lead to market's creation of socially undesirable outcomes. For example I think the AB's interpretation of, 14 (d) in US Lumber IV which was extended to 14 (b) in the recent US AD/CVD (China) is a reflection of the old orthodoxy read into the text.

One of the problems of such broad interpretive approach to the definition (what is in and what is out) apart from the normative, ideological aspect of it: not recognizing the pervasive role of the state in addressing market failures) is that a broad definition leads to larger scope for abusive CVD actions which are no less prone to rent-seeking than subsidization per se.

Having said that, the AB has been diligently countering the broad definition approach, at least in the area of actionable subsidies, with a very strict procedural and evidence-based approach towards “adverse effect” especially serious prejudice and to a lesser extent causation.

Overall, I think the AB, has chosen the most formalist interpretive approach to the SCM text compared to other WTO agreements. And I think this is understandable perhaps for political expediency reasons as Bob Hudec brilliantly called “formalism an judicial “avoidance technique”. But the problem with that is that too much emphasis about “lack of sufficient evidence” or “to be examined on a case by case basis” contributes little to the predictability and certainty without which “rule of law” objectives of the Uruguay Round would be undermined.

The Appellate Body has also so far avoided playing that meditative role in the ideological aspect of subsidy conflict that I described earlier. But this is bound to change and as we have already seen in US AD/CVD (by China), the AB changed a conventional wisdom as to what constitutes ‘public body’. In deciding that a “public body” is not simply a majority-owned entity, the AB said:

“A public body within the meaning of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case.”

CONCLUDING WITH A FEW POINTS ON THE FUTURE

With the emergence of BRIC countries and whatever comes out of the US and EU in terms of the government responses to the on-going financial crisis, we face grave challenges in the area of subsidies with almost all of the pressure being exerted on the panels and the AB.

The objective of the SCM should be aligned with the objective of WTO/GATT in general which should be to strike the right balance between Member States right to regulate and promote the environment as well as development through all sorts of sound policies including industrial policy while ensuring against Members resorting to “protectionism” – which means nothing more than pure rent-seeking by import-competing industries at the expense of public at large. I think the future of judicial law-making in the subsidy area should be about fine-tuning and getting that balance right.

We have heard a lot these days about concerns over **the rise of protectionism** *as cholesterol accumulating in the blood of the world trading system* and it may well be true: but I think there is a problem of viewing protectionism as a laundry list of trade restrictive measures in terms of “effect” regardless of “intent”. Not distinguishing between what may be perceived by many as “sound economic, environmental or industrial policy” on the one hand and pure rent-seeking by import-competing industries at the expense of public at large (famous examples of which is farm and ethanol subsidies but also fossil fuel or even some of the renewable energy support schemes that are all about throwing money at a problem

motivated by special interest) I think is a reflection of an orthodoxy – reminiscence of the neoliberal consciousness – which needs to be revisited.

