

Special and Differential Treatment of Developing Countries Regarding Export Promotion Policies under the WTO

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ABSTRACT

This paper explains the export promotion measures that can be utilized by developing countries under the current World Trade Organization (WTO) system and compares the WTO Members' proposals on modification of export promotion provisions in the Doha Development Agenda (DDA) negotiations. Non-reciprocity between developed countries and developing countries in favour of the latter needs to be strengthened in modifying the current WTO regulations concerning export promotion, due to the extremely different levels of economic development between those two groups of countries. Therefore, from the viewpoint of 'distributional fairness' it suggests ways of modifying the special and differential treatment (SDT) provisions applied to export promotion policies of developing economies in the Agreement on Subsidies and Countervailing Measures of the WTO.

Keywords: developing countries, export promotion, WTO

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I. Introduction

Several countries recording rapid economic growth rates for the past half century have pursued the outward-oriented economic development strategy. Outward orientation of those countries is regarded as having contributed to rapid economic growth due to, among other reasons, economies of scale arising from expanded sales opportunities and productivity improvement as a result of the producers' facing more severe competition.¹ Even if those rapidly growing economies commonly pursued outward-orientation, they differ significantly in the degree of government intervention, as the issues of outward orientation and the degree of government intervention are separate issues (Milner (1990: 2)). The city states, especially Hong Kong, have followed the market-led outward orientation. The experience of the other rapidly growing non-city-state economies such as South Korea and Taiwan shows that their governments tried aggressively to promote exports during the period of rapid economic growth.

In addition to the benefits of outward orientation, we can also expect the rationale for the government-led export promotion in the sense of removing any anti-export bias made by import protection and subsidizing the infant exporters, since entering the new export markets is a difficult and costly activity (Meyer (1984)). We can also consider the strategic trade policy argument. According to this, exports subsidized by the government may pre-empt the international market so that the domestic company receives the monopoly profit, as the foreign competitors not subsidized by the government are driven out (Brander and Spencer (1985)). That is, export promotion by the government can be the first-best policy in such a situation and an appropriate governmental role would be to transfer resources from 'less productive' toward 'more productive' uses (Wade (2004: xviii)).²

The northeast Asian developing economies, for instance, were able to pursue active export promotion policies by government subsidization of exporters especially until the 1980s.

¹ Of course, there is also a view that outward orientation has not been so beneficial to development of developing countries. For instance, Singer (1988: 232) expressed the view that the positive effect of outward orientation has become less evident since the mid-1970s even in the Newly Industrializing Countries.

² We can also consider the costs of the export promotion policies, which include giving up allocation of resources to sectors other than exports, the resource allocational inefficiencies due to the difference between the international price and the domestic price in the subsidizing country (Barcelo (1977)), forgone tax revenue in case of tax incentives, and ill-performing financial sector in case of provision of excessive financial incentives, as seen in the case of the Korean financial crisis (Mah (2002)).

The export promotion measures taken by those economies comprised tax incentives (Falvey and Gemmel (1990)), duty drawback (Wade (1991)), export credit/insurance (Mah and Milner (2005)), provision of export processing zones (EPZs) or special economic zones (Warr (1990); Mah (2008)), devaluation or depreciation of domestic currency, and establishment of export promotion organizations providing trade marketing, information and assisting trade fair (Seringshaus and Rosson (1990)). Until the early 1990s, developing countries were relatively free from trade regulations in the global trading system prohibiting the use of export promotion measures. Meanwhile, as of now there are many restrictions or even strict prohibition on the developing countries' use of export promotion policies under the WTO system. Considering the extremely different level of economic development between developed and developing countries, one may wonder whether or not the current WTO system, which strictly regulates the use of export promotion policies by developing countries, is 'fair'.

This paper explains the export promotion measures that can be utilized by developing countries even under the current WTO system and compares the WTO Members' proposals on modification of export promotion provisions in the Doha Development Agenda (DDA) negotiations. Then, from the viewpoint of 'distributional fairness', it suggests ways of modifying the special and differential treatment (SDT) provisions applied to exports of developing economies in the Agreement on Subsidies and Countervailing Measures, the Subsidies Code hereafter, of the WTO. Although export promotion can be very meaningful in the economic development of developing countries, most works on the SDT of developing countries have been too comprehensive, for example, Pangetsu (2000) and Senona (2008). Despite the importance of export promotion in economic development, there has been little, if any, work focusing on the SDT of developing countries with respect to export promotion policies in the WTO system. This paper is intended to fill the gap.

The structure of this paper is as follows. Section II explains the trade regulations governing export promotion policies, especially those relating to developing economies, in the WTO system. Section III describes the proposals made by various Members of the WTO during the DDA negotiations regarding the export promotion of developing economies. Section IV provides suggestions for modifying the current WTO regulations in favour of the export promotion of developing economies. Conclusions are provided in Section V.

II. WTO Regulations on Export Promotion

1. General Agreement on Tariffs and Trade (GATT)

GATT Article XVI made room for controlling subsidy in general and export subsidy in particular. From 1958 GATT Article XVI.4 prohibited the granting of export subsidies other than that provided to primary products. In 1960, the non-exhaustive list of practices deemed to form export subsidies was drafted by a Working Party in the GATT. Six non-tariff barriers (NTBs) Codes were established as a result of the Tokyo Round in 1979. One of those, the Subsidies Code, included an Illustrative List of Export Subsidies which prohibited export subsidies, which was re-introduced, with only minor modifications, in the Uruguay Round (UR) Subsidies Code later (Collins-Williams and Salembier (1996); Adamantopoulos and Akritidis (2008)). However, such prohibition of export subsidies did not bind developing countries until the establishment of the WTO, as the contracting parties were allowed to sign the Tokyo Round NTB Codes voluntarily.

GATT Article VI allows the imposition of countervailing duties (CVDs) as a trade remedy to offset the effect of subsidized imports on domestic producers in importing countries. If there exists subsidized import, material injury to the domestic industry, and causation from the former to the latter, then the government of an importing country may impose CVDs to offset the effect of subsidization.

The contracting parties did not in effect introduce any element of developing country interest into the original framework of the GATT, since the original GATT was essentially a contract among developed countries (Wolfe (2004: 586)). Developing and developed countries were treated as equals and the fundamental principle in the initial framework of the GATT was that rights and obligations were to be applied on an equal basis. There was no SDT provision designed for developing economies. Due to the continuing pressure of developing countries, after the 1954-1955 GATT Review Session, GATT Article XVIII was modified to focus on government assistance to economic development and only developing countries could derogate from obligations using provisions in it (Pangetsu (2000: 1286)).

Part IV of GATT on Trade and Development was introduced at the end of the Kennedy Round in 1964. While many of the expressions of Part IV suggest just good intentions rather than obligations, the addition was important as it introduced the principle of 'non-reciprocity' for developing countries (GATT Art. XXXVI.8). With the inclusion of Part IV of the GATT, developing countries successfully introduced a concept of 'fairness' into the GATT in the sense of recognizing the importance of equity of outcomes rather than just legitimacy of process (Narlikar (2006: 1016-1017)). GATT Article XXXVI in Part IV recognizes that export earnings of developing countries can play a vital part in their economic

development. It also acknowledges the importance of the diversification of export commodities in economic development, stipulating that:

“The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification of the structure of their economies and the avoidance of an excessive dependence on the export of primary products (Article XXXVI.5).”

According to Pangetsu (2000: 1288), Part IV on Trade and Development acknowledging non-reciprocity was only a set of guidelines which essentially did not influence the negotiations in favour of developing countries, or result in specific actions. Institutionalizing the principle of non-reciprocity further, the UNCTAD passed a resolution in favour of an establishment of a system of preferences. The GATT introduced a waiver to the most-favoured nation (MFN) principle, allowing the Generalised System of Preferences (GSP) for the next ten years. The GSP was given a legal basis in 1979 as a result of the Tokyo Round, although developed countries were able to withdraw concessions granted under the GSP unilaterally (Narlikar (2006: 1017)).

The Tokyo Round, which ended in 1979, included the Enabling Clause, entitled Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries. It included, for the first time, a mention of special treatment for least developed countries, introducing the two-tier concept of developing economies into the global trading system (Pangetsu (2000: 1288-1289)).

2. The Subsidies Code of the WTO³

(1) The Subsidies Code on Export Promotion

Subsidized exports relating to manufactured goods trade are currently governed by the UR Subsidies Code in the WTO system. Due to the single undertaking principle in the UR, all Members, regardless of their economic development level, were obliged to accept all Agreements in the WTO except for the plurilateral Agreements. Any kind of subsidy is

³ Collins-Williams and Salembier (1996) and Hoda and Ahuja (2005: 1009-1030) provide comprehensive explanation of the UR Subsidies Code, although they do not focus on export promotion policies.

regarded as one of the following types: prohibited subsidies; actionable subsidies; and non-actionable subsidies.

Subsidy is defined as a financial contribution by a government or any public body and a benefit to be thereby conferred. The types of export incentives provided by the government, but not regarded as subsidies include the provision of general infrastructure such as railways, highways, ports, telecommunication lines, etc. (Adamantopoulos (2008: 436)). Art. 3.1 of the Subsidies Code prohibits: (a) export subsidies, which are provided contingent upon export performance; and (b) import substituting subsidies which are provided contingent upon the use of domestic over imported goods. The prohibition of export subsidies thus stipulated is not applied to the developing countries with a GNP per capita of less than US\$1,000 per annum (Annex VII of the Subsidies Code), the LDCs hereafter. The Subsidies Code provides the Illustrative List of export subsidies prohibited, which includes 12 types of export subsidies.

The export subsidies appearing in the Illustrative List comprise, among others: the provision by governments of direct subsidies to a firm or an industry contingent upon export performance; currency retention schemes; internal transport and freight charges on export shipments, provided by governments, on terms more favourable than for domestic shipments; the provision by governments of imported or domestic products or services for the production of exported goods, on favourable terms; and the allowance of special deductions directly related to exports, over and above those granted with respect to production for domestic consumption. One interesting aspect of the Illustrative List of export subsidies is related to tax. According to the Illustrative List of export subsidies, the exemption or remission of direct tax is regarded as an export subsidy, although that of indirect tax such as VAT is not regarded as a subsidy (footnote 1 of the Subsidies Code).

The List also shows two examples which are specific to exports, i.e. duty drawback and an export insurance/credit scheme. Item (i) of the Illustrative List of export subsidies stipulates that the remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product would be regarded as export subsidy. It implies that the amount of duty drawback not exceeding the threshold amount would not be regarded as export subsidies. Besides physically incorporated inputs, energy, fuels and oil used in the production process, and catalysts, which are consumed in the course of their use to produce the exported product, are regarded as inputs used in the production process. Meanwhile, capital goods are not regarded as being used in the production process even in case of depreciation (Hoda and Ahuja (2005: 1015)).

According to item (j) of the Illustrative List, the provision by governments or special institutions controlled by governments of export insurance programmes, of insurance against increases in the cost of exported products at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes, is regarded as a type of export subsidy. Item (k) of the Illustrative List stipulates that if a Member abides by the conditions in the OECD Arrangement on Official Export Credits, then such export credits would not be regarded as export subsidy.⁴

One interesting aspect of prohibition of export subsidy is that exchange rate manipulation by the government benefiting exporters, i.e. devaluation or depreciation of domestic currency, is not regulated under the WTO regulations, although it has a positive effect on export promotion like tax or financial incentives. Meanwhile, there would be a limit on using it in the sense that devaluation or depreciation of domestic currency would tend to have an inflationary effect that the policy authorities generally wish to avoid.

(2) SDT Provisions in the UR Subsidies Code

Art. 27 of the UR Subsidies Code deals with the SDT of developing countries. Among others, it recognizes the important role of subsidies in the economic development of developing countries, stipulating that:

“Members recognize that subsidies may play an important role in economic development programmes of developing country Members (Art. 27.1).”

It also stipulates that prohibition of export promotion policies is not applied to the LDCs without any specified time limit and other developing countries until the end of 2002. Meanwhile, according to Art. 27.5, an LDC which has reached export competitiveness in any given product should phase out its export subsidies over a period of eight years. Since the word ‘export competitiveness’ can be interpreted arbitrarily, Art. 27.6 provides the concrete criterion. That is, export competitiveness in a product is considered to exist if a developing country’s exports of that product reach a share of at least 3.25 percent in world trade of that

⁴ Even in the 1970s, certain export incentives were regarded as such common practices that it would be perhaps disruptive to apply CVDs against them. Export credit was one of such practices. In 1976, the OECD Arrangement established guidelines for down payment amounts, interest rates, and repayment terms which aimed at a closer approximation of the commercial market (Barcelo (1977)).

product for two consecutive calendar years. For the purposes of the export competitiveness provision, a product is actually defined as a section of the Harmonized System (HS) (Hoda and Ahuja (2005: 1028)).

Developing countries may also benefit from an SDT relating to *de minimis* values. That is, any CVD investigation of a product imported from a developing country should be terminated if (a) the overall level of subsidies granted upon the product in question does not exceed 2 percent of its value calculated on a per unit basis, while the threshold is 1 percent for developed countries; or (b) the volume of the subsidized imports represents less than 4 percent of the total imports of the like product in the importing Member (Art. 27.10). The favourable treatment of developing countries in Art. 27.10(b) is weakened by the cumulation provision also appearing in it. That is, even if the imports from developing countries represent less than 4 percent of the total imports of the like product in the importing Member, if such imports collectively account for more than 9 percent of the total imports of the like product in the importing country, then the national authorities of the importing country can investigate the CVD.

Despite the existence of SDT provisions in the Subsidies Code of the WTO as is the case in the other Agreements, the inclusion of such provisions might be dominated by the basic direction of the UR, which took the 'single undertaking' principle obliging all Members to abide by basically all Agreements in the WTO, irrespective of the economic development level. That is, up until the settlement of the UR, the contracting parties to the GATT 1947 could choose not to join the Agreements. Most developing countries decided not to adhere to the NTB Codes in the Tokyo Round. Furthermore, many developing countries feel that the rules established as a result of the UR codify existing rules or practices created in the developed countries and do not reflect developing countries' needs (Wolfe (2004: 588)). Export insurances/credits can be mentioned as one of such practices.

III. The WTO Members' Position on Export Promotion in the DDA

1. General Direction

The Doha Ministerial Conference in November 2001 gave birth to the DDA negotiations. The Doha Ministerial Declaration emphasized the needs and interests of

developing countries at the heart of those.⁵ Thus, the WTO Members noticed that ‘balanced rules’ have important roles in the global trading system, although what is ‘balanced’ remains unclear. It reaffirmed that provisions for SDT are an integral part of the WTO Agreements,⁶ although concrete details relating to SDT did not appear in the Declaration. Regarding subsidies, the Declaration called for:

“negotiations aimed at clarifying and improving disciplines under the Agreement(s) on Subsidies and Countervailing Measures ... *taking into account the needs of developing and least-developed participants* (italic added by the author).”⁷

In the same month of 2001, the Committee on Subsidies and Countervailing Measures of the WTO decided that prohibition of export subsidies provided by developing countries beginning from 2003 can be extended to the end of 2007, subject to annual reviews.⁸ Such extension of the transition period lapsed.

The Hong Kong Ministerial Conference in December 2005 reaffirmed that the provisions for SDT are an integral part of the WTO Agreements and all SDT provisions should be reviewed with a view to strengthening them and making them more precise, effective and operational.⁹ More concretely, it reaffirmed the SDT of products imported from the LDCs, saying that developed countries and developing country Members declaring themselves in a position to do so agree to implement duty-free and quota-free market access for products originating from the LDCs. It also reaffirmed its support relating to trade-related technical assistance and capacity building to the LDCs on a priority basis in helping to overcome their limited human and institutional trade-related capacity.¹⁰

Duty-free and quota-free import from the LDCs can be evaluated as a meaningful SDT. The Hong Kong Ministerial Declaration mentions the necessity of aid to build trade-related infrastructure, saying that aid for trade should aim to help developing countries, particularly the LDCs, to build the supply-side capacity and trade-related infrastructure.¹¹ Besides the duty-free and quota-free import from the LDCs and support of institution building

⁵ WTO, “Doha Ministerial Declaration”, 14 November 2001, para. 2.

⁶ *Ibid.*, para. 44.

⁷ *Ibid.*, para. 28.

⁸ WTO, G/SCM/39, “Procedures for extensions under Article 27.4 for certain developing country members”, 20 November 2001, para. 1.(e).

⁹ WTO, “Hong Kong Ministerial Declaration”, 18 December 2005, para. 35.

¹⁰ *Ibid.*, para. 47.

¹¹ *Ibid.*, para. 57.

in those countries, there is no mention on the SDT of developing countries in general. Furthermore, there is no mention on the benefits of and/or preferential treatment of export promotion policies taken by developing countries. Instead of dealing with preferential treatment of export subsidies provided by developing countries, discussions in the development group at the Hong Kong Ministerial Conference centred on market access issues (Wilkinson (2006: 298)). Although the Hong Kong Ministerial Declaration did not mention the modification of the rules relating to export promotion policies of developing countries, several developing country Members of the WTO actively argued for modification of the current rules in the WTO more in favour of policies leading to export expansion of those countries.

There have been proposals on modifying the rules on subsidies and CVDs during the DDA negotiations. Regarding the characteristics of the proposals, Magnus (2004: 989), for instance, complains that those tabled are overwhelmingly weighted towards loosening direct disciplines on subsidies and/or making it harder to use the CVD remedy. Meanwhile, such a complaint does not actually consider the development needs of developing countries, especially the beneficial role of export promotion by the government in some cases. In the DDA negotiations process, the WTO Members' views, with respect to export promotion of developing countries, have been significantly divided. India has led the developing countries' opinion and suggested many concrete ways of modifying the current regulations in favour of developing countries' export-led economic growth. It emphasized that the SDT provisions are meant to ensure that equal rules do not apply to unequal players.¹² It also noted disadvantages faced by industries in developing countries as compared to their counterparts in developed countries.¹³ More specifically, it says that:

"industry in developing countries is characterized by low level of infrastructure development, high cost of capital, prevalence of underdeveloped regions where industries may be reluctant to invest etc. The various export incentive schemes in developing countries are ... more for the purpose of creating a level playing field, in view of the fact that their competitors from the developed countries do not suffer from these disadvantages."¹⁴

¹² WTO, TN/RL/W/68, "Communication from India", 11 March 2003, p. 1

¹³ WTO, TN/RL/W/4, "Submission by India", 25 April 2002, p. 1

¹⁴ WTO, TN/RL/W/68, "Communication from India", 11 March 2003, p. 2

India suggested that the government of a developing country has to assume a more active and positive role in assisting the industry by creating a level playing field.¹⁵ According to India, providing the “temporary” measure of SDT would not be appropriate for the developing countries facing “structural” disadvantages.¹⁶ Criticizing the US’ position, India noticed that trade distortions made by export credits and agricultural subsidies which are in favour of developed countries are overlooked by developed countries.¹⁷

Meanwhile, the US is adamant about not considering further SDT provision, saying that the objective of the Rules Group must be the continuation of the progressive strengthening and expansion of disciplines.¹⁸ The US reaffirmed its position, saying that the substance of the WTO prohibition on export subsidies and import substitution subsidies, and the general obligation of all Members to eliminate such subsidies should be preserved.¹⁹ Among developed countries, Canada appears to sympathize with the position of developing countries, especially small ones, in the sense of recognizing that:

“Recent dispute settlement decisions or factors relevant to the assessment of contingency on export performance have placed certain economies at an apparent disadvantage vis-à-vis those with large domestic markets.”²⁰

The following are the WTO Members’ proposals on specific provisions on export promotion in the Subsidies Code relating to the SDT of developing countries during the DDA negotiations.

2. Members’ Proposals on Specific Provisions on Export Promotion

(a) Art. 3 on prohibited subsidy

¹⁵ Ibid.; WTO, TN/RL/W/4, “Submission by India”, 25 April 2002, p. 1

¹⁶ WTO, TN/RL/W/40, “Communication from India”, 10 December 2002, p. 2

¹⁷ WTO, TN/RL/W/68, “Communication from India”, 11 March 2003, p. 3

¹⁸ WTO, TN/RL/W/27, “Communication from the United States”, 22 October 2002, p. 4

¹⁹ WTO, TN/RL/W/33, “Communication from the United States”, 2 December 2002, p. 4

²⁰ WTO, TN/RL/W/1, “Communication from Canada”, 15 April 2002

The WTO Members' viewpoints are extremely divided with respect to Art. 3 on prohibited subsidy. A radical view in favour of developing countries was suggested by Venezuela. Venezuela proposed that all subsidies bestowed by developing countries should be treated as non-actionable subsidies.²¹ However, the US considered it to be appropriate to explore ways of strengthening the remedies for prohibited subsidies.²² Although the US is opposed to loosening the Subsidies Code in general, it recognizes the severe difficulties of the small, poorest countries, saying that for certain developing countries, not included in the LDCs in Annex VII, but whose economies were small and who had very small export shares of world trade, the transition period for export subsidy programmes can be extended.²³

(b) Export credits

Among developed countries, the EC notices a need to establish clear and consistent rules for all types of export financing. The EC expresses sympathy with the developing countries' position with respect to the export credits and its preparedness to address the concerns of developing countries in this regard.²⁴ Brazil and India complain about the dominance of developed countries in using export credits. India declared that a grant of official export credits by OECD countries has been permitted, while most of the other countries have been prohibited from giving such credits²⁵ and opined that unreasonable benchmark premium rates have been used by developed countries.²⁶ Regarding item (k) of the Illustrative List, India proposed to change it into one where export credits are not supplied at rates below market rates.²⁷ Brazil complained that all participants of the OECD Arrangement are the OECD Members and developing countries do not participate in the discussions and decisions in it. Brazil emphasized that under no circumstances should a

²¹ WTO, TN/RL/W/41, "Proposal by Venezuela", 17 December 2002, p. 2

²² WTO, TN/RL/W/78, "Communication from the United States", 19 March 2003, p. 2

²³ WTO, TN/RL/W/33, "Communication from the United States", 2 December 2002, p. 2

²⁴ WTO, TN/RL/W/30, "Proposal by the European Communities", 21 November 2002, p. 4

²⁵ WTO, TN/RL/W/68, "Communication from India", 11 March 2003, p. 2

²⁶ WTO, TN/RL/W/120, "Communication from India", 16 June 2003, p. 3

²⁷ WTO, TN/RL/W/177, "Paper from Brazil", 31 March 2005, p. 3

small group of WTO Members be allowed to change the rules through decisions taken in another forum, actually meaning the OECD.²⁸

(c) Duty drawback

Since the average tariff rates of developing countries are generally high, there is much room for using duty drawback as an effective method of export promotion. India suggested that the current rules should be modified by making it more difficult to impose CVDs to duty drawback schemes.²⁹ It is India's view that in cases where over-rebate is found the CVD must be limited to the extent of over-rebate.³⁰ India also proposed that imported capital goods and consumables used in the production process should be included in the list of goods that are consumed in that relating to duty drawback.³¹ Regarding duty drawback with respect to capital goods, India says that:

“developing countries have to impose customs duty on capital goods for meeting the exigencies of revenue generation. However they are not able to avail remission, exemption or deferral of such duties when the capital goods are used for production of products which are exported. Thus a level playing field is denied to the developing countries' exports as an element of customs duty paid on capital goods used get reflected in the total cost of the exported products. On the other hand, developed countries' exports do not include such costs as the customs duty on capital goods is low or the capital goods are manufactured within their countries.”³²

(d) Indirect taxes

The Subsidies Code permits remission, exemption and deferral of prior stage cumulative indirect taxes on goods and services used in the production of exported products. Meanwhile, India noticed the widespread lack of VAT system in developing countries.³³

²⁸ Ibid., p. 1

²⁹ WTO, TN/RL/W/120, “Communication from India”, 16 June 2003, pp. 1-3.

³⁰ Ibid., p. 2

³¹ Ibid., p. 2

³² WTO, TN/RL/W/68, “Communication from India”, 11 March 2003, p. 2

³³ Ibid., p. 2

(e) Non-actionable subsidies in Art. 8

Among developed countries, without any concrete details, Canada took the attitude toward considering the re-introduction of non-actionable subsidies relating to Art. 8.³⁴ The EC states the need to address the environmental dimension of subsidies following the expiry of Art. 8 of the Subsidies Code.³⁵ India was worried about the EC's proposal in the sense that developing countries are not the main users of such subsidies due to the financial constraints.³⁶ In this sense, India expressed its position opposed to re-introducing non-actionable subsidies in lieu of Art. 8 of the Subsidies Code.

Cuba and Venezuela focused on the fact that the document on Implementation-Related Issues and Concerns set out four legitimate development goals: i.e. regional growth, technology research and development, production diversification, and implementation of environmentally sound methods of production. Cuba and Venezuela proposed that the WTO system might treat measures taken in pursuit of any one of these goals as non-actionable if adopted by developing countries.³⁷ Those four legitimate development goals comprise three types of subsidies illustrated in Art. 8 and an additional type relating to product diversification, which can be interpreted as one from specialization in primary products to industrialization. Of those four development goals, Cuba and Venezuela regard diversification of production as having key importance and a topmost priority in a country's development policy.³⁸

(f) Art. 25 on notification

Even the US, which appears to be one of the least sympathetic to developing countries in export subsidies issue, admits the difficulties faced by developing countries with respect to the notification requirements, saying that consideration should be given to other ways of lessening the burden on those, especially the LDCs.³⁹ Such an approach by the US with respect to notification appears to be due to its recognition that the resource of

³⁴ WTO, TN/RL/W/1, "Communication from Canada", 15 April 2002

³⁵ WTO, TN/RL/W/30, "Proposal by the European Communities", 21 November 2002

³⁶ WTO, TN/RL/W/40, "Communication from India", 10 December 2002, pp. 1-2

³⁷ WTO, TN/RL/W/131, "Communication from Cuba and Venezuela", 11 July 2003, p. 1

³⁸ *Ibid.*, p. 4

³⁹ WTO, TN/RL/W//78, "Communication from the United States", 19 March 2003

government officials in small developing countries that can deal with such notification requirements is very limited.

(g) SDT

Regarding Art. 27.5 and 27.6 of the Subsidies Code, India says that there should be a discussion on the provision that a developing country (LDC) which has reached 3.25 per cent in world trade of a product for two consecutive calendar years should phase out its export subsidies over two (eight) year periods.⁴⁰ India's proposal reflects the viewpoint of a large, developing country whose share in a product may be bigger than 3.25 percent. For the SDT provision, India proposed that CVDs should not be imposed in the case of imports from developing countries where the total volume of imports is negligible, i.e. 7 percent of total imports. Regarding *de minimis* subsidy, India also proposed that export subsidies granted by developing countries where they account for less than 5 percent of the f.o.b. value of the product should be treated as non-actionable.⁴¹

Of developed countries, the EC expressed that it is ready to sign off on additional derogations – going beyond the set already provided in Art. 27 of the Subsidies Code for developing countries under the heading of the SDT.⁴² Since, unlike the Antidumping Code, the Subsidies Code does not contain any requirement that the 'special situation' of developing countries should be taken into account when taking CVDs (Avgoustidi and Ballschmiede (2008: 725)), the EC proposed that it is necessary to consider the incorporation of such provisions into Art. 27 of the Subsidies Code.⁴³ Meanwhile, the EC have not provided further concrete details on the additional derogation.

3. The 2008 Draft Text on the Subsidies Code

The Draft Chair Text of the Negotiating Group on Rules of the WTO, which was released in December 2008, includes the following changes that are related to the export

⁴⁰ WTO, TN/RL/W/120, "Communication from India", 16 June 2003, p. 3

⁴¹ WTO, TN/RL/W/4, "Submission by India", 25 April 2002, p. 2

⁴² WTO, TN/RL/W/30, "Proposal by the European Communities", 21 November 2002

⁴³ WTO, TN/RL/GEN/93, "Countervailing Measures: Paper from the European Communities", 18 November 2005, p. 4

promotion concerns of developing countries.⁴⁴ Regarding Art. 3 on prohibited subsidies, except for a provision prohibiting fisheries subsidies that contribute to overcapacity and over-fishing, there is no change. On the Illustrative List of export subsidies appearing in Annex I, there is no change in either the provision on direct and indirect taxes or that on the duty drawback scheme. That is to say, India's suggestions on those issues are not reflected at all in the Draft Chair Text. Meanwhile, it mentions that there is no consensus on the 'cost-to-government' versus 'benefit-to-recipient' criterion in deciding subsidy relating to export credit, guarantee or insurance in item (j). It also mentions that there is no consensus on the provision acknowledging the OECD Arrangement, which reflects a few developing countries' criticism with respect to item (k).

Regarding the criterion of the LDCs' exemption from prohibition of export subsidies, the Draft Text modifies the relevant provision in Annex VII into:

"In constant 1990 dollars for three consecutive years ... and (a) Member ... shall be reincluded in the list in Annex VII(b) when its GNP per capita falls back below US\$1,000."⁴⁵

On Art. 27 relating to the SDT of developing countries, any proposal made by a developing country is not reflected except for export competitiveness. For export competitiveness, the Draft Text mentions the split in the opinions of the Members, saying that views differ considerably among the Members as to the best way to do this, including changing the period and/or methodology for calculating the share of world trade in a product, or clarifying the definition of a "product" for this purpose. It also says that views differ widely as to whether the reintroduction of export subsidies should be allowed if export competitiveness is lost after having been reached, and, if so, on what basis and for how long.⁴⁶

It is noteworthy that there is no modification of the SDT provision at all in the Draft Text despite many proposals by developing countries. Neither is there any change in Art. 31

⁴⁴ WTO, TN/RL/W/236, "New Draft Consolidated Chair Texts of the AD and SCM Agreements", 19 December 2008

⁴⁵ Ibid.

⁴⁶ Ibid.

on provisional application, meaning that the non-actionable subsidies appearing in Art. 8 are no longer non-actionable, according to the 2008 Draft Text.⁴⁷

IV. Modification of the Export Promotion Provisions in the Subsidies Code

1. Non-reciprocity as Distributional Fairness

Supporters of trade liberalization such as Srinivasan (1999) argue that it would be beneficial for developing countries to participate fully in the liberal world trading system. Finger and Winters (1998) even suggest that SDT provisions in the global trading system led to the delay in integrating the developing countries into the world economy. Meanwhile, regarding export promotion, their argument is inconsistent with the experience of the developing countries that grew very fast during past decades. Even if developing countries wish to pursue export promotion policies, many instruments that the rapidly growing economies such as South Korea and Taiwan utilized in their export-led economic growth process are not allowed in the current WTO system. Therefore, it is necessary for developing countries to think of concrete ideas and put pressures on modifying the current WTO regulations in favour of promoting their exports, which, of course, can be justified from the viewpoint of 'fairness' in international trade.

Due to the extremely conflicting views, it would be impossible to arrive at a consensus on the definition of fair trade. Regarding fairness in international trade, we can contrast 'non-discrimination fairness' with 'distributional fairness.' The former can be defined by assuming that there is a set of groups deemed to be equal. From the viewpoint of 'non-discrimination fairness', if one of these groups is allowed to take some action, then all other groups should also be allowed to take the same action (Suranovic (2000: 288)). The basic principles of the GATT/WTO, i.e. national treatment and most-favoured nation (MFN) treatment, follow the 'non-discrimination fairness.' 'Distributional fairness' can be defined as equality fairness applied to final outcomes or attributes. It is based on a belief that the distributions of benefits among individuals, after all actions are taken, would need to be

⁴⁷ Ibid.

equalized to be fair in distribution (Suranovic (2000: 290-291)).⁴⁸ SDT of developing countries in the GATT/WTO can be understood in terms of 'distributional fairness' applied to international trade relations, which aim to narrow the gap between developed countries and developing countries with respect to per capita income.

As Wade (2003) argues, non-reciprocity between developed countries and developing countries in favour of the latter needs to be strengthened in modifying the current WTO regulations concerning export promotion, due to the extremely different levels of economic development between those two groups of countries.⁴⁹ Although the current trade regulations in the WTO system generally limit government intervention in international trade compared with the previous GATT, according to Weiss (2005: 744), for developed countries the disciplinary effect of multilateral trade rules has been government augmenting, offering generous room to manoeuvre in areas such as technology development. It would be opposite to the direction of 'distributional fairness'.

Developing countries may promote export if more market access opportunities are given from their trade partners, most of whom are developed countries, and their supply capacities are expanded (Wolfe (2004: 584)). Explaining the case of sub-Saharan African (SSA) countries, Blackhurst, *et al.* (2000) explains that most if not all SSA governments, especially technocrats and the private sectors in those countries, now accept that the key problem at this point in time after the UR is not a lack of market access opportunities, but rather the inadequate domestic supply response to existing market access opportunities. Therefore, it would be more appropriate for the WTO Members to think of ways of promoting export capacities of developing countries and alleviating the threat of trade remedies such as CVDs against the products exported from developing countries.

2. Modifying the Subsidies Code

⁴⁸ A belief in egalitarianism is the case that distributional fairness is applied in the extreme. Although pure egalitarianism is rarely suggested any longer, less stringent applications of egalitarianism still remain, such as a belief that a more equal distribution of income and/or wealth is preferable to a less equal distribution (Suranovic (2000: 290)).

⁴⁹ Similarly, Qureshi (2003: 869) proposed that non-reciprocity principle appearing in GATT Article XXXVI(8) should be mirrored in the interpretation process of the WTO Agreements, i.e. the dispute settlement panels in the WTO regarding disputes between developing and developed Members.

Many current provisions in the WTO acknowledge the special situation of developing countries. For instance, the UR Subsidies Code acknowledges the 'development needs' of developing countries (Art. 27.2), while it can be interpreted arbitrarily and there would be no objective criterion on those. Regarding a trade dispute in the WTO system, it was made clear that there will always be justification for claiming that a given subsidy is not inconsistent with 'development needs' (Benitah (2001: 186)). Whether a measure reflects those would depend on the decision of the concerned government. From the viewpoint of distributional fairness, it may be necessary for the future WTO system to start from incorporating the phrase 'development needs' of developing countries in the SDT provision of the Subsidies Code.

Art. 6.1 of the Subsidies Code stipulates the criteria of the existence of serious prejudice. One of those is 'the total ad valorem subsidization of a product exceeding 5 percent.' It lapsed at the end of 1999. As an SDT of developing countries, it may be conceivable to make the paragraph concerned effective with respect to developing countries and combine it with modification of *de minimis* subsidy provision. Then, if the products exported by the developing countries are subsidized below the threshold level, they would not be subject to imposition of CVDs.

The R&D subsidy which was categorized as non-agricultural subsidy until the end of 1999 is currently not non-actionable. The current negotiations in the WTO about rules have so far seen limited discussion on the possible reintroduction of a category of non-actionable subsidies (Rios Herran and Poretti (2008: 749)). R&D is usually regarded as having positive externality. Therefore, compared with resource allocation without government intervention, from the welfare viewpoint, it would be better to provide an R&D subsidy. Without it, there would be under-production of R&D. In addition, if we look at the evidence of the northeast Asian dynamic economies, R&D policy and the consequent development of technology intensive industries have contributed significantly to the economic development of those, for instance.⁵⁰ It would be necessary to think of considering the SDT of categorizing the R&D subsidy provided by developing countries as non-actionable, partly reflecting the proposal by Cuba and Venezuela.⁵¹

Developing countries are likely to be subjected to the imposition of CVDs but they are less likely to have the resource to investigate foreign subsidies negatively affecting their economies (Horlick and Shoop (2008: 694)). Therefore, even besides the issue of pursuing

⁵⁰ See Ahn and Mah (2007) for Korea and Kim and Mah (2009) for China for details.

⁵¹ WTO, TN/RL/W/131, "Communication from Cuba and Venezuela", 11 July 2003.

their own export promotion policies and economic development, developing countries are at a disadvantage with respect to CVDs.

The current Subsidies Code allows the national authorities to be able to cumulatively assess import volume in investigating material injury to domestic producers. Therefore, cumulation has become a common practice in investigating the CVD cases (Durling (2008: 607)). To control abuse of CVDs against exports of developing countries, it would be necessary to eliminate the cumulation provision appearing in Art. 15.3 of the Subsidies Code.

Art. 27 of the Subsidies Code acknowledges the important role of subsidies in economic development and, thereby, the LDCs are allowed to grant export subsidies. Although it may make room for the LDCs' use of export subsidies, since developed countries can offset the effect of provision of export subsidies by CVDs, such preferential treatment of the LDCs may become meaningless. Therefore, it would be conceivable for developed countries not to impose CVDs against the products which were provided export subsidies by the LDCs,⁵² if they do not exceed, for instance, 10 or 15 percent *ad valorem*.⁵³ A somewhat lower threshold level can be similarly introduced at the same time.

Since it is not likely that small developing country products are exported to developed countries for predatory purposes, it would not be appropriate to prohibit export subsidies provided by small developing countries. In addition, export subsidies may be needed if they should earn foreign exchange to relieve themselves of the serious balance of payments difficulties. They often face such a situation due to the fact that most developing countries have suffered from continuing current account deficits. It may be worthwhile to design a provision not imposing CVDs against developing countries undergoing chronic current account deficits.

Furthermore, we can think of modifying the current provision on the prohibition of export subsidies into not prohibiting export subsidies by developing countries in general. Then, the subsidized products may be subject to the imposition of CVDs by the importing country. It is not so likely that the exports of small developing countries subsidized by their

⁵² In the context of industrial policies of developing countries, Lee (2004) proposed trade protection measures comprising import substituting tariff, not prohibiting developing countries as a whole using export subsidies, and not putting limitations on CVD actions against imports from developing countries, allowing subsidies provided by developing countries depending on the percentages of their exports in total trade values.

⁵³ The suggested threshold level reflects the fact that South Korea's and Taiwan's export subsidy ratios were about or higher than 11-13 percent during the active export promotion period.

governments result in material injury to the concerned industry in developed countries. Therefore, they may not be subjected to the imposition of CVDs by developed countries. Alternatively, we may think of applying the 'export competitiveness' criterion with respect to developing countries in general if developed countries are worried about losing competitiveness to the large developing countries. Then, the preferential treatment can be restricted to small, developing economies.

In Art. 27.2 of the Subsidies Code, as is the case in the other Agreements, the transition period for developing countries was set too short, since economic development is a long process.⁵⁴ Consequently, it would be necessary to re-introduce and lengthen the transition period to, say, 20-25 years on the condition that the developing country concerned does not reach developed country status during the relevant period. Although such a treatment of export subsidies may appear to be too generous to developing countries, by invoking Art. 27.5 and 27.6 of the Subsidies Code, i.e. the 'export competitiveness' provision, the WTO system can control the trade-distorting effect of the use of export subsidies.

For export credit and export insurance, it would be appropriate to discuss the conditions such as the benchmark fee level not in the forum monopolized by developed countries such as the OECD, as Brazil suggested.⁵⁵ Regarding indirect tax such as VAT, although it is true that many developing countries do not yet have such schemes, they have recently introduced or are taking steps to introduce them. Therefore, unlike India's proposal, the current provision allowing VAT exemption to exported products would be appropriate.⁵⁶ For duty drawback with respect to depreciation of capital goods used in the process of producing exported goods, although India's proposal explained in Section III makes sense qualitatively, it may be too difficult to arrive at a consensus on the method of calculating it quantitatively. Since even most developed countries understand the administrative difficulties of small developing countries with respect to the notification requirement, it would not be difficult to modify Art. 25 on notification requirement in favour of small developing countries.

⁵⁴ Pangetsu (2000: 1293) also noticed the unrealistic transition period with respect to the other Agreements such as the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) and Customs Valuation Agreement given the limited resources of developing countries needed to set up new institutions, regulatory framework, physical infrastructure and training of human resources. Therefore, Bora, Lloyd and Pangetsu (2000: 556-557) suggested an extension of the transition period relating to industrial policy.

⁵⁵ WTO, TN/RL/W/177, "Paper from Brazil", 31 March 2005, p. 1

⁵⁶ WTO, TN/RL/W/68, "Communication from India", 11 March 2003, p. 2

V. Conclusion

Some critics of the WTO system have argued that most policy options except for human capital policies such as education and training have been prohibited under it (Held, *et al.* (1999: 187-188)). They also argue that the measures permitted are developed country-friendly and such allowed measures enable the developed countries to align their national economic development goals with support for industry, technology, and exports (Weiss (2005: 724)). Such arguments can be regarded as an exaggeration of the characteristics of the current WTO regulations in the sense of the existence of SDT provisions in the UR Subsidies Code. Meanwhile, it is true that the Subsidies Code has made less room for export promotion policies of developing countries than the situation before the operation of the WTO regulations.

It would be possible for the current developing country Members of the WTO to utilize the currently available export promotion measures and existing SDT provisions in the WTO. Even the developed countries actively utilize export promotion measures such as export finance/insurance which are not prohibited in the current Subsidies Code, realizing the benefits of export expansion.

Although it is true that the current WTO system prohibits export subsidies and strictly regulates the provision of subsidies by allowing the imposition of CVDs, developing countries, especially the LDCs can still provide subsidies to promote exports. The LDCs can provide export subsidies to promote exports as long as their share falls short of the export competitiveness threshold level. Although they may be subject to the imposition of CVDs, the share of such imports from small developing economies in particular would be likely to be insignificant and it would be difficult for the investigating authorities to prove the existence of material injury to their domestic producers.

Developing economies may also provide a small number of export subsidies up to the stipulated *de minimis* level, i.e. 2 percent of product values for developing countries. Even large developing economies can provide such a *de minimis* number of subsidies, which is not actionable. Meanwhile, such a small amount of subsidy may not be so effective in promoting exports, if we think of the high subsidy ratios of the northeast Asian developing economies during the active export promotion period.

Realizing the limited availability of export promotion measures, certain developing countries proposed the ideas of SDT with respect to export promotion policies in the DDA

negotiation process. After explaining such developing country Members' proposals, the current paper suggests various ways of modifying the current UR Subsidies Code in favour of the export promotion of developing countries. Such SDT based on non-reciprocity can be justified from the viewpoint of 'distributional fairness', as there exist extreme differences in economic development levels between developed and developing countries.

Limiting full developing countries' participation and the consequent dissatisfaction of developing countries regarding the extent to which their interests were reflected could be regarded as an important cause of the failures of the WTO Ministerial Conferences. Therefore, the success of future WTO negotiations will be imperilled without greater balance between developed and developing countries (Stiglitz (2000: 437); Wolfe (2004: 580)). Maintaining and improving the WTO system has been more unlikely without further SDT consideration of developing countries. Making more room for developing countries to move with respect to export promotion is expected to contribute to export-led growth of developing countries and, subsequently, stability of the world economy.

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