

Analyzing the Disputes on Subsidy and Countervailing Measures

Implications for the Current WTO Negotiations

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Abstract: Presently the Doha Round negotiations for ensuring disciplines in the area of subsidies and countervailing measures are going on at the multilateral level. In particular, a major focus of the current negotiation is on removal of the actionable subsidies being provided in the fishery sector. The current analysis looks into the Agreement on Subsidies and Countervailing Measures and points out the areas for further reform with reference to the findings on the disputes lodged at the dispute settlement body of the WTO. In addition, the analysis attempts to identify the concern areas for the ongoing fisheries subsidies negotiation.

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I. DOHA ROUND NEGOTIATIONS ON SUBSIDY AND COUNTERVAILING MEASURES

Provision of subsidies to domestic players in order to create price advantage for them is a time-tested practice in international trade. The trade-distorting effects of subsidies have been pointed widely in the literature (Sharp and Sumaila, 2009; Tallontire, 2004; Gooday, 2002; OCEANA, undated). Hence in recent period international trade governance has been characterised by a progressive regulation on subsidies, tightening disciplines over time in order to avoid such distortions. These rules essentially seek to balance the need for redistribution and implementation of legitimate policy goals and to avoid protectionism and unnecessary distortions of conditions of competition on domestic markets. Trade-restrictive border measures apply to countervail unlawful subsidies but are not at the heart of legal rules relating to this important field of international trade law.

Subsidies consist of specific financial or equivalent benefits to public entities and economic operators. To offset price advantages of imported products, states make specific monetary payments or provide tax relieves to domestic producers, allowing them to lower domestic or export prices and obtain a competitive advantage vis-à-vis competing foreign products. Subsidies exist in different forms (export subsidies, domestic subsidies, production subsidies or decoupled subsidies). Subsidies are specific and different from general payments such as social security to which the public at large or large segments of the population are entitled to. Subsidies are an important instrument in pursuing domestic policy goals and redistribution. At the same time, they exert distorting effects on competition, in particular to the detriment of foreign competitors who generally do not benefit from such measures.⁴ On the one side, they can improve the domestic economy, but on the other side, they can distort trade.⁵

The efforts to address concerns originating from provision of industrial subsidies started quite early as compared to other disciplines. The GATT 1947 Contracting Parties adopted an illustrative list of prohibited export subsidies in 1960 before the Tokyo Round negotiations resulted in the conclusion of a special Code for Subsidies. During the Uruguay Round negotiations, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) was negotiated. The SCM Agreement

⁴ Countervailing duties may be imposed after an investigation of a member has led to determine the existence of i) a countervailable subsidy; ii) injury to the domestic industry producing the like product; and iii) a causal link between the subsidised imports and the injury.

⁵ The striking example of trade distorting subsidies, the upland cotton subsidies granted by US government for local farmers which had more adverse consequences away from its shores. The efforts of rural farmers in developing countries are being undermined by these subsidies. Therefore the fulfillment of obligations by WTO members and further development of subsidies regulation within the WTO framework prevent its Members from the adverse consequences of harmful subsidies. To sum up, the main focus of subsidy regulation, established under the WTO agreements, is to try to control and reduce the trade-distorting effects of subsidies.

defines the term ‘subsidy’⁶ in detail in Article 1. Moreover, it classifies subsidies into three broad categories: i) prohibited; ii) actionable; and iii) non-actionable subsidies. This categorisation is sometimes referred to as a ‘traffic light’ approach. Prohibited subsidies are ‘red light’ subsidies which are harmful to trade per se. Non-actionable subsidies are ‘green light’ subsidies which are considered to be permitted on the grounds of an explicit reference in the legal text. This category unfortunately was applied only for a period of five years beginning with the entry into force of the WTO, since developing countries were afraid it would be excessively used by industrialised countries. Today efforts are under way to put it back, as the category is important for the promotion of small and medium-sized enterprises (SMEs) in developing countries as well. Lastly, actionable subsidies are ‘yellow light’ subsidies which are open to be challenged only if they are considered to cause adverse effects on international trade.

In the recent period, under the Doha Round negotiations the concern over provision of fisheries subsidies has taken a central position, given its implications for the wide number of fishermen in developing countries and LDCs.

The fishery sector provided direct employment to more than 250 million people for their livelihoods during late nineties (Porter, 1997) and the number has increased considerably since then. Nearly 40 per cent of global fishery production is exported, and almost fifty percent of international trade in this category is explained by developing country exports (Dommen and Deere, 1999). The “Open Access” nature of a significant part of world’s marine fisheries and massive state subsidies are cited as the major reason behind overcapitalization of fishing industry. Fisheries subsidies lower the total cost of production, leading to exploitation of fish stocks, particularly in the absence of effective management (Datta and Nilakantan, 2005; UNEP, 2004).

It is also argued that though fishing access agreements confer economic benefits to the South if effective enforcement and compliance mechanisms are introduced (Atta-Mills et al, 2004), evidence during nineties did not always provide empirical support to this contention (Milazzo, 1998). In particular, it has been reported that several of the EU fisheries agreements with West African States during this period were potentially harmful for them, as catch quotas for EU vessels were not specified, which potentially leads to resource overexploitation (Kaczynski and Fluharty, 2002). Similar overexploitation was observed in case of some other countries as well (Mwikya, 2006; Steenblik and Munro, undated).

⁶ Since the Agreement includes in its definition of subsidies a number of commonly used investment incentives, it does not address this subject in terms of discrimination between foreign and domestic investment. For this reason, this Agreement tackles investment directly but it does not build up any significant incompatibility between foreign and domestic investment. See, Chaisse Julien and Gugler Philippe, Foreign Direct Investment Issues and World Trade Organisation Law in Julien Chaisse & Tiziano Balmelli (eds) *Essays on the Future of WTO – (Volume I) Policies and Legal Issues* (Geneva: Edis, 2008), pp. 135-170.

In this background, there is a need to understand to what extent the current multilateral negotiations are going to address the valid concerns of WTO Members. In order to do so, the paper is arranged along the following lines. Section 2 looks into the actual violations of ASCM from the reported / concluded WTO cases. The current trends in Fisheries Subsidies negotiation and the concern for the developing countries are discussed in Section 3. Finally Section 4 draws the conclusions.

II. DATA ANALYSIS

Given the fact that several areas in the ASCM may potentially be misused for protectionist purposes; the current section attempt to analyze the global tendencies towards imposition of these measures.

A. EXPLORING THE USE / MISUSE SCM MEASURES⁷

It is observed from **Figure 1** that the number of global CVD initiations and CVD measures has shown a fluctuating trend during 1995-2009. The number of CVD initiations exhibited a continuous increasing trend from 1996 to 1999 and was at its peak in 1999 with 41 initiations during that year. Since 1999 however a cyclical pattern is being observed. The scenario improved considerably in 2005, when the number of initiations reached a minimum of 6. However SCM imitations have increased ever since and reached 28 initiations during 2009, which is an area of concern. The imposition of CVD measures has also shown a cyclical pattern. While during 1996-2001 an increasing trend has been observed in CVD measures, an overall decreasing trend was noticed during 2001-2007 with minor fluctuations. However, the number of measures in 2008 increased to 11 and marginally declined to 9 in 2009.

In order to understand the SCM imposing behaviour of the major trading countries with respect to each other during the period 1.1.1995 to 31.12.2009, **Table 1** has been constructed from WTO data. While the countries facing the SCM measures are noted row-wise, the countries initiating the same are reported column-wise. A total of 245 SCM actions have been initiated during this period. United States topped the list by accounting for 41.63 percent of the total CVD initiations, followed by the EU (22.04 percent). Interestingly, a significant proportion of the initiations made by the US have taken place against major Asian economies like China (22.55 percent) and India (12.75 percent). On the other hand, only 11 SCM initiations has been undertaken against the US of which 3 were initiated by Canada and China each and 2 by the EU respectively.

A similar trend has been noticed in case of the EU as well. Among the 54 cases initiated, 29.63 percent of the cases have been lodged against India. The other countries suffering from the EU initiations include South Korea (12.96 percent) and

⁷ The analysis undertaken in this section draws from the methodology developed by Chaisse and Chakraborty (2007) and Chakraborty and Khan (2008).

Taiwan (11.11 percent). On the contrary, the EU has faced only 11 initiations on SCM ground against its exports.

India presently tops the list of the countries suffering from the SCM initiations (19.18 percent of the total initiations), followed by China (15.10 percent) and South Korea (6.94 percent). Canada, the EU and the US jointly initiate 72.34 percent of all the SCM initiations against India. However, other developing countries like South Africa have also targeted Indian exports on SCM grounds. On the whole an interesting picture emerges from the analysis; while Canada, the EU and the US account for 73.47 percent of all SCM initiations, China, India and South Korea account for 41.22 percent of the affected cases. If Indonesia and Thailand are also added to the list of the affected developing countries, the corresponding figure reaches 50.20 percent. Clearly the low cost economies of Asia are emerging as the major targets of SCM activism in major developed countries.

The SCM measures are reported in the parenthesis of the same table and a similar conclusion emerges from the analysis. The calculations reveal that Canada, the EU and the US jointly account for 71.94 percent of all SCM measures during the study period. On the other hand among the target economies, China, India and South Korea account for 41.01 percent of the SCM measures.

The finding underlines the need to have a closer analysis of the SCM behaviour of Canada, the EU and the US, which is noted at HS sectional level in **Table 2**. Section XV which consists of Base Metals and articles of Base Metals is found to attract most of the SCM initiations for these three players. The triad has jointly initiated 46.67 percent of the total SCM initiations and 30.56 percent of the total measures on this front. The SCM activism for base metals is particularly high in the US. The other major sectors facing SCM challenges in the triad include low-tech products in Section VII (Plastics and articles thereof; Rubber and articles thereof), Section VI (Products of Chemical or allied industries) and Section XI (Textiles and textile articles). However, a relatively sophisticated product group like Machinery and electrical appliances has also been subject to SCM actions. While the EU has adopted several SCM actions on plastic and rubber products and textile products, US actions on chemical products are larger in number.

Table 3 looks at the other side of the coin, i.e., the distribution of the sectors affected by SCM actions in exporting countries. Six entities, namely, Brazil, China, EU, India, Indonesia and South Korea are considered here for the analysis. India has been affected by SCM actions in most serious manner and almost one-third of the initiations against India have been related to Section XV (Base Metal and articles of Base Metal). The other affected sectors include Section VI (Products of Chemical or allied industries) and Section VII (Plastics and articles thereof; Rubber and articles thereof). It is observed from the data that the base metal sector in Brazil, China, Indonesia and South Korea are also suffering heavily from the SCM initiations and measures. Interestingly the EU has faced no SCM initiation or measure against its base metal products. The SCM action on EU exports has instead focused on Section

III (Animal or Vegetable Fats and Oils) and Section IV (Prepared Foodstuffs), perhaps in line with the provisions of Common Agricultural Policy.

B. AN OVERALL ANALYSIS OF WTO DISPUTES ON SCM

In **Table 4** some of the well-known WTO cases on SCM agreement have been arranged. It is observed from the table that the SCM agreement has been misused on quite a few occasions, both by developed and developing countries. For instance, in *DS 341*, the panel ruled the Mexican measures on initiation, conduct of the investigations and imposition of definitive countervailing measures on imports of olive oil from the European Communities to be inconsistent with their WTO obligations under SCM. Similarly in *DS 336*, Korea claimed that the countervailing duties imposed on its export of certain Dynamic Random Access Memories (DRAMs) are inconsistent with Japan's obligations. Although the dispute settlement panel rejected some of their claims, several Japanese measures were declared WTO-incompatible. Similarly as a result of the Korean complaint against Section 771 of the US Tariff Act (1930) in *DS 296*, the alleged provision was found to be inconsistent with the SCM agreement.

However, all the claims against SCM violation have not been equally successful. For instance, under *DS 222* Brazil complained against subsidies granted to Canada's regional aircraft industry, but the panel found the same to be inconsistent with Article 3 of the SCM Agreement only on one count. Similarly, in *DS 345* India complained against the amended bond directive and the enhanced bond requirement (EBR) imposed by the US on imports of frozen warmwater shrimp from India. Though the panel found that the US actions are inconsistent with certain provisions of the AD agreement, they were not found to be inconsistent with their obligation under SCM agreement.

The outcome of the SCM complaints lodged at DSB has been analyzed with the help of **Table 5**, by placing the cases where SCM violation has been alleged under seven different categories, following the framework devised by Chakraborty and Chaisse (2007) and Chakraborty and Khan (2008). The first two columns represent 'win' and 'loss' in a particular case. 'Win' by a complainant is defined as its win at the panel level, which remains unchanged even if the appellate body reverses certain legal interpretations of the verdict later, since the existence of a WTO-incompatible policy has been established. However rejection of the claims, both at panel and appellate body level, is termed as 'loss'. The third column considers several possibilities – ongoing cases, cases currently with the appellate body, cases where verdict is expected within a specified time or cases which are not officially closed. The fourth option represents the scenario where the parties jointly request DSB for suspension of proceeding after panel formation, which shows that both sides are willing to negotiate on the alleged measures in force.

Fifth column shows the cases where no panel had been formed, which show mutual discussion, probably leading the respondent to guarantee the desired market

access for the complainant to resolve the dispute. Two other possibilities cannot be ruled out in this case. One, a (developed country) complaint might have been raised for harassing the respondent as a trade policy instrument, and two, a (developing country) complainant might have lacked the necessary technical expertise to support his claim, and decided to opt out before formation of the panel. The sixth column notes the cases where a mutually agreeable solution has been notified to the DSB. In the final column the cases where the alleged measure was promptly discontinued after the initial notification at DSB are placed. The last column on one hand indicates the existence of a WTO-incompatible measures in force, and highlights the effectiveness of the dispute settlement mechanism on the other as a credible threat mechanism.

While the top panel of **Table 5** represents the global scenario, the bottom panel shows the situation for the US, which has faced maximum number of complaints for violating its obligations from various quarters (i.e., as respondent). It is observed from the top panel that among the 83 cases lodged at the WTO on SCM-related violations so far, on 30 occasions (36.14 percent) the WTO-incompatibility of the alleged measure has been proved. However in 6 cases, the complaint has been rejected. On 35 occasions (42.17 percent) however, the initial complaint has not been actively pursued, resulting into formation of no panel. Interestingly, unlike the case of ADA, the SCM Agreement has not witnessed any instance of discontinuation of the alleged measure by the respondent.

It is observed from the bottom panel on the US participation that it has lost 11 (42.31 percent of the total cases) cases as respondent, signifying some justification behind the claims of the trade partners. However on 8 cases (30.77 percent) no panel has been formed. Interestingly, no case has been amicably settled or any request for suspending the panel proceedings has ever been submitted to the WTO. This signifies the intensity of the conflict between the US and the partners on SCM ground. It is worth mention that only the US has been able to win a case as respondent four times.

C. WHICH ARTICLES OF THE SCM AGREEMENT ARE SUSCEPTIBLE TO MISUSE?

In the following the macro analysis conducted in the earlier section has been supplemented with an article-level micro analysis. For that purpose, each individual dispute reported at the WTO involving violations on SCM ground has been analyzed and the number of times a particular provision has been allegedly misused is noted. The alleged violations are reported in **Figure 2**.

It is observed from the figure that article 3 (prohibition) of the SCM agreement has allegedly been violated maximum number of times (15.86 percent of the total alleged violations), followed by article 1 (definition of a subsidy) and article 10 (application of article VI of GATT 1994), which account for 10.03 and 9.39 percent of total number of alleged violations respectively. Article 32 (other final provisions) and article 2 (specificity of the subsidy) comes next in terms of alleged violation (6.15 percent). Alleged violations of Article 11 (initiation and subsequent investigation) and article 19 (imposition and collection of countervailing duties)

comes in the next layer which have been violated by 5.83 and 5.50 percent respectively. Article 14 (calculation of the amount of a subsidy in terms of the benefit to the recipient), article 5 (trade effects) and article 6 (serious prejudice) witnessed violations in 4.85 percent of the cases.

The other major articles of the SCM agreements which has been allegedly misused includes article 21 (duration and review of countervailing duties and undertakings), article 15 (definition of injury), article 12 (evidence), article 22 (public notice and explanation of determinations), article 17 (provisional measures), article 27 (SDT for developing country Members), article 4 (remedies), article 7 (remedies), article 13 (consultations), article 28 (existing programmes) etc. Among the relatively less controversial areas within the SCM agreement, article 18 (undertakings) and article 16 (definition of domestic industry) have been allegedly violated once twice. Annex V (procedure for developing information concerning serious prejudice), Annex I (illustrative list of export subsidies), article 30 (dispute settlement) and article 20 (retroactivity) have been violated once each.

It is observed from the analysis that almost all the major articles of the SCM agreement have been allegedly violated by both developed and developing countries. In order to identify the areas, where the actual violation of the ASCM occurs, the above methodology is repeated for the completed cases. The cases which have reached the appellate body stage after the defeated party challenged the panel ruling are taken into account for identifying the actual violations. The results of the analysis are reported in **Figure 3**.

It is observed from the Figure that actual violations have taken place most frequently (11 times) under article 3.1 (coverage of prohibition), which accounts for 21.15 percent of the total number of violations. The actions of WTO Members have been proved WTO-incompatible under article 1.1 (definition of a subsidy) and article 3.2 (removal of subsidies mentioned under article 1) five times each. Article 5c (serious prejudice) and article 10 (application of article VI of GATT 1994) have been misused in four cases each, while article 14 (calculation of the amount of a subsidy in terms of the benefit to the recipient) has been proved WTO-incompatible three times.

Article 32.5 (implementation and operation of SCM agreement), article 18.4 (undertakings), article 19.1 (amount of the countervailing duties and lesser duty rule) and article 19.4 (non-imposition of duties in excess of the subsidized amount) have been violated twice. However allegations of misuse under article 6.3 (existence of serious prejudice), article 32.1 (imposition of every final action against a Member in accordance with the SCM agreement), article 27.4 (phasing out the export subsidies by a developing country Member over a period of two years after reaching competitiveness), articles 21.1-21.3 (imposition of duties for as long as necessary period), article 20.6 (injury caused by massive import in a relatively short time), articles 17.1 - 17.4 (provisional measures), article 15.5 (demonstrating causal link between subsidized imports and actual damage to domestic industry) and article 15.7 (consideration of the factors while determining existence of a threat of material

injury) have been proved only under one occasion each. Like the case of initiations, actual violations have also taken place under each and every major provision of the ASCM.

The WTO cases demonstrate that in practice the reason behind seldom applying the provisions on serious prejudice probably lie in its vague legal text. There are still legal elements which are arguable and needs further clarification. There is also no clear threshold for subsidies which causes “serious prejudice”.

For example phrases such as “significant” without any clarification and threshold makes these provisions open to interpretation and misuse. But the problem is that it is difficult to fix certain determinants to find serious prejudice because every case on serious prejudice is unique and each such case will have different threshold and determinants to find serious prejudice.

That is why the WTO Members before initiating the “serious prejudice” case should always bear in mind the possible difficulties and obstacles they can face and only after consideration of all pros and cons they should bring the case before the WTO DSB. Moreover it seems that today only developed countries can take advantage from the present legal text on serious prejudice because they can potentially abuse the fact of difficulty for complainant to demonstrate “serious prejudice” (especially for developing countries) and thus can adopt subsidies which could have adverse consequences for international trade.

Probably the replacement of “serious prejudice” concept to simple prejudice would be one of the solutions of this problem. This replacement would simplify the process of proof of the adverse effect caused by subsidies to international trade. In this case the developing countries will gain from such reformation and the result will be the reduction of adverse subsidies and therefore harmonization of international trade.

Thus there is still a room for further development of the concept in order to make the application of serious prejudice provisions easier for complainant party and in order to avoid the abuse by developed WTO Members the fact of inability of developing countries to initiate the case on serious prejudice.

III. A CASE IN POINT: THE CURRENT ROUND OF NEGOTIATIONS ON FISHERIES SUBSIDIES

The above discussion brings forward the most important question, whether the present negotiations under the Doha Round are capable of restricting the misuse of SCM measures. Currently the WTO Member countries are engaged in multilateral negotiation so as to limit the usage of actionable subsidies in international trade. Negotiation on disciplining the Fishery subsidies hold a special position in this framework in the sense that a substantial proportion of fishermen in developing countries and LDCs tend to suffer in securing their livelihood, as a result of

continuation of high support in other economies.⁸ In the following section, it is attempted to see whether the recent negotiations on fishery subsidies may positively contribute in its goal.

A. CURRENT NEGOTIATIONS ON FISHERY SUBSIDY

Throughout Nineties several multilateral bodies pointed out the potential dangers of fisheries subsidies.⁹ The Doha Development Agenda (2001) noted the need to “*clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries*”, and also acknowledged the relationship of this concern with trade-environment linkage discussion. The need to eliminate subsidies that contribute to illegal, unreported and unregulated fishing (IUU) and also lead to creation of over-capacity by the fleets was raised in the World Summit on Sustainable Development in Johannesburg (2002) though an explicit mention of the same was not included in Johannesburg Declaration.

In line with the concerns raised at Johannesburg, the Ministerial Declaration of the sixth WTO Ministerial Conference at Hong Kong (WTO, 2005) stressed the commitment to enhance mutual cooperation and collaboration on trade and environment, and advocated the need to reach a broad agreement in the fisheries sector, including the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing:

“recall our commitment at Doha to enhancing the mutual supportiveness of trade and environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and over-fishing, and call on Participants promptly to undertake further detailed work to, inter alia, establish the nature and extent of those disciplines, including transparency and enforceability.” (Annex D, para 9).¹⁰

⁸ WTO Director-General Pascal Lamy commented on 8 June 2009, on the occasion of World Oceans Day that, “.. today, we run the risk that over-fishing will so deplete fish stocks in our oceans that many species will disappear forever.. it is bad news for the world’s 43.5 million full time fishers... Governments have contributed to this problem by providing nearly \$16 billion annually in subsidies to the fisheries sector. This support keeps more boats on the water and fewer fish in the sea.” Source http://www.wto.org/english/news_e/sppl_e/sppl129_e.htm (last accessed on September 10, 2010).

⁹ “.. by 1995 the FAO and other UN Bodies had for some time identified depletion of the world's fisheries resources as an issue of urgency, and called on all nations to work together to resolve this pressing problem. For example, the FAO estimated that by 1994 some 69 per cent of the world's marine fish stocks were fully- to over-exploited.” Statement by the Negotiating Group on Rules Chairman during the Informal Open-Ended Meeting with Senior Officials on 25 November 2009, WTO Document No. TN/RL/W/246 (Dated 27 November 2009).

¹⁰ World Trade Organization (2005), “Hong Kong Ministerial Declaration”, WTO Document No. WT/MIN(05)/W/3/Rev.2, 18 December 2005, Geneva.

In addition, the declaration also underlined the need for ensuring Special and Differential Treatment (SDT) for developing countries and LDCs in line with their development Compulsions:

“Appropriate and effective special and differential treatment for developing and least-developed Members should be an integral part of the fisheries subsidies negotiations, taking into account the importance of this sector to development priorities, poverty reduction, and livelihood and food security concerns” (Annex D, para 9).

The discussions initiated by Hong Kong Ministerial Declaration were subsequently supplemented by the negotiations on fisheries subsidies under the Negotiating Group on Rules (NGR). A broad agreement has been reached among the WTO Members on the need to regulate fisheries subsidies and till date several countries have made submissions on this front. The focus of the current negotiations is to identify the subsidies that are considered harmful for the interest of Member countries, especially developing countries and LDCs. Orellana (2008) notes that the current WTO negotiation on fisheries subsidies is a sensitive area.

The text circulated by NGR Chair on 30 November 2007¹¹ identifies a list of subsidies provided by various countries (Article-1), which are most trade-distorting. The list of these proposed prohibited subsidies is provided in **Annex 1**. The text also identifies a list of proposed exceptions (Article-2), which might be allowed. The details of the proposed exceptions are mentioned in **Annex 2**.

The negotiating positions of the WTO Members on the fisheries subsidies issue could be classified under two broad headings. First, a ‘Top-down approach’ is presently being advocated by the ‘Friends of Fish’ group. The broad standpoint of the group is that all fisheries subsidies should be prohibited apart from certain exemptions. The proponents of this approach include Argentina, Australia, Chile, Colombia, Iceland, New Zealand, Norway, Peru, Pakistan and the US.

Second, a ‘Bottom-up approach’ is advocated by another group of countries arguing that all subsidies should be allowed, apart from those that is specifically prohibited. Proponents of this group include Japan, Korea and Taiwan. It can be said that the current position of the EU is located in between (OECD, 2006b). Despite the differences in the negotiating approach within the two groups, there is a general agreement that subsidies that support capital costs should be prohibited (e.g. the acquisition, modification or construction of fishing vessels). However, it is also important to restrict subsidies provided to operating costs such as fuel, labour etc.

It is increasingly being felt that there is a need to take into account the special development compulsion of the developing countries and LDCs through the use of appropriate and effective SDT. To further this goal, China, India and Indonesia have

¹¹ WTO (2007), “Draft Consolidated Chair Texts of the AD and SCM Agreements”, WTO Document No. TN/RL/W/213, 30 November 2007, Geneva.

supported exemptions for developing country small-scale fishermen from subsidies disciplines in terms of infrastructure, capital and operating costs. Interestingly, some developed countries have also requested exemptions for their small-scale fisheries¹². However, implementation of SDT requires a number of issues to be resolved, including the criteria to be used for identifying eligible fisheries for SDT; territorial limits on the use of SDT; the need for effective management of subsidised fisheries; how access rights for foreign fleets should be treated etc.¹³

The present negotiation is trying to determine the manner in which the interest of the small fishermen in the developing countries can be ensured. The 'Friends of Fish' group has recognized the need for Special and Differential Treatment (SDT) for the developing countries and LDCs, wanted the flexibility provided to be responsible and appropriate, geared for ensuring a realistic balance. It also wanted that subsidies which are exempted from the prohibition under SDT should otherwise remain actionable under the existing SCM Agreement.¹⁴

The negotiating positions of several developing countries on SDT are that they must provide effective and substantive flexibilities to developing countries, and not remain limited to mere technical support or transitional provisions. One major concern for developing countries like Brazil and China is that the SCM disciplines should not be restricting their freedom to develop their fisheries sector in a sustainable manner:

“In this respect, we see no ground for building exceptions on the basis of parameters such as boat size or the area of capture. The harmful or harmless effect of fisheries subsidies should be all that matters”.¹⁵

From this perspective, the recent submission by Brazil, China, India and Mexico has tried to draw from the Article 6.2 of the Agreement on Agriculture for this purpose. The idea here is to exclude form of certain subsidies from the fold of actionable category:

“On the issue of small-scale, artisanal fisheries, the proponents decided to bring forward a definition based on socio-economic criteria, inspired by the current Article 6.2 of the Agreement on Agriculture. We believe that this is the best way for striking a satisfactory balance, in the absence of internationally-agreed definitions on those fisheries activities by other Organizations more directly involved in fisheries issues. Each Member should be able to work on its own

¹² Department for International Development (undated b), “Fisheries subsidies and the WTO Negotiations”, Policy Brief No. 9, London: Marine Resources Assessment Group (MRAG) Ltd., DFID.

¹³ DFID, *op cit*.

¹⁴ WTO (2009), “Fisheries Subsidies”, Communication from Argentina, Australia, Chile, Colombia, the United States, New Zealand, Norway, Iceland, Peru and Pakistan, Document No. TN/RL/W/243 (dated 7 October 2009).

¹⁵ WTO (2009), “Fisheries Subsidies”, Communication from Brazil, China, Ecuador, Mexico and Venezuela, Document No. TN/RL/W/241/Rev.1 (dated 16 October 2009).

definition, insofar as the criteria set forth in the future WTO disciplines are observed”.¹⁶

The negotiating standpoint of the small and vulnerable economies (SVEs) on the other hand has focused on retaining the ability to support their fishery sector on the basis of the present quantum of trade and financial supports, leading to lower distortion. For instance, Barbados has proposed that the developing countries with a share of world NAMA trade of not more than 0.1 per cent, should be exempt from the prohibition of Article 1.1 a and Article 1.1.c subsidies.¹⁷ On a similar note, the SVE submission has pointed out that:

“The magnitude of subsidies typically provided by SVEs is small and, at this stage in their development, many SVEs are not even in a position to provide subsidies.. SVEs require the necessary *policy space* to provide subsidies of small magnitudes in the future, to be better equipped to harvest their own resources, within sustainable limits.”¹⁸

South Korea has expressed displeasure at the current level of negotiations by stressing that they have on one hand not properly addressed the mandates of Hong Kong Ministerial Declarations, and there remain several misunderstandings on the Hong Kong mandate in the Chair's roadmap on the other. The country argued that it is legally inappropriate to make Article 3.1 (prohibited subsidies) of the SCM Agreement a reference point for the entire annex on fisheries subsidies:

“The Chair's roadmap, like the draft text, begins with the presumption that all subsidies in the fisheries sector should be prohibited with very limited exceptions. This is manifestly inconsistent with the concepts and principles of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), which identifies as prohibited only those subsidies that are unarguably harmful and for which a consensus in this regard has long existed in the international community. Designating now a wide range of subsidies as prohibited in the Annex would run the risk of undermining the basic structure and principles of the SCM Agreement.”¹⁹

The recent US proposal has attempted to modify the Chair's text in some aspects, covering general exemptions, general disciplines and fisheries management. Certain aspects of the US proposals, especially the one covering burden of proof, are expected to help the developing countries:

¹⁶ WTO (2010), “Fisheries Subsidies: Special and Differential Treatment”, Communication from Brazil, China, India and Mexico, Document No. TN/RL/GEN/163 (dated 11 February 2010).

¹⁷ WTO (2009), “Fisheries Subsidies”, Communication from Barbados, Document No. TN/RL/W/242 (dated 7 October 2009).

¹⁸ WTO (2010), “Textual Proposal for Additional Flexibilities for Small and Vulnerable Economies under Article III of the Proposed Draft Chair's Text on Fisheries Subsidies”, Communication from Small and Vulnerable Economies, Document No. TN/RL/GEN/162 (dated 8 January 2010).

¹⁹ WTO (2009), “Framework of the Disciplines on Fisheries Subsidies”, Communication from the Republic of Korea, Document No. TN/RL/W/245 (dated 24 November 2009).

“ .. in certain situations harm can be deemed to exist, regardless of whether an affirmative demonstration of evidence of overfishing or overcapacity has been made under IV.2. In Article IV.3, we identify two such situations: (1) there is no valid scientific assessment establishing a sustainable allowable catch for the stock; and (2) the subsidizing Member has not implemented a management plan for the stock that is designed to achieve a sustainable allowable catch throughout the duration of subsidization. In those cases, the burden would shift to the subsidizing Member to demonstrate that the subsidy in question has not caused harm.”²⁰

B. THE FISHERY SUBSIDY SCENARIO

The extent of subsidization in the fishery sector by the major players over the period 1996-2006 could be observed from the data on Government Financial Transfers (GFTs) obtained from OECD Factbook (2009), which is reported in **Table 6**. It is observed from the table that major subsidizing countries include the developed and advanced developing countries in North America (Canada and the US), Europe (Spain, Norway, Italy, UK, France and Denmark), Asia (Japan, Korea and Turkey) and Australia. While in 1996 the total amount of subsidies provided in these countries stood at US \$ 5997.79 million, the figure has increased to US \$ 6726.67 million in 2006. However the increase in total fishery sector subsidy in the 12 countries has not witnessed a continuous growth. The volume of total subsidy had declined to US \$ 4019.90 million in 1998, which however increased to US \$ 5676.34 million in the following year. A decadal peak of US \$ 6726.67 million in the subsidy level has been reported in 2006, which is a matter of concern for the developing countries.

It is also observed that the US and Japan are consistently the two major subsidy-providing countries over the period. However, the relative importance of the major subsidy providers has undergone a marked transformation over the last decade. It is observed that in 1996 Japan was the highest subsidy provider in the World. In particular, the subsidy provided by Japan (53 per cent) was greater than the combined volume of subsidies provided by the other eleven countries. The US (15 per cent) and Canada (9 per cent) were placed at a distant second and third position respectively. In 2006, the US provided maximum amount of subsidy (32 per cent), with Japan finishing second close behind (29 per cent). It was observed that while the volume of subsidy provided by Japan gradually reduced, on the contrary the same for the US has increased over this period. Other major countries providing substantial volume of GFTs included Korea (11 per cent) and Canada (9 per cent). The proportional contribution of countries like Australia (1 per cent) and the UK (2 per cent) in GFTs remained more or less constant.

The detailed break-up on the subsidies provided by the major countries are reported from OECD (2006), which is available for four major categories, namely: (1)

²⁰ WTO (2010), “Fisheries Subsidies — Articles I.2, II, IV and V”, Communication from the United States, Document No. TN/RL/GEN/165 (dated 22 April 2010).

direct payments, (2) cost reducing transfers, (3) general services and (4) cost recovery charges over the period of 1996-2003. The contribution of these components in the overall subsidy level over this period for select countries is reported in **Table 7**. The relative importance of the sub-categories becomes clear from the table. For instance, while direct transfers are found to be an important component in Canadian subsidy programme, France, Japan and the US rely more on general services route for supporting their fishery sector.

C. TRADE DIVERSION IN FISHERY SECTOR BECAUSE OF THE SUBSIDY?

It is a long standing allegation of the developing countries that the subsidies provided by several developed countries distort competition by lowering production costs for their fishery sector, thereby giving them an artificial competitive advantage. In particular, these practices may drive out producers from the developing countries / LDCs. In other words, the exporters from the subsidy recipient countries may enhance their global market share at the expense of unsubsidized competitors.

Measures of revealed comparative advantage (RCA) could be of use here to assess this contention. The RCA indicates whether a country is in the process of expanding exports of the products in which it has a trade potential, as opposed to situations in which the number of products that can be competitively exported is static. The RCA index of country *i* for product *j* is often measured by the product's share in the country's exports in relation to its share in world trade by the following formula:

$$RCA_{ij} = \frac{\frac{x_{ij}}{X_i}}{\frac{x_{wj}}{X_w}}$$

where x_{ij} and x_{wj} are the values of country *i*'s exports of product *j* and world exports of product *j* and X_i and X_w refer to the country *i*'s total exports and world's total exports. A value of less than unity implies that the country has a revealed comparative disadvantage in the product. Similarly, if the index exceeds unity, the country is said to have a revealed comparative advantage in the product.

The current study first determines the RCA trends for all fishery exports at HS 6-digit level for the 12 major subsidy providing countries as noted in **Table 6** and India as a developing country for the years 2000, 2004 and 2008. The data is obtained from the WITS database. In **Table 8**, the proportion of HS tariff lines for the fishery sector (i.e., within HS 3) with the RCA greater than 1 has been reported. It is observed from the table that barring the exception of Australia and Denmark the share of tariff lines with RCA greater than one has increased over 2000 to 2008. In other words, relative exports of fishery sector products have increased from these countries. On the other hand, the same has gone down for India and South Korea over the same period. Though the findings in strict sense do not indicate a one-to-one

correspondence between subsidies in the developed countries and RCA decline in developing countries like India, it stresses the requirement to urgently conclude the ongoing negotiation on fishery subsidies for greater discipline.

D. WILL THE CURRENT NEGOTIATIONS SOLVE THE FISHERY SUBSIDY PROBLEMS?

In order to understand the effectiveness of the current negotiation, the current study attempted to look at the subsidy provided by various countries. It is however observed that a long standing problem in the field of fishery subsidy is that of widespread discrepancies of the data available with various multilateral / international agencies. For instance, Japan in 1996 reported to the WTO that it has provided US \$ 5 billion as subsidies for tax preference programs under fisheries, but the same was not included in either of its reported data to the OECD or APEC. Milazzo (1998) reported that while China was annually providing around US \$ 700–800 million to this sector, it officially reported only US \$ 50 million subsidy in its reported statistics to APEC. The OECD (2006a) study, for the US on the other hand did not report the federal subsidy program on fishing access payments or some state subsidies. A similar underreporting in case of fuel subsidies is also widely reported in the literature (Khan et al, 2006; Sumaila et al, 2008). Also the fisheries subsidies data reporting system by various countries is substantially different, which makes comparison across categories difficult (WWF, 2001; Chakraborty and Kumar, 2010).

Therefore in order to compare the fishery sector subsidy data for the major subsidizing countries from an authentic single source, the data reported by OECD (2006a, 2009) has been considered, which has been reported in **Table 6** and **7** earlier. The problem however is that OECD database (2006a) does not report the subsidy data for the covered countries in terms of Article 1 and Article 2 subsidies. The reporting on fishery subsidy is rather done under some broader categories like ‘direct payments’, ‘cost reducing transfers’, ‘general services’ and ‘cost recovery charges’. The constituents of the four categories, as explained by OECD, are reported in **Annex 3**. The first three of these four categories are considered in the current context. Detailed breakups of subsidy data is however not available even for the OECD countries in the most recent reported source (OECD, 2009), which provides data over 1996-2006. Moreover even for the OECD countries the detailed break-up data are available only for the period of 1996 to 2003 (OECD, 2006a).

In order to understand the challenge posed by the data availability problem, a concordance between the WTO classification of subsidies (Article 1 and Article 2) and the OECD classification of subsidies (direct payments, cost reducing transfers and general services) is attempted by the current study on the basis of the definitions. The generated concordance has been reported in **Table 8**.

Though the concordance provides a clearer perspective on the classification of the actionable / non-actionable subsidies, the data problem still remains owing to overlap of reported subsidies between the categories. For instance, ‘direct payments’ under the OECD classification includes both ‘price support payments to fishers’ and

‘disaster relief payments’. While the former is an Article 1 type subsidy, the latter falls under Article 2 category.

Similarly under ‘cost reducing transfers’, ‘fuel tax exemptions’ and ‘government funded training of fish processing workers’ could be classified under Article 1 and Article 2 subsidies respectively.

Finally, looking at the ‘general services’ category, it is observed that while entries like ‘support to build port facilities for commercial fishers’ distort production and trade and hence comes under Article 1, other categories such as ‘grants to local authorities for retraining of fishers into other activities’ create the opposite effect and are placed under Article 2.

Though arriving at a definitive conclusion on Article 1 / Article 2 subsidies prevailing in developed countries is not possible due to the reported overlap; judging by the concentration of subsidy categories under various heads, it could be noted that Article 1 subsidies are broadly falling under ‘direct payments’ and ‘cost reducing transfers’. However, it is to be noted that several Article 2 subsidies are also included in these two categories. On the other hand, the exemptions (Article 2) are mostly concentrated under ‘general services’ category, despite having some Article 1 subsidies included within that group.

It has already been shown under section 3.3 that the use of SCM articles which have been used in a WTO-inconsistent manner includes article 3.1 (coverage of prohibition) and article 1.1 (definition of a subsidy). Clearly the present scenario on fisheries data transparency is not enough for preventing further misuse of these ASCM provisions for fishery products.

IV. IN LIEU OF CONCLUSION

The number of cases in international trade practice demonstrated that the consequences of granting of subsidies by a government could have serious adverse effect on international trade. This situation demonstrates the necessity to improve the regulation of subsidies at the international level. Despite the fact that it passed more than half a century since trading countries started negotiations on subsidies issue in order to regulate them it seems they still have a room for further development. The current study after analysis of the relevant issues arrives at the two following conclusions.

First, the discussion of the completed disputes on ASCM indicates that several major provisions of the agreement have been liberally misused by WTO Members. Therefore the current negotiation on rules should attempt to prevent such misuse through relevant modification of the ASCM text.

Second, it is obvious from the current discussion that fisheries subsidy in several countries pose a serious problem in ensuring multilateral discipline in the area

of subsidies. The experience of Agreement on Agriculture shows that, even the straight-jacketed classification of subsidies in amber, blue and green boxes could not entirely tackle the continuation of harmful subsidization of primary products in several countries after fifteen years since inception of WTO. Cotton subsidy in US for instance is a classic case in point here.

In this background, the potential problems associated with the current non-transparency in the fisheries subsidy-reporting mechanism, leading to overlapping of Article 1 and Article 2 subsidies as observed from the OECD reported categories, poses a serious threat to multilateral trade regime. Hence the negotiating standpoint of the developing countries at the forthcoming WTO forums should focus primarily on ensuring greater transparency and harmonization in fisheries subsidy data reporting. The negotiations should also ensure that disciplines emerging from such negotiations are able to reign in the high levels of subsidies prevailing in the developed countries, but do not curtail the flexibility of developing countries to extend subsidy in order to improve the lot of the resource poor fisherman community whose livelihood sustenance depends upon fishing activity.

BIBLIOGRAPHY

- Atta-Mills, J. Alder and J. U.R. Sumaila, (2004), "The Decline of a Fishing Nation: The Case of Ghana and West Africa, *Natural Resources Forum*, 28: 13-21.
- Chaisse, Julien and Debashis Chakraborty (2007), "Implementing WTO Rules through Negotiations and Sanction: The Role of Trade Policy Review Mechanism and Dispute Settlement System", *The University of Pennsylvania Journal of International Economic Law*, 28(1): 153-185.
- Chaisse Julien and Gugler Philippe, "Foreign Direct Investment Issues and World Trade Organisation Law" in Julien Chaisse & Tiziano Balmelli (eds) *Essays on the Future of WTO – (Volume I) Policies and Legal Issues* (Geneva: Edis, 2008), pp. 135-170.
- Chakraborty, Debashis and A. U. Khan (2008), "The WTO Deadlocked: Understanding the dynamics of International trade", Sage, New Delhi, 2008.
- Chakraborty, Debashis and Animesh Kumar (2010), "Implications of Fishery Sector Subsidies: A Review of Issues in light of WTO Negotiations", CWS Working Paper No. 7, Indian Institute of Foreign Trade: New Delhi.
- Cox, A. and C. Schmidt (2002), "Subsidies in the OECD Fisheries Sector: A Review of Recent Analysis and Future Directions", Paris: Directorate of Agriculture, food and fisheries, OECD.
- Datta, Samar K. and Rahul Nilakantan, "Evolving India's Strategies for the Global Debate on Fisheries Subsidies"
- Department for International Development (undated b), "Fisheries subsidies and the WTO Negotiations", Policy Brief No. 9, London: Marine Resources Assessment Group (MRAG) Ltd., DFID.
- Dommen, C., Deere, C. (1999), "Fish for Thought: Fisheries, International Trade and Sustainable Development", *International Trade and Sustainable Development Series No. 1*, Geneva: ICTSD and IUCN.
- Food and Agriculture Organization, "FAO Code of Conduct for Responsible Fisheries", available at <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM> (last accessed at September 15, 2010).
- Gooday, Peter (2002), "Fisheries Subsidies, ABARE Report for the Fisheries Resources Research Fund" Canberra
- Kaczynski, V.M. and D.L. Fluharty (2002), "European Policies in West Africa: Who Benefits from Fisheries Agreements?", *Marine Policy*, 26: 75-93
- Khan, A., U. R. Sumaila, R. Watson, G. Munro, and D. Pauly. (2006), "The nature and magnitude of global non-fuel fisheries subsidies", in Ussif R. Sumaila and Daniel Pauly (Eds), "Catching more bait: A Bottom-up Re-estimation of Global Fisheries Subsidies", pp. 5-37, 14 (6), *Fisheries Centre Research Reports*, 2nd Version, Vancouver: University of British Columbia.; R. Sharp and Ussif R. Sumaila (2009), "Quantification of U.S. Marine Fisheries Subsidies", *North American Journal of Fisheries Management*, 29:18–32.
- M. Milazzo (1998), "Subsidies in World Fisheries: A Re-examination. World Bank Technical Paper. No. 406. Fisheries Series, Washington DC: The World Bank.

- Mbithi Mwikya, S. (2006), “Fisheries Access Agreements: Trade and Development Issues”, International Trade and Sustainable Development Series Issue Paper No 2, Geneva: ICTSD.
- OCEANA (Undated), “Fisheries Subsidies: The good, the bad, and the ugly”, Washington DC.
- Orellana, Marcos A. (2008), “Towards Sustainable Fisheries Access Agreements: Issues and Options at the World Trade Organization”, Commissioned by United Nations Environment Programme (UNEP), Geneva: Economics and Trade Branch (ETB), UNEP.
- Organization for Economic Co-Operation and Development (2006a), “Financial Support to Fisheries: Implications for Sustainable Development”, Paris: OECD.
- Organization for Economic Co-Operation and Development (2006b), “Fishing for Coherence”, Proceedings of the Workshop on Policy Coherence for Development in Fisheries, Paris: OECD.
- Organization for Economic Co-Operation and Development (2009), “OECD Fact Book 2009: Economic, Environmental and Social Statistics”, Paris: OECD.
- Porter, Gareth (1997), “The Euro-African Fishing Agreements: Subsidizing Over-fishing in African Waters”, Background Paper for UNEP / WWF Workshop
- Sharp, R. and Ussif R. Sumaila (2009), “Quantification of U.S. Marine Fisheries Subsidies”, *North American Journal of Fisheries Management*, 29:18–32.
- Sumaila, U. R., L. Teh, R. Watson, P. Tyedmers, and D. Pauly (2008), “Fuel Price Increase, Subsidies, Overcapacity and Resource Sustainability”, *ICES Journal of Marine Science*, 65:832–840.
- Tallontire, A (2004), “Trade Issues Background Paper: The Impact of Subsidies on Trade in Fisheries Products.
- UNEP (2004), “Analyzing the Resource impact of Fisheries Subsidies: A Matix Approach”, United Nations Publication
- World Bank, “World Integrated Trade Solution”, available at wits.worldbank.org (last accessed on September 17, 2010).
- World Trade Organization (2005), “Hong Kong Ministerial Declaration”, WTO Document No. WT/MIN(05)/W/3/Rev.2, 18 December 2005, Geneva
- ____ (2007), “Draft Consolidated Chair Texts of the AD and SCM Agreements”, WTO Document No. TN/RL/W/213, 30 November 2007, Geneva.
- ____, “http://www.wto.org/english/news_e/sppl_e/sppl129_e.htm” (last accessed on September 10, 2010).
- ____ (2007), “Draft Consolidated Chair Texts of the AD and SCM Agreements”, WTO Document No. TN/RL/W/213, 30 November 2007, Geneva.
- ____ (2009), “Fisheries Subsidies”, Communication from Argentina, Australia, Chile, Colombia, the United States, New Zealand, Norway, Iceland, Peru and Pakistan, Document No. TN/RL/W/243 (dated 7 October 2009).
- ____ (2009), “Fisheries Subsidies”, Communication from Barbados, Document No. TN/RL/W/242 (dated 7 October 2009).

_____ (2009), “Fisheries Subsidies”, Communication from Brazil, China, Ecuador, Mexico and Venezuela, Document No. TN/RL/W/241/Rev.1 (dated 16 October 2009).

_____ (2009), “Framework of the Disciplines on Fisheries Subsidies”, Communication from the Republic of Korea, Document No. TN/RL/W/245 (dated 24 November 2009).

_____ (2010), “Fisheries Subsidies — Articles I.2, II, IV and V”, Communication from the United States, Document No. TN/RL/GEN/165 (dated 22 April 2010).

_____ (2010), “Fisheries Subsidies: Special and Differential Treatment”, Communication from Brazil, China, India and Mexico, Document No. TN/RL/GEN/163 (dated 11 February 2010).

_____ (2010), “Fisheries Subsidies: Special and Differential Treatment”, Communication from Brazil, China, India and Mexico, Document No. TN/RL/GEN/163 (dated 11 February 2010)

_____ (2010), “Textual Proposal for Additional Flexibilities for Small and Vulnerable Economies under Article III of the Proposed Draft Chair's Text on Fisheries Subsidies”, Communication from Small and Vulnerable Economies, Document No. TN/RL/GEN/162 (dated 8 January 2010).

World Wildlife Fund (2001), “Hard Facts, Hidden Problems: A Review of Current Data on Fishing Subsidies”, Washington DC: WWF

TABLE 1: SUBSIDY AND COUNTERVAILING DUTY INITIATION MATRIX FOR MAJOR COUNTRIES (1.1.95 – 31.12.09)

Exporting Country	Reporting Country										
	Argentina	Brazil	Canada	China, P.R.	European Community	India	South Africa	Turkey	United States	Venezuela	Total
Argentina	0	0	0	0	0	0	0	0	4 (2)	0	7 (4)
Brazil	0	0	2 (1)	0	0	0	0	0	4 (3)	0	7 (8)
Canada	0	0	0	0	0	0	0	0	8 (3)	0	8 (3)
China, P.R.	0	0	9 (7)	0	0	1 (0)	1 (0)	0	23 (12)	0	37 (19)
European Community	2 (3)	0	1 (1)	0	0	0	0	0	0	1 (1)	11 (9)
India	0	3 (2)	5 (4)	0	16 (11)	0	9 (4)	1 (1)	13 (8)	0	47 (30)
South Africa	0	0	0	0	1 (0)	0	0	0	2 (2)	0	6 (4)
Turkey	0	0	0	0	0	0	0	0	2 (1)	0	2 (1)
United States	0	0	3	3 (0)	2 (0)	0	0	0	0	0	11 (2)
Venezuela	0	0	0	0	0	0	0	0	2 (0)	0	2 (3)
Total	3 (4)	3 (7)	24 (15)	3	54 (25)	1	13 (5)	1 (1)	102 (60)	2 (1)	245 (139)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

TABLE 2: CANADIAN, EU AND US COUNTERVAILING INITIATIONS / MEASURES BY PRODUCT TYPE – A COMPARATIVE ANALYSIS (1.1.95 – 31.12.09)*

HS Section	Product Description	Canada	EU	US
I	Live Animals; Animal Products	0	1 (1)	4 (1)
II	Vegetable Products	2 (0)	0	3 (1)
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	3 (1)	0	3 (2)
V	Mineral Products	0	1 (1)	4 (4)
VI	Products of the Chemical or Allied Industries	0	6 (2)	10 (5)
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	0	14 (5)	7 (2)
XIX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	1 (1)	0	2 (1)
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof	0	0	8 (3)
XI	Textiles and Textile Articles	0	10 (5)	2 (1)
XII	Footwear, headgear etc.	0	2 (0)	0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	0	1 (0)
XV	Base Metals and Articles of Base Metal	17 (12)	15 (7)	52 (36)
XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and Parts and Accessories of Such Articles	1 (1)	5 (4)	6 (4)
Total		24 (15)	54 (23)	102 (57)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

TABLE 3: COUNTERVAILING MEASURES BY PRODUCT TYPE – A COMPARATIVE ANALYSIS OF MAJOR AFFECTED COUNTRIES

HS Section	Product Description	Brazil	China	EU	India	Indonesia	South Korea
I	Live Animals; Animal Products	0	0	1 (1)	0	0	0
II	Vegetable Products	0	0	1 (1)	0	0 (1)	0
III	Animal or Vegetable Fats and Oils and Their Cleavage Products etc.; Animal or Vegetable Waxes	0	0	3 (2)	0	0	0
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	0	0	6 (5)	0	0	0
V	Mineral Products	0	0	0	0	0	0
VI	Products of the Chemical or Allied Industries	0	4 (2)	0	10 (5)	0	0
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	0	1 (1)	0	10 (6)	2 (0)	1 (0)
XIX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	0	1 (1)	0	0	0	0
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Paper or Paperboard; Paper and Paperboard and Articles Thereof	0	4 (1)	0	1 (1)	3 (1)	1 (0)
XI	Textiles and Textile Articles	0	2 (1)	0	3 (2)	2 (1)	2 (0)
XII	Footwear, headgear etc.	0	0	0	1 (0)		0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	1 (0)	0	0		0
XV	Base Metals and Articles of Base Metal	6 (8)	20 (9)	0	16 (14)	5 (4)	8 (4)
XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers etc.	1 (0)	4 (4)	0	6 (2)	0	5 (4)
Total		7 (8)	37 (19)	11 (9)	47 (30)	12 (7)	17 (8)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

TABLE 4: SELECTED WTO CASES ON SUBSIDY AND COUNTERVAILING DUTY ISSUES

Case No	Complainant	Respondent	Alleged violation	WTO ruling
DS 345 (2006)	India	United States	<p>Amended Bond Directive and the enhanced bond requirement (EBR) imposed on imports of frozen warmwater shrimp from India are inconsistent with:</p> <ul style="list-style-type: none"> Articles 1, 7.1, 7.2, 7.4, 7.5, 9.2, 9.3, 9.3.1, 18.1 and 18.5 of the ADA; Articles I, II, III, VI:2, VI:3 (including Note 1 Ad paragraphs 2 and 3 of Article VI), X, XI and XIII of the GATT 1994; and Articles 10, 17.4, 17.5, 19.3, 19.4, 32.1 and 32.5 of the SCM Agreement. 	<p>Panel concluded that the application of EBR is -</p> <ul style="list-style-type: none"> inconsistent with Articles 7.1(iii), 7.4 and 7.5 of the ADA; inconsistent with Articles I:1, II:1(a) and (b), X(3)(a), XI:1 and XIII of the GATT 1994 the laws, rules and regulations of the United States that authorize the imposition of the EBR and the instruments comprising the Amended CBD are inconsistent <i>as such</i> with Articles I:1, II:1(a) and (b), X(3)(a), XI:1 and XIII of the GATT 1994. <p>The appellate Body however upheld the panel's findings that US action is not inconsistent with respect to –</p> <ul style="list-style-type: none"> Articles 1, 9.1, 9.2, 9.3, and 9.3.1 and 18.1 of the ADA Articles 10, 19.2, 19.3, and 19.4 and 32.1 of the SCM Agreement.
DS 342 (2006)	Canada	China	<p>The Chinese measures favour domestic manufacturers of vehicles if they use domestically produced parts in the manufacture. This is in violation of –</p> <ul style="list-style-type: none"> The Protocol of Accession (WT/L/432) (including Parts I.1.2 and I.7.3, and paras. 93 and 203 of the Working Party Report). Articles II (including para. 1) and III (including paras. 2, 4 and 5) of the GATT 1994. Article 2 of the TRIMs Agreement. Article 2 of the Agreement on Rules of Origin, specifically paras. (b), (c) 	<p>The Panel ruled that -</p> <ul style="list-style-type: none"> Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts; Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts; and Policy Order 8, Decree 125 and Announcement 4 are not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the

			<p>and (d).</p> <ul style="list-style-type: none"> • Article 3 of the SCM Agreement. 	<p>GATT 1994.</p> <ul style="list-style-type: none"> • With respect to CKD and SKD kits: (i) Policy Order 8, Decree 125 and Announcement 4 are inconsistent with China's commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement. • With respect to Canada's claims that Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:5 of the GATT 1994 and the TRIMs Agreement, the Panel decided to exercise judicial economy. <p>China appealed against certain decisions of the panel, but broad findings were upheld by the Appellate Body.</p>
DS 341 (2006)	European Communities	Mexico	<p>The EC claimed that the initiation, conduct of the investigations and imposition of definitive countervailing measures on imports of olive oil from the European Communities are inconsistent with Mexico's obligations under -</p> <ul style="list-style-type: none"> • Article VI of GATT 1994. • Articles 1, 10, 11, 12, 13, 14, 15, 16, 19, 22 and 32 of the SCM Agreement. • Articles 13 and 21 of the Agreement on Agriculture. 	<p>The Panel ruled that -</p> <ul style="list-style-type: none"> • Mexico acted inconsistently with Article 11.11 of the SCM Agreement because Economía's investigation in this case was concluded more than 18 months after the date of its initiation, and Article 11.11 does not permit such prolongation under any circumstances; • Mexico acted inconsistently with Article 12.4.1 of the SCM Agreement because Economía failed to require non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the information submitted in confidence, in the absence of sufficient explanations of the existence of exceptional circumstances and of the reasons why summarization was not possible; and • Mexico acted inconsistently with the obligation in Article 15.1 of the SCM Agreement to base the injury determination on positive evidence and pursuant to an objective examination because Economía limited its injury analysis to the periods from April to December of 2000, 2001 and 2002.

DS 340 (2006)	United States	China	<p>The Chinese measures are inconsistent with -</p> <ul style="list-style-type: none"> • Article 2 of the TRIMs Agreement. • Articles II (including para. 1) and III (including paras. 2, 4 and 5) of the GATT 1994. • Article 3 (including paras. 1 and 2) of the SCM Agreement. • The Protocol of Accession (WT/L/432) (including Parts I.1.2 and I.7.3, and paras. 93 and 203 of the Working Party Report). 	<p>The Panel ruled that -</p> <ul style="list-style-type: none"> • Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts; • Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts; and • Policy Order 8, Decree 125 and Announcement 4 are not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994. • With respect to CKD and SKD kits, Policy Order 8, Decree 125 and Announcement 4 are inconsistent with China's commitment under paragraph 93 of China's Working Party Report, which is an integral part of the WTO Agreement. • With respect to the United States' claims that Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:5 of the GATT 1994, TRIMs Agreement and SCM Agreement, the Panel decided to exercise judicial economy. <p>China appealed against certain decisions of the panel, but broad findings were upheld by the Appellate Body.</p>
DS 339 (2006)	European Communities	China	<p>The Chinese measures are inconsistent with -</p> <ul style="list-style-type: none"> • Articles II:1(a), II:1(b), III:2, III:4, III:5 of the GATT 1994, as well as with the principles contained in Article III:1. 	<p>The Panel ruled that -</p> <ul style="list-style-type: none"> • Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:2, first sentence of the GATT 1994 in that they subject imported auto parts to an internal charge in excess of that applied to like domestic auto parts

			<ul style="list-style-type: none"> Articles 2.1 and 2.2 of the TRIMs Agreement in conjunction with paragraphs 1(a) and 2(a) of the Illustrative List annexed to the Agreement. Article 3 of the SCM Agreement. China's obligations under its Access Protocol, in particular Part I, para. 7.3 of the Accession Protocol, and in para. 203 of the Working Party Report on the Accession of China (WP Report) in conjunction with Part I, para. 1.2 of the Accession Protocol, and para. 342 of the WP Report. 	<ul style="list-style-type: none"> Policy Order 8, Decree 125 and Announcement 4 are inconsistent with Article III:4 of the GATT 1994 in that they accord imported auto parts less favourable treatment than like domestic auto parts Policy Order 8, Decree 125 and Announcement 4 are not justified under Article XX(d) of the GATT 1994 as measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994. <p>China appealed against certain decisions of the panel, but broad findings were upheld by the Appellate Body.</p>
DS 336 (2006)	South Korea	Japan	<p>Korea claimed that the countervailing duties imposed on certain Dynamic Random Access Memories (DRAMs) are inconsistent with Japan's obligations under -</p> <ul style="list-style-type: none"> "including, but not limited to", Articles VI:3 and X:3 of the GATT 1994 Articles 1, 2, 10, 11, 12, 14, 15, 15.5, 19, 19.1, 21, 22 and 32.1 of the SCM Agreement. 	<p>Though the Panel rejected several claims made by Korea, they found that -</p> <ul style="list-style-type: none"> Japan improperly found government "entrustment or direction" of the Four Creditors to participate in the December 2002 restructuring, contrary to Article 1.1(a)(1)(iv) of the <i>SCM Agreement</i>; Japan improperly found that the December 2002 restructuring conferred a benefit on Hynix, contrary to Articles 1.1(b) and 14 of the <i>SCM Agreement</i>; Japan improperly calculated the amount of benefit conferred by the October 2001 and December 2002 restructurings, contrary to Articles 1.1(b) and 14 of the <i>SCM Agreement</i>; Japan improperly used methods to calculate the amount of benefit to the recipient that were not provided for in its national legislation or implementing regulations, contrary to the <i>chapeau</i> of Article 14 of the <i>SCM Agreement</i>; Japan improperly levied countervailing duties in 2006 to

				<p>offset some of the subsidies provided by the October 2001 restructuring, even though the JIA only found that some of those subsidies applied from 2001 through 2005, contrary to Article 19.4 of the <i>SCM Agreement</i>.</p> <p>Though the Appellate Body reversed a few decisions made by the Panel, on the whole they concluded that Japan acted inconsistently with respect to several SCM provisions including the ones described in articles 1.1 (b), 14, 19.4.</p>
DS 301 (2003)	South Korea	European Communities	<p>South Korea Complained that EC Regulation 1177/2002 (“TDM Regulation”) and EC Regulation 1540/98, as well as the EC member States’ implementing provisions provide for subsidies in favour of commercial vessels in various forms. In addition, the provision by the EC and the member States of subsidies in support of commercial vessels built in the EC, in form of (a) operational aid granted on a contractual basis in forms such as grants, export credits, guarantees or tax breaks, (b) restructuring aid, (c) regional or other investment aid, (d) research and development aid, (e) environmental protection aid and (f) insolvency and closure aid are in breach of their obligations under the provisions of the WTO Agreements, <i>inter alia</i>:</p> <ul style="list-style-type: none"> Articles 1, 2, 3.1, 5(a) and (c), 6.3(a), (b) or (c), 6.4 and 6.5 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”); 	<p>According to the Panel -</p> <ul style="list-style-type: none"> Regarding the claim of Korea under Article III:4 of the GATT 1994, the subsidies authorized under the TDM Regulation were covered by the notion of “the payment of subsidies exclusively to domestic producers” in Article III:8(b) of the GATT 1994, and thus were not “prevented” by Article III. Regarding the claim of Korea under Article I:1 of the GATT 1994, the subsidies authorized under the TDM Regulation were not covered by Article III:4 of the GATT 1994 by virtue of Article III:8(b), they were also not covered by the phrase “all matters referred to in paragraphs 2 and 4 of Article III” in Article I:1. Regarding Korea’s claim under Article 32.1 of the SCM Agreement, although the measures at issue were “specific” within the meaning of that provision as interpreted by the Appellate Body, the measures at issue did not constitute action “against” a subsidy of another member as that term has been interpreted by the Appellate Body. Regarding Korea’s claim under Article 23.1 of the DSU, the Panel found that the EC had adopted the TDM mechanism in response to what it considered to be a violation by Korea of its obligations under the SCM Agreement and that the Communities was seeking to induce Korea to remove its allegedly WTO-inconsistent

			<ul style="list-style-type: none"> Articles I:1 and III:4 of GATT 1994; Article 23(1) and (2) of the DSU and Articles 4, 7 and 32(1) of the SCM Agreement. The above-described measures nullify or impair benefits accruing to Korea under the WTO Agreements, within the meaning of Articles XXIII:1(a) and (b) of GATT 1994 and Article 5(b) of the SCM Agreement. 	<p>subsidies. Accordingly, the Panel concluded that the European Communities had acted inconsistently with Article 23.1 of the DSU.</p> <ul style="list-style-type: none"> It however rejected the claims of Korea that the measures at issue are in breach of Articles I and III of the GATT 1994 and Article 32.1 of the SCM Agreement.
DS 296 (2003)	Korea	United States	<p>Section 771 of the US Tariff Act of 1930 is inconsistent with –</p> <ul style="list-style-type: none"> Articles VI:3 and X:3 of the GATT 1994 Articles 1, 2, 10, 11, 12, 14, 17, 22, 32.1 of the SCM 	<p>Panel concluded that the alleged measures are –</p> <ul style="list-style-type: none"> inconsistent with Articles 1.1(a)(1)(iv), 1.1(b) and 15.5 of the <i>SCM Agreement</i>. consistent with Article 2 of the <i>SCM Agreement</i>. <p>The Panel either rejected or exercised judicial economy on all other claims by Korea. US expressed its willingness to appeal certain provisions of the Panel ruling.</p>
DS 277 (2003)	Canada	United States	<p>The US measure is inconsistent with –</p> <ul style="list-style-type: none"> Article VI:6(a) of the GATT 1994 Articles 1, 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 12 and 18.1 of the ADA Articles 10, 15.1, 15.2, 15.3, 15.4, 15.5, 15.7, 15.8, 22 and 32.1 of the SCM 	<p>The Panel found that the measures are inconsistent with –</p> <ul style="list-style-type: none"> Articles 3.5 and 3.7 of the ADA Article 15.5 and 15.7 of the SCM Agreement
DS 273 (2002)	European Communities	Korea	<p>Korean measures are inconsistent with Articles 1, 2, 3.1, 5(a), 5(c), 6.3 and 6.5 of the SCM Agreement</p>	<p>The Panel found that the Korean measures are -</p> <ul style="list-style-type: none"> consistent with Articles 3.1(a) and 3.2 of the SCM Agreement inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement <p>The Panel further concluded that EC failed to demonstrate some of its claims.</p>

DS 257 (2002)	Canada	United States	The US measures were inconsistent with – <ul style="list-style-type: none"> Articles 1, 2, 10, 11, 12, 14, 15, 19, 22 and 32.1 of the SCM Articles VI:3 and X:3 of GATT 1994 	The Panel found that US procedure was inconsistent with – <ul style="list-style-type: none"> Articles 10, 14, 14(d) and 32.1 SCM Agreement Article VI:3 of GATT 1994 The Appellate Body upheld the major findings of the Panel.
DS 222 (2001)	Brazil	Canada	Subsidies granted to Canada's regional aircraft industry is inconsistent with Article 3 of the SCM Agreement	Most of Brazil's claims were rejected. Only on one count the Canadian measure was found inconsistent with Article 3.1(a) of the SCM Agreement.
DS 221 (2001)	Canada	United States	US actions concerning Section 129(c)(1) of the Uruguay Round Agreements Act are inconsistent with – <ul style="list-style-type: none"> Article 21.3 of the DSU Article VI of the GATT 1994 Articles 10 and note 36, 19.2, 19.4 and note 51, 21.1, 32.1, 32.2, 32.3, and 32.5 of the SCM. Articles 1, 9.3, 11.1, 18.1-4 and note 12 of the ADA Article XVI:4 of the WTO Agreement 	The Panel concluded that that Canada had failed to establish that section 129(c)(1) of the Uruguay Round Agreements Act was inconsistent with Articles VI:2, VI:3 and VI:6(a) of the GATT 1994; Articles 1, 9.3, 11.1 and 18.1 and 18.4 of the AD Agreement; Articles 10, 19.4, 21.1, 32.1 and 32.5 of the SCM Agreement; and Article XVI:4 of the WTO Agreement.
DS 213 (2000)	European Communities	United States	The US measures were inconsistent with Articles 10, 11.9 and 21 of the SCM Agreement.	The Panel found that US acted inconsistently with – <ul style="list-style-type: none"> Articles 21.3 and 32.5 of the SCM Agreement Article XVI:4 of the WTO Agreement The Appellate Body upheld the major findings of the Panel.
DS 212 (2000)	European Communities	United States	The US methodology was inconsistent with Articles 10, 19 and 21 of the SCM Agreement.	The Panel found that both the countervailing duty determinations and Section 1677(5)(F) were inconsistent with the SCM Agreement. Although the Appellate Body reversed the Panel ruling on certain Articles of SCM Agreement, it upheld the major findings of it.
DS 194 (2000)	Canada	United States	The US restraint on exports of a product acts as a subsidy to other products and is inconsistent with – <ul style="list-style-type: none"> Articles 1.1, 10, 11, 17, 19, 32.1 and 	The Panel noted that the US actions are not inconsistent with its obligations under SCM Agreement.

			<p>32.5 of the SCM</p> <ul style="list-style-type: none"> • Article XVI:4 of the WTO Agreement 	
DS 126 (1998)	United States	Australia	The Australian measures are inconsistent with Article 3 of the SCM Agreement	The Panel concluded that the payments under the grant contract are subsidies within the meaning of Article 1 of the SCM Agreement.
DS 108 (1997)	European Communities	United States	<p>The US FSC scheme was inconsistent with –</p> <ul style="list-style-type: none"> • Articles III:4 and XVI of the GATT 1994 • Articles 3.1(a) and (b) of the SCM • Articles 3 and 8 of the AoA 	<p>The panel concluded that the US acted inconsistently with –</p> <ul style="list-style-type: none"> • Article 3.1(a) of the SCM Agreement • Article 3.3 of the AoA
DS 70 (1997)	Brazil	Canada	Certain subsidies granted by the Canadian Government are inconsistent with Article 3 of the Subsidies Agreement.	The Panel found that Canada's measures were inconsistent with Articles 3.1(a) and 3.2 of the Subsidies Agreement. The Appellate Body upheld the findings of the panel.
DS 46 (1996)	Canada	Brazil	The export subsidies granted to foreign purchasers of Brazil's Embraer aircraft are inconsistent with the Subsidies Agreement Articles 3, 27.4 and 27.5.	The Panel found that Brazil's measures were inconsistent with Articles 3.1(a) and 27.4 of the Subsidies Agreement. The Appellate Body upheld all major findings of the panel.
DS 22 (1995)	Philippines	Brazil	The countervailing duty imposed by Brazil on the Philippine's exports of desiccated coconut was inconsistent with WTO and GATT rules.	The Panel concluded that the provisions of the agreements relied on by Philippines were inapplicable to the dispute. The Appellate Body upheld the findings and legal interpretations of the Panel.

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TABLE 5: AN ANALYSIS OF DSB COMPLAINTS ON SCM RELATED DISPUTES²¹

Overall analysis of SCM cases from complainant's perspective								
Year	A	B	C	D	E	F	G	Total
1995	1	-	-	-	-	-	-	1
1996	4	-	-	-	2	1	-	7
1997	2	-	-	1	6	1	-	10
1998	4	-	-	-	7	-	-	11
1999	-	-	-	-	3	-	-	3
2000	3	2	-	-	2	-	-	7
2001	3	1	-	-	-	-	-	4
2002	6	-	-	-	1	-	-	7
2003	2	2	-	-	1	-	-	5
2004	-	-	2	-	4	-	-	6
2005	-	-	-	-	2	-	-	2
2006	5	1	2	-	1	1	-	10
2007	-	-	-	-	1	1	-	2
2008	-	-	2	-	4	1	-	7
2009	-	-	-	-	1	-	-	1
Total	30	6	6	1	35	5	0	83
Overall analysis of SCM cases against US from complainant's perspective								
Year	A	B	C	D	E	F	G	Total
1995	-	-	-	-	-	-	-	0
1996	-	-	-	-	-	-	-	0
1997	1	-	-	-	1	-	-	2
1998	1	-	-	-	-	-	-	1
1999	-	-	-	-	1	-	-	1
2000	3	2	-	-	1	-	-	6
2001	2	1	-	-	-	-	-	3
2002	3	-	-	-	1	-	-	4
2003	-	1	-	-	1	-	-	2
2004	-	-	1	-	2	-	-	3
2005	-	-	-	-	-	-	-	0
2006	-	1	1	-	-	-	-	2
2007	-	-	-	-	1	-	-	1
2008	-	-	1	-	-	-	-	1
2009	-	-	-	-	-	-	-	0
2010	-	-	-	-	-	-	-	0
Total	11	4	3	0	8	0	0	26

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²¹ A – Win for complainant
 B – Loss for complainant
 C – Continuing / result expected soon / case with Appellate Body / not officially closed
 D – Request to suspend panel proceeding
 E – Panel not formed / formed but not composed
 F – Amicably settled
 G – Discontinuation of the alleged measure by the respondent

TABLE 6: GOVERNMENT FINANCIAL TRANSFERS TO FISHING (RANKED ON THE BASIS OF 2006)

(US \$ million)

S. No	Country\Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
1	United States	891.2	1002.6	1041.0	1103.1	1037.7	1169.6	1130.8	1290.4	1064.4	1222.5	2128.8
2	Japan	3186.4	2945.8	2135.9	2537.5	2913.1	2574.1	2323.6	2310.7	2437.9	2165.2	1985.1
3	Korea	367.8	379.0	211.9	471.6	320.4	428.3	538.7	495.3	495.3	649.4	752.2
4	Canada	545.3	433.3		606.4	564.5	521.4	497.8	590.0	618.8	591.0	591.0
5	Spain	246.5	344.6	296.6	399.6	364.1	376.6	301.9	353.3	256.6	433.8	425.4
6	Norway	172.7	163.4	153.0	181.0	104.6	99.5	156.3	139.2	142.3	149.5	159.5
7	Turkey	28.7	15.1		1.3	26.4	17.7	16.2	16.3	59.5	98.1	133.9
8	Italy	162.6	91.8		200.5	217.7	231.7	159.6	149.3	170.1	119.2	119.2
9	United Kingdom	115.4	128.1	90.8	76.0	81.4	73.7		82.7	87.5	103.2	114.7
10	France	158.2	140.8		71.7	166.1	141.8	155.3	179.7	236.8	126.2	113.8
11	Denmark	85.8	82.0	90.5	27.8	16.3		68.8	37.7	28.5	58.1	113.2
12	Australia	37.4	41.2			82.3	75.9	78.0	95.6	95.6	46.3	90.0

Source: OECD (2009)

TABLE 7: COMPOSITION OF FISHERY SUBSIDY IN SELECT COUNTRIES

(US \$ million)

Australia								
Particulars/Years	1996e	1997e	1998e	1999e	2000e	2001e	2002e	2003e
Direct Payments		4.96				1.10		
Cost Reducing Transfers	68.75	66.67	57.86	61.29	56.32	50.52	55.15	63.64
General Services	29.61	28.89	25.79	27.68	25.95	24.28	30.92	31.92
Cost Recovery Charges	-21.48	-17.70	-14.47	-14.84	-13.30	-11.86	-11.96	-14.29
Total	76.88	82.82	69.18	74.13	68.98	64.05	74.11	81.27
Canada								
Particulars/Years	1996	1997e	1998e	1999	2000	2001	2002	2003
Direct Payments	304.29	247.27	213.68	310.94	211.81	213.42	204.59	259.00
Cost Reducing Transfers	17.04	17.70	21.32	25.84	69.20	72.84	52.10	34.00
General Services	187.96	168.35	174.36	189.33	229.40	228.90	238.60	266.29
Cost Recovery Charges	-35.10	-35.61	-31.55	-29.46	-32.25	-31.68	-31.02	-35.71
Total	510.20	397.70	377.80	496.65	478.16	483.48	464.27	523.57
France								
Particulars/Years	1996	1997	1998e	1999	2000	2001	2002	2003
Direct Payments	25.06	22.50	11.94	1.55	49.82	23.75	20.94	25.96
Cost Reducing Transfers	15.25	13.69			8.72	14.02	14.15	11.91
General Services	117.89	104.63	88.75	70.11	97.71	90.63	108.87	140.90
Cost Recovery Charges								
Total	158.19	140.81	100.69	71.67	156.24	128.39	143.96	178.76
Japan								
Particulars/Years	1996	1997	1998	1999	2000	2001	2002	2003
Direct Payments	27.57	24.79		26.34	19.01	16.88	27.09	18.12
Cost Reducing Transfers	27.02	21.82		35.12	37.49	32.18	30.39	25.56
General Services	3131.78	2899.17	2135.95	2476.07	2807.06	2483.15	2266.12	2267.98
Cost Recovery Charges								
Total	3186.36	2945.79	2135.95	2537.54	2863.56	2532.20	2323.60	2311.66
United States								
Particulars/Years	1996	1997	1998	1999	2000	2001	2002	2003
Direct Payments		59.7	54.8	120.7	66.8	49.9	81.28	175.6
Cost Reducing Transfers	0.25	19	13	12.3	12.25	51.8	3.5	3.5
General Services	545.96	548.28	596	548.1	726.08	774.24	1046.03	1111.34
Cost Recovery Charges								
Total	546.21	626.98	663.8	1084.4	805.13	875.94	1130.81	1290.44

Source: OECD (2006a)

TABLE 8: PERCENTAGE OF RCAs ABOVE 1 FOR THE FISHERY SECTOR

Country	2000	2004	2008
Australia	26.32	20.00	22.06
Canada	31.33	34.57	34.15
Denmark	57.65	58.82	55.81
France	24.14	24.42	31.40
India	34.43	16.90	18.06
Italy	11.90	10.71	11.90
Japan	5.63	7.04	11.11
Korea, Rep. of	22.22	15.15	11.43
Norway	52.00	56.16	59.42
Spain	49.43	55.81	52.87
Turkey	18.52	20.00	20.00
United Kingdom	20.00	23.53	29.41
United States	19.54	24.14	26.44

Source: Author's calculations from the WITS Data

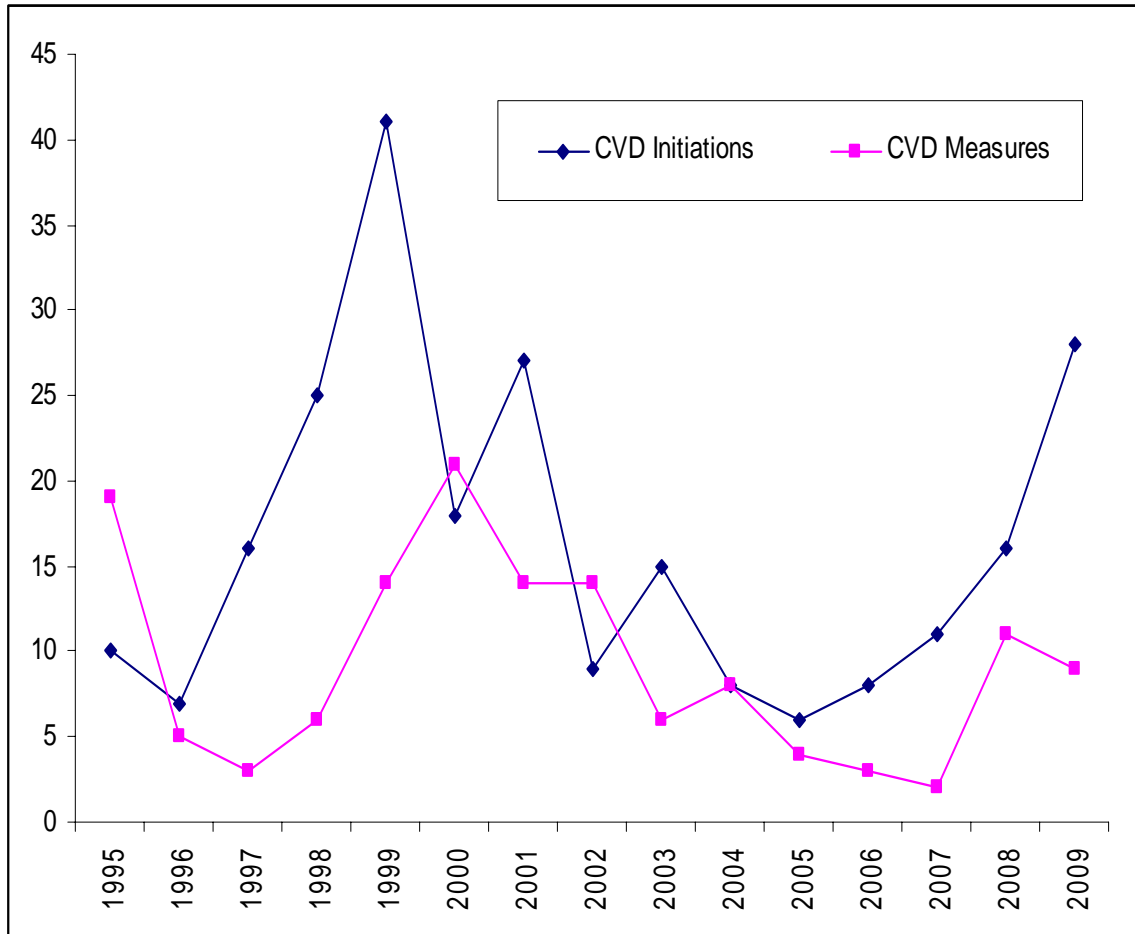
TABLE 9: CONCORDANCE BETWEEN ARTICLE 1 AND ARTICLE 2 SUBSIDIES AND THE OECD DATA

Subsidy	Direct payments	Cost-reducing transfers	General services
Article 1	<ul style="list-style-type: none"> • Price support payments to fishers • Grants for new vessels • Grants for modernisation • Buyouts of licences and permits • Buyouts of quota and catch history • Income support • Compensation for closed or reduced seasons • Compensation for damage from predators on fish stocks • Grants to purchase second hand vessels • Grants to small fisheries • Direct aid to participants in particular fisheries • Income guarantee compensation • Grants to set up temporary joint ventures in other countries • Payments to set up permanent joint ventures in other countries • Temporary grants to fishers and vessel owners • Price support payments direct to fishers 	<ul style="list-style-type: none"> • Fuel tax exemptions • Subsidised loans for vessel construction • Subsidised loans for vessel modernisation • Payments to reduce accounting costs • Provision of bait services • Loan guarantees • Underwriting of insurance costs • Contributions to match private sector investments • Low cost loans to young fishers • Interest rebates • Transport subsidies • Low cost insurance • Low cost loans to specific fisheries • Income tax deduction for fishers • Government funding of the introduction of new gear and technology • Support for crew insurance • Tax exemptions for deep-sea vessels • Support for development of deep-sea fisheries • Interest subsidies for the purchase of machines and equipment for fishing vessels • Interest subsidy for the purchase of second-hand vessels • Support to improve economic efficiency • Reduced charges by government agencies 	<ul style="list-style-type: none"> • Market intervention schemes • Support to build port facilities for commercial fishers • Payments to producer organisations • Fisheries enhancement expenditure • Expenditure on exploratory fishing

		<ul style="list-style-type: none"> • Support to build facilities for commercial fishers at ports 	
Article 2	<ul style="list-style-type: none"> • Vessel decommissioning payments • Retirement grants for fisheries • Vacation support payments • Grants for temporary withdrawal of fishing vessels • Unemployment insurance • Disaster relief payments 	<ul style="list-style-type: none"> • Government payment of access to other countries' waters • Government funded training of fish processing workers 	<ul style="list-style-type: none"> • Research expenditure • Management expenditure • Enforcement expenditure • Regional development grants • Protection of marine areas • Grants to local authorities to for retraining of fishers into other activities • Expenditure on the protection of marine areas • Payments to support community based management • Support to enhance the fisheries community environment • Expenditure on research and development • Expenditure on research of deep-sea fisheries • Expenditure to promote international fisheries co-operation • Support to improve the management of co-operatives • Support to improve fishing villages • Expenditure on fisheries policy advice • Expenditure on prosecution of fisheries offences • Support for artificial reefs • Support to establish producers' organisations • Aid for restocking of fish resources • Funding of information dissemination • Funding for the promotion and development of fisheries • Expenditure for information collection and analysis • Expenditure on conservation and management

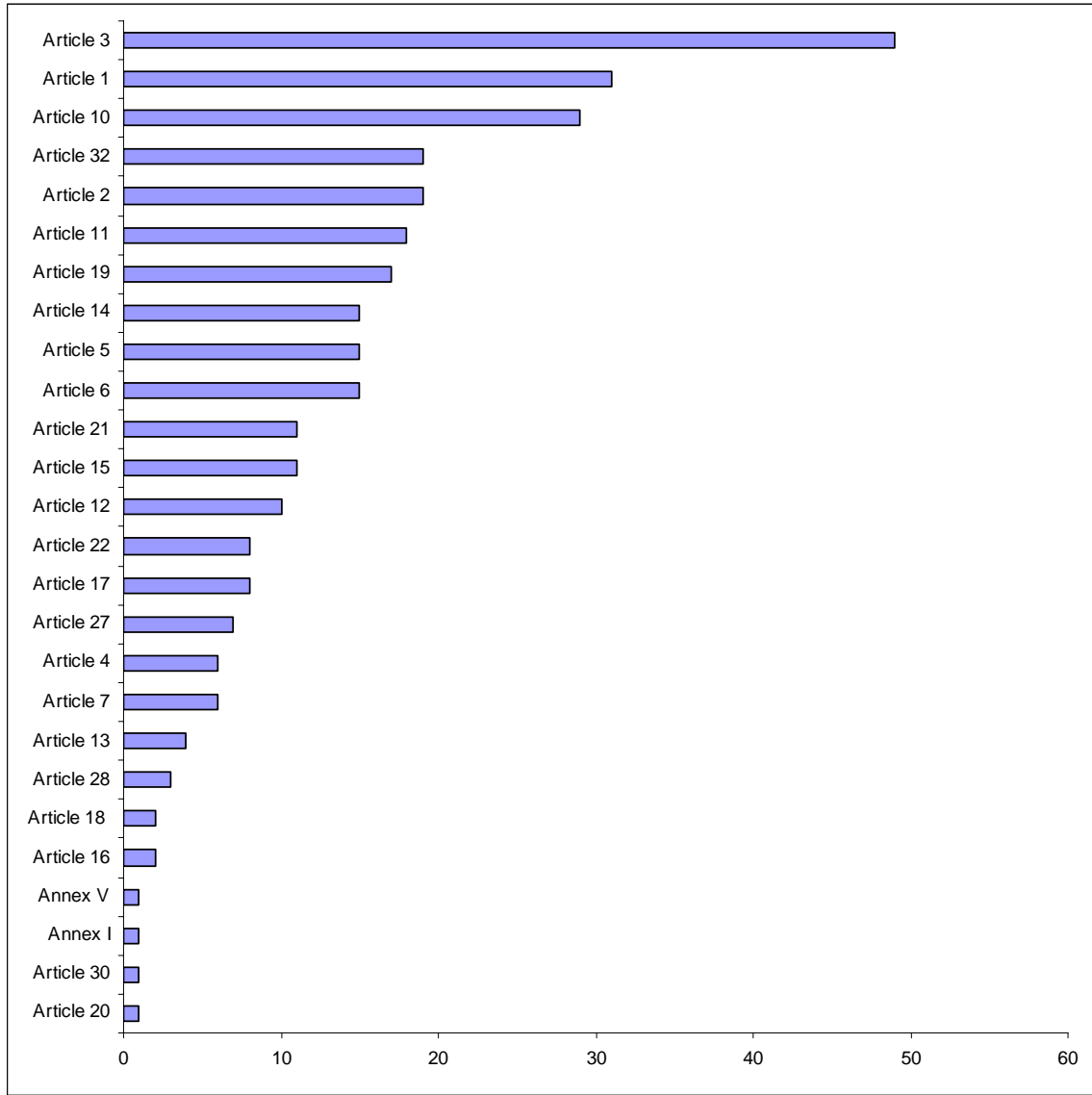
Source: Constructed on the basis of Cox and Schmidt (2002) classifications and WTO (2007)

FIGURE 1: COUNTERVAILING DUTY INVESTIGATIONS INITIATED FROM 1995 TO 2009 (JUNE), WORLDWIDE



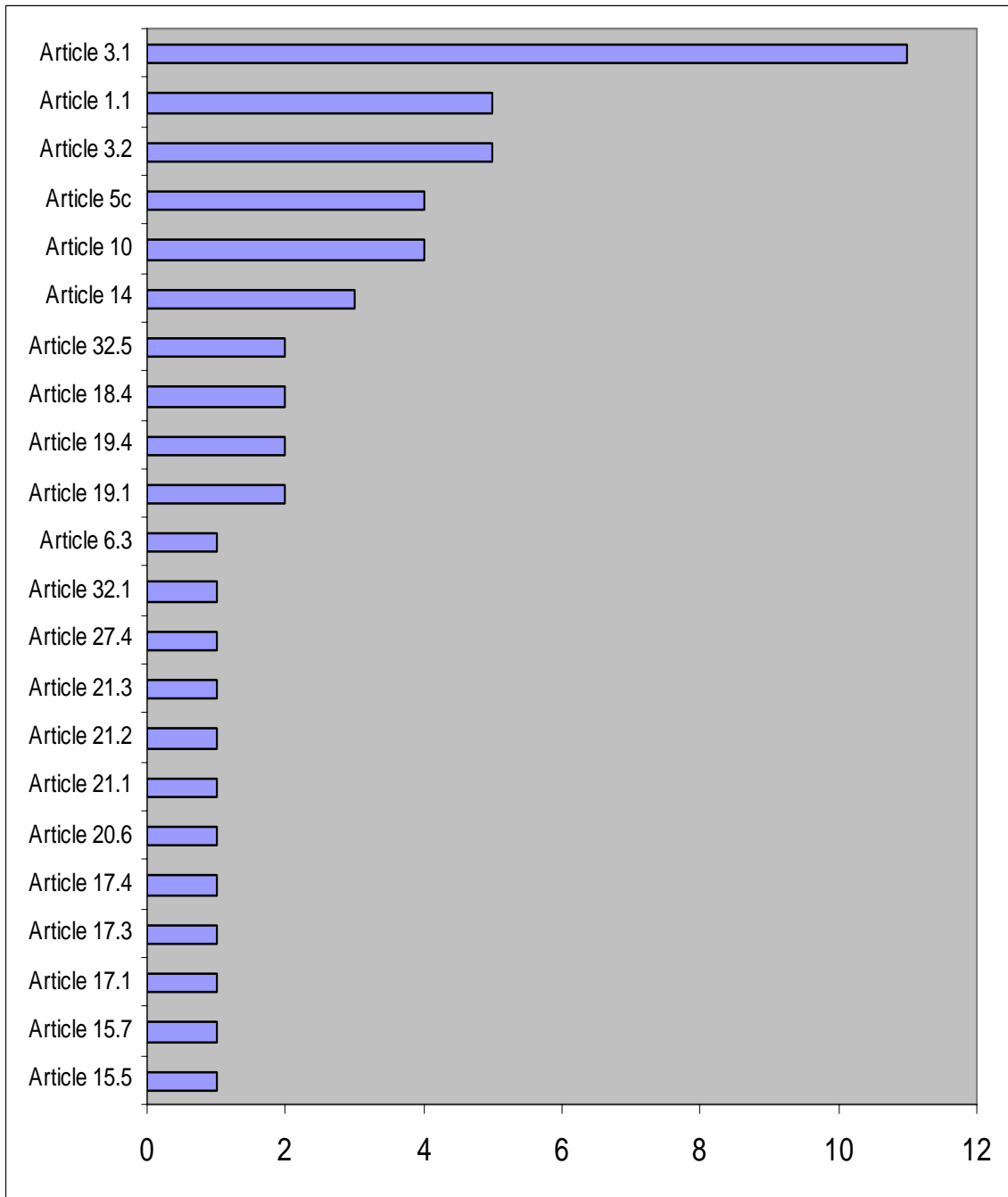
Source: Constructed by the authors from WTO SCM database

FIGURE 2: ALLEGED VIOLATION OF WTO SCM AT DSB, BY ARTICLE



Constructed by the authors from WTO Dispute Settlement Page

FIGURE 3: ACTUAL VIOLATIONS OF WTO SCM PROVISIONS – DSB RULINGS



Constructed by the authors from WTO Dispute Settlement Page

ANNEX 1: PROHIBITION OF CERTAIN FISHERIES SUBSIDIES (ARTICLE 1 SUBSIDIES IN ANNEX VIII)

I.1 Except as provided for in Articles II and III, or in the exceptional case of natural disaster relief²², the following subsidies within the meaning of paragraph 1 of Article 1, to the extent they are specific within the meaning of paragraph 2 of Article 1, shall be prohibited:

(a) Subsidies the benefits of which are conferred on the acquisition, construction, repair, renewal, renovation, modernization, or any other modification of fishing vessels²³ or service vessels²⁴, including subsidies to boat building or shipbuilding facilities for these purposes.

(b) Subsidies the benefits of which are conferred on transfer of fishing or service vessels to third countries, including through the creation of joint enterprises with third country partners.

(c) Subsidies the benefits of which are conferred on operating costs of fishing or service vessels (including licence fees or similar charges, fuel, ice, bait, personnel, social charges, insurance, gear, and at-sea support); or of landing, handling or in- or near-port processing activities for products of marine wild capture fishing; or subsidies to cover operating losses of such vessels or activities.

(d) Subsidies in respect of, or in the form of, port infrastructure or other physical port facilities exclusively or predominantly for activities related to marine wild capture

²² Subsidies referred to in this provision shall not be prohibited when limited to the relief of a particular natural disaster, provided that the subsidies are directly related to the effects of that disaster, are limited to the affected geographic area, are time-limited, and in the case of reconstruction subsidies, only restore the affected area, the affected fishery, and/or the affected fleet to its pre-disaster state, up to a sustainable level of fishing capacity as established through a science-based assessment of the post-disaster status of the fishery. Any such subsidies are subject to the provisions of Article VI.

²³ For the purposes of this Agreement, the term "fishing vessels" refers to vessels used for marine wild capture fishing and/or on-board processing of the products thereof.

²⁴ For the purposes of this Agreement, the term "service vessels" refers to vessels used to tranship the products of marine wild capture fishing from fishing vessels to on-shore facilities; and vessels used for at-sea refuelling, provisioning and other servicing of fishing vessels.

fishing (for example, fish landing facilities, fish storage facilities, and in- or near-port fish processing facilities).

(e) Income support for natural or legal persons engaged in marine wild capture fishing.

(f) Price support for products of marine wild capture fishing.

(g) Subsidies arising from the further transfer, by a payer Member government, of access rights that it has acquired from another Member government to fisheries within the jurisdiction of such other Member.²⁵

(h) Subsidies the benefits of which are conferred on any vessel engaged in illegal, unreported or unregulated fishing.²⁶

I.2 In addition to the prohibitions listed in paragraph 1, any subsidy referred to in paragraphs 1 and 2 of Article 1 the benefits of which are conferred on any fishing vessel or fishing activity affecting fish stocks that are in an unequivocally overfished condition shall be prohibited.

Source: WTO (2007)

²⁵ Government-to-government payments for access to marine fisheries shall not be deemed to be subsidies within the meaning of this Agreement.

²⁶ The terms "illegal fishing", "unreported fishing" and "unregulated fishing" shall have the same meaning as in paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing of the United Nations Food and Agricultural Organization.

ANNEX 2: GENERAL EXCEPTIONS (ARTICLE 2 SUBSIDIES IN ANNEX VIII)

Notwithstanding the provisions of Article I, and subject to the provision of Article V:

(a) For the purposes of Article I.1(a), subsidies exclusively for improving fishing or service vessel and crew safety shall not be prohibited, provided that:

(1) such subsidies do not involve new vessel construction or vessel acquisition;

(2) such subsidies do not give rise to any increase in marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn; and

(3) the improvements are undertaken to comply with safety standards.

(b) For the purposes of Articles I.1(a) and I.1(c) the following subsidies shall not be prohibited:

subsidies exclusively for: (1) the adoption of gear for selective fishing techniques; (2) the adoption of other techniques aimed at reducing the environmental impact of marine wild capture fishing; (3) compliance with fisheries management regimes aimed at sustainable use and conservation (e.g., devices for Vessel Monitoring Systems); provided that the subsidies do not give rise to any increase in the marine wild capture fishing capacity of any fishing or service vessel, on the basis of gross tonnage, volume of fish hold, engine power, or on any other basis, and do not have the effect of maintaining in operation any such vessel that otherwise would be withdrawn.

(c) For the purposes of Article I.1(c), subsidies to cover personnel costs shall not be interpreted as including:

- (1) subsidies exclusively for re-education, retraining or redeployment of fishworkers²⁷ into occupations unrelated to marine wild capture fishing or directly associated activities; and
 - (2) subsidies exclusively for early retirement or permanent cessation of employment of fishworkers as a result of government policies to reduce marine wild capture fishing capacity or effort.
- (d) Nothing in Article I shall prevent subsidies for vessel decommissioning or capacity reduction programmes, provided that:
- (1) the vessels subject to such programmes are scrapped or otherwise permanently and effectively prevented from being used for fishing anywhere in the world;
 - (2) the fish harvesting rights associated with such vessels, whether they are permits, licences, fish quotas or any other form of harvesting rights, are permanently revoked and may not be reassigned;
 - (3) the owners of such vessels, and the holders of such fish harvesting rights, are required to relinquish any claim associated with such vessels and harvesting rights that could qualify such owners and holders for any present or future harvesting rights in such fisheries; and
 - (4) the fisheries management system in place includes management control measures and enforcement mechanisms designed to prevent overfishing in the targeted fishery. Such fishery-specific measures may include limited entry systems, catch quotas, limits on fishing effort or allocation of exclusive quotas to vessels, individuals and/or groups, such as individual transferable quotas.
- (e) Nothing in Article I shall prevent governments from making user-specific allocations to individuals and groups under limited access privileges and other exclusive quota programmes.

Source: WTO (2007)

²⁷ For the purpose of this Agreement, the term "fishworker" shall refer to an individual employed in marine wild capture fishing and/or directly associated activities.

ANNEX 3: COMPOSITION OF DIFFERENT CATEGORIES OF TRANSFERS TO MARINE CAPTURE FISHERIES SECTOR IN OECD COUNTRIES

Direct payments

Price support payments to fishers, grants for new vessels, grants for modernisation, vessel decommissioning payments, buyouts of licences and permits, buyouts of quota and catch history, income support, unemployment insurance, retirement grants for fisheries, compensation for closed or reduced seasons, compensation for damage from predators on fish stocks, disaster relief payments, grants to purchase second hand vessels, grants for temporary withdrawal of fishing vessels, grants to small fisheries, direct aid to participants in particular fisheries, income guarantee compensation, vacation support payments, grants to set up temporary joint ventures in other countries, payments to set up permanent joint ventures in other countries, temporary grants to fishers and vessel owners, price support payments direct to fishers

Cost-reducing transfers

Fuel tax exemptions, subsidised loans for vessel construction, subsidised loans for vessel modernisation, payments to reduce accounting costs, provision of bait services, loan guarantees, underwriting of insurance costs, contributions to match private sector investments, low cost loans to young fishers, interest rebates, transport subsidies, low cost insurance, government payment of access to other countries' waters, low cost loans to specific fisheries, income tax deduction for fishers, government funded training of fish processing workers, government funding of the introduction of new gear and technology, support for crew insurance, tax exemptions for deep-sea vessels, support for development of deep-sea fisheries, interest subsidies for the purchase of machines and equipment for fishing vessels, interest subsidy for the purchase of second-hand vessels, support to improve economic efficiency, reduced charges by government agencies, support to build facilities for commercial fishers at ports.

General services

Research expenditure, management expenditure, enforcement expenditure, market intervention schemes, regional development grants, support to build port facilities for commercial fishers, protection of marine areas, grants to local authorities to for retraining of fishers into other activities, payments to producer organisations, expenditure on the protection of marine areas, payments to support community based management, fisheries enhancement expenditure, support to enhance the fisheries community environment, expenditure on research and development, expenditure on research of deep-sea fisheries, expenditure to promote international fisheries co-operation, support to improve the management of co-operatives, support to improve fishing villages, expenditure on fisheries policy advice, expenditure on prosecution of fisheries offences, support for artificial reefs, expenditure on exploratory fishing, support to establish producers' organisations, aid for restocking of fish resources, funding of information dissemination, funding for the promotion and development of fisheries, expenditure for information collection and analysis, expenditure on conservation and management.

Cost recovery

An additional component of the OECD classification framework is cost recovery. Under this item, countries are able to report on the extent to which the governmental costs of managing fisheries are recovered from the fishing sector. For some countries, cost recovery is a significant feature of their management regimes. New Zealand, Iceland and Australia, for example, recover around 50%, 37% and 24% of the public costs of fisheries research, management and enforcement from the industry.

Source: Cox and Schmidt (2002)