

Make the playing field level again!

(Ensuring global fair trade by 2030)

Panel hosted by European Commission, United States Trade
Representative and the Government of Japan

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Subsidies Disciplines—CVD vs. Adverse Effects

- CVD preferred remedy by most countries
 - 154 measures in force
 - 46 WTO disputes alleging violations of Article 10 of ASCM
- Adverse effects
 - 9 WTO disputes alleging violations of Article 6 of ASCM

Problem with CVDs—

- a. Only available if the subsidized goods come into your market
- b. Pushes subsidized goods into other markets

Subsidies Disciplines Haven't Worked—Why?

1. Focus on defining the “contributor” of the subsidy—narrow approach based on the *function* of the “contributor”
2. Remedy once a subsidy is found—remove the adverse effects in a system of prospective relief does not work
3. Evidence—each part of subsidy analysis requires substantial evidence that is hard to obtain

Need to change definition of government/public body

ASCM: “government or any public body”

AB in *China-AD/CD*— “A public body . . . must be an entity that possesses, exercises or is vested with governmental authority.”

Definition can be:

1. Function based
2. Ownership based
3. Control based

Need to change to definition that can encompass all or a combination of them

Need to reexamine evidentiary requirements

- Subsidy cases notoriously difficult to bring due to lack of transparency and information about subsidies
- Evidentiary burden particularly difficult due to requirement in serious prejudice cases to prove the effect of the subsidy
- Evidentiary burden greater with respect to SOEs if have to provide evidence beyond 100% government ownership
- New subsidy disciplines should create more rebuttable presumptions in favor of finding adverse effects due to subsidies based on the type of subsidy, the amount of the subsidy, the increase in production and output following the receipt of the subsidy and any increases in exports of the products receiving subsidies

Expand definition of prohibited subsidy

- Most efficient way to address problems of overcapacity and related problems may be to expand the definition of a prohibited subsidy under Article 3 of the ASCM.
- Would clarify that remedy is “withdrawal of the subsidy without delay” and provide expedited procedures for failures to withdraw the subsidy.
- Prohibited subsidies could include: below-market financing, transfers of funds to cover operating losses, loans to uncreditworthy entities, loans to insolvent enterprises without a credible restructuring plan, and the provision of key material inputs at below market rates.
- Plus push to renew the expired provisions of the ASCM, including Article 6.1 (presumption of serious prejudice) along with Article 8 (non-actionable subsidies)

Need to reconsider remedy in serious prejudice cases

- If serious prejudice/adverse effects found, remedy is “take appropriate steps to remove the adverse effects” or “withdraw” the subsidy
- Problem for cases in which excess capacity has already been built using subsidies is the lack of clarity about what it means to “remove the adverse effects” of a subsidy—with little chance that manufacturing facilities will be dismantled
- AB in *EC –Large Civil Aircraft (Article 21.5-US)* “To the extent that the underlying subsidy has ceased to exist, there is no additional requirement, under Article 7.8, to remove any lingering effects that may flow from that subsidy.”
- Remedies need to be designed to force repayment of subsidies, even at the possible cost of foreclosures

Trilateral Cooperation—EU, Japan, US

- Formed at MC 11 in Argentina-December 12, 2017

--Agreed to strengthen commitment to ensure global level playing field

--Concern with severe excess capacity exacerbated by:

- a) government-financed and support capacity expansion,
- b) unfair competitive conditions cause by large market-distorting subsidies and state owned enterprises,
- c) forced technology transfer
- d) local content requirements and preferences

Trilateral Cooperation Scoping Paper—May 31 2018

1. Improve transparency in notifying subsidies
2. Better address public bodies and SOEs
 - basis for determining what is a “public body”
 - how to address distortions by non “public bodies”
 - additional obligations and rules for public bodies and SOEs
3. More effective subsidy rules
 - prohibit or at least shift the burden of proof for the most harmful types of subsidies
 - developed new rules for a targeted remedy to address subsidies related to excess capacity
 - strengthen rules to allow greater information gathering on subsidies and their effects

Trilateral Cooperation-Joint Statement Sept 25, 2018

- Need to address market-distorting behavior and confront particularly subsidy practices, including:
 - State-owned bank lending incompatible with a company's creditworthiness
 - Government or government-controlled investment fund equity investment on non-commercial terms
 - Non-commercial debt-to-equity swaps
 - Preferential input pricing, including dual pricing
 - Subsidies to ailing enterprises without a credible restructuring plan
 - Subsidies leading to or maintaining overcapacity
- Need to impose costs for notification and transparency failures
- Strengthen ability to obtain information on subsidies