

WTO Provisions and Implications for Energy Subsidies

Joint UNEP and UNECE Expert Meeting on Energy Subsidies

15-16 November 2007

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Individual project on energy in WTO law and policy

Issues

- Relevant provisions
- Renewable energy subsidies
 - ASCM-related subsidy disciplines
 - AoA and bio-energy/biofuel subsidies
- Fossil fuel subsidies under the ASCM

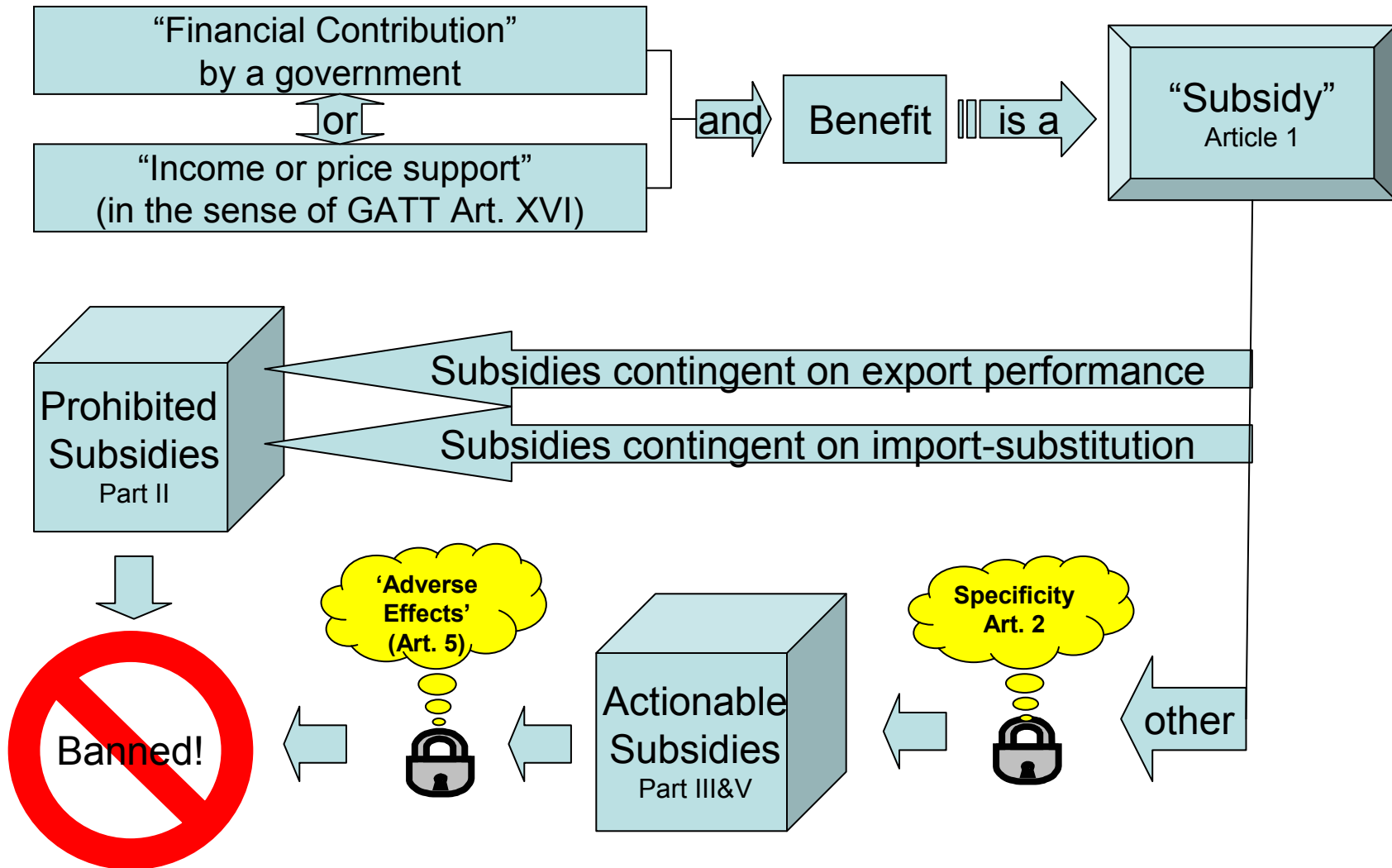
Relevant Provisions (1)

- Subsidies for energy products:
 - General Agreement on Tariffs and Trade ('GATT') 1994
 - Agreement on Subsidies and Countervailing Measures ('ASCM')
 - Agreement on Agriculture ('AoA')
- Applicability of General Agreement on Trade in Services (GATS)
 - Energy subsidies for energy services (e.g. delivery)

Relevant Provisions (2)

- Electricity: what are the relevant subsidy provisions?
- Classification problem still exists:
 - EU and NAFTA: electricity covered by trade in goods
 - Optional heading as a commodity in the ‘HS’ system
=> lack of consensus among Members
- Implication for subsidy disciplines is significant: GATS does not contain many ‘hard law’ provisions on subsidy disciplines

Architecture of the ASCM



The status of renewable energy subsidies

- Which incentive schemes to promote renewables are ‘subsidy’ as defined in the ASCM?
 - 1. Straightforward subsidies
 - 2. Tax exemptions on the basis of environmental objectives
 - 3. Indirect subsidies (downstream or upstream subsidies)
 - 4. Subsidization through regulatory means
- ‘Specificity’ condition met for all non-hydro RE
- Possibility of a WTO challenge? (including R&D)

Proposing an **green box** for RE?

- Reviving the green light category (Art. 8) or introducing a green energy box?
- Q: Fragmentation between trade and climate regimes: one encouraging RE promotion policies and the other restraining them?
 - Removing RE trade barriers is the best way to move forward
 - Domestic subsidies function as barriers against efficient RE producers.
 - Defining a “broad” exemption is not a good idea.
 - A need for a necessity test similar to GATT XX
 - Environmental subsidies could be designed in a non-distortive way
 - Since anything in that green box would be trade distortive, the question is how to balance trade costs vs. environmental benefits?
 - Q: What about R&D subsidies?

Biofuel subsidies under the Agreement on Agriculture

- Inconsistency in biofuels classification and implications for subsidy disciplines
 - Ethanol Under Chapter 22 => Covered by the AoA
 - Caught by the Amber Box Disciplines (Reductions Commitments)
- Ethanol subsidies as green box subsidies under the AoA?
 - Could be the case, but most of the current schemes do not meet the green box criteria!
- Ethanol and ASCM applicability after the expiry of the peace clause: double-discipline for Ag products?

Fossil fuel subsidies under the ASCM

- Dual pricing
 - The legal status under the current Agreement
 - The relevant case law: US Lumber IV (on the issue of ‘benefit’)
 - The EU proposal in Doha negotiations
 - Saudi Arabia’s protocol of accession
 - Russia’s accession negotiations (more leeway)
- Fossil fuel subsidies might be found to be ‘actionable’ if proved to be ‘specific’!
 - ‘de facto’ specificity
 - ‘Adverse effect’

The ‘friends of fish’ in the WTO, why not the friends of climate?

- ‘Actionability’ of fossil fuel subsidies (if it is the case) is not enough: incentive problem!
- A path through ‘prohibition’ seems to be necessary.
- The Doha/Hong Kong model to eliminate fisheries subsidies (which lead to over-fishing and overcapacity) could be applied to all environmental harmful subsidies.
- Huge potential for NGOs to get involved.
- Caveat: differences should all be taken into account.

Proposing a 'fisheries subsidies' model for energy subsidies

- A move toward an international fiscal reform?: from a global carbon tax to phasing out fossil fuel subsidies
- Eliminate 'production' subsidies (AMS-like system)
 - A need to reach consensus on the definition of 'energy security'
- Scope (top-down, button-up/fuel-based?)
- How to clearly define clean exceptions
 - Take account of technology advancement: need to define a performance benchmark
 - Exceptions left actionable?
- Graduation and the effect of different scenarios on global emissions
 - How to define 'special and differential' treatment
- Transparency through mandatory notification
- What level of harmonization on consumption subsidies?

Main Conclusions – Questions for discussion

- Renewable energy subsidies are legally vulnerable. But only the ones which distort trade may lead to a dispute.
- Q : Is there a need to introduce certain exemptions for ‘good’ but trade distortive energy subsidies?
- Fossil fuel subsidies have/will mainly remain untouched under the current system.
- Q : How to define the scope /S&D/ graduation/ etc. of an ‘ESA’* based on the fisheries model?
 - What level of harmonization should be reached on consumption subsidies?

*Energy Subsidies Agreement (‘ESA’)