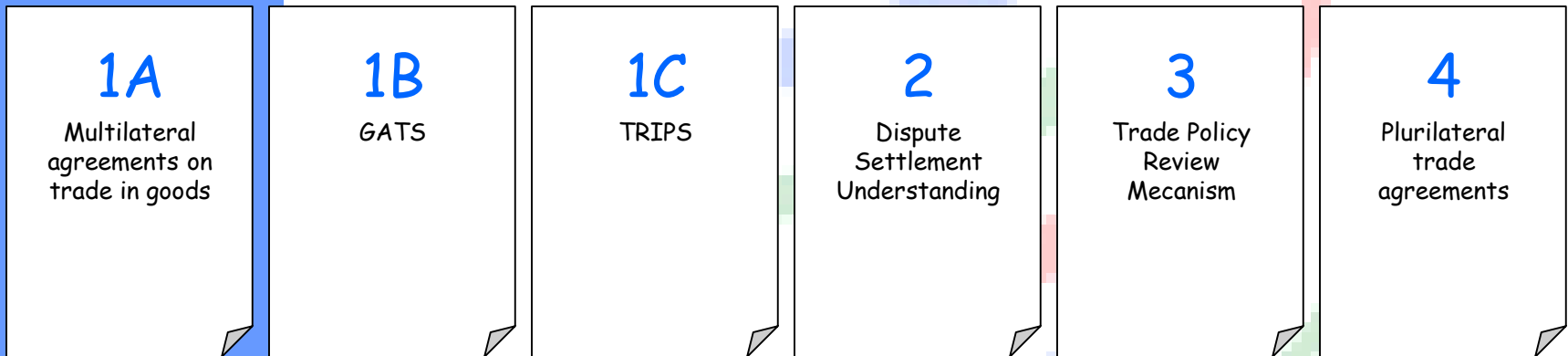
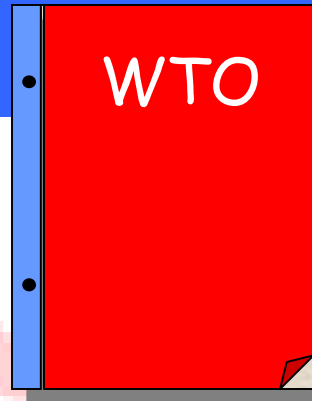


# WTO Rules and Disciplines

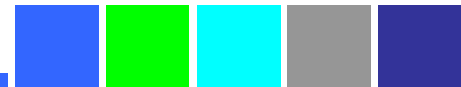
(Subsidies, local content requirements, IP rights, Government procurement)

Jorge Castro / World Trade Organization  
OECD, November 2018

# WTO: Trade Rules and Disciplines



Marrakech Agreement establishing the WTO



# WTO: Trade Rules and Disciplines

## Annex 1A

### Multilateral agreements on trade in **Goods**

**GATT 1994** (General Agreement on Tariffs and Trade)

Understandings

Marrakech Protocol

Agreements on:

Agriculture

Antidumping

Sanitary and phytosanitary measures

Customs valuation

Safeguards

Preshipment inspection

Technical barriers to trade

Rules of origin

Trade-related investment measures (TRIMS)

Import licensing

Subsidies and countervailing measures

1A

Multilateral trade agreement on trade in goods

Goods



# WTO Rules on Subsidies

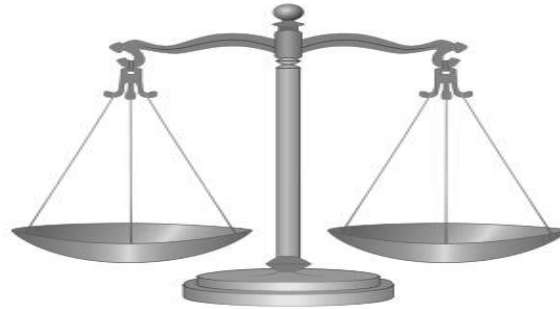
- GATT 1994
- Agreement on Subsidies and Countervailing Measures
- Agreement on Agriculture

# Subsidies in the WTO

- What is a Subsidy?
- What effects may a subsidy have on international trade?
- Disciplines and actions with respect to subsidies

# Agreement on Subsidies and Countervailing Measures

Avoid Unfair  
Competition

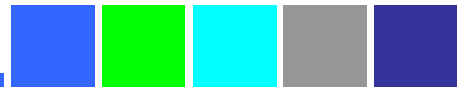


Allow public policy  
objectives

- Rules on Subsidies
  - Definition
  - Disciplines
- Disciplines on Countervailing Measures
- Dispute Settlement

# What is a Subsidy?

- A financial contribution
- By a government or public body
- That confers a benefit
- That is specific



# A Financial Contribution

- Direct transfer of funds (Grants, Loans, Equity infusions)
- Potential direct transfer of funds (Loan guarantees)
- Foregone or uncollected Government revenue (Tax credits, Taxes/duties exemptions)
- Provision of goods or services, other than general infrastructure / Purchase of goods
- Income or price support



# Government or Public Body

- Financial Contribution granted by a **government** (for example, federal, regional or local) Or by a **public body** (for example, a national bank, a national power company, etc.)
- **Or** the government **entrusts or directs** a private body to make the financial contribution
- Within the territory of a Member

# Is there a benefit?

## Benefit to the recipient

Benefit = advantage (to the recipient), no need for cost to the government

Basis for comparison = the market

Is the financial contribution provided in better terms than those available to the recipient on the market?

Guidelines: Article 14 of the ASCM

# "Specific" Subsidies

- Only specific subsidies are subject to disciplines in parts II, III and IV of the ASCM
- Limited to an enterprise or industry or to a group of enterprises or industries
- Enterprises located within a designated geographical region
- De facto / de jure specificity
- Prohibited subsidies

# Types of Subsidies

- Prohibited — Red light
- Actionable — Yellow light
- ~~Non Actionable — Green light~~ (expired)

# Which subsidies are prohibited?

## Export subsidies

- Contingent
- In law or in fact
- Whether solely or as one of several conditions
- On export performance

## Import substitution subsidies

- Contingent
- Whether solely or as one of several conditions
- On the use of domestic over imported goods

# Export Subsidies

Illustrative list of export subsidies -  
Annex I, ASCM, for example:

- Direct subsidies contingent upon export performance
- Internal transport and freight charges, provided or mandated by governments, more favourable for export shipments than for domestic shipments

# Prohibited Subsidies

- Deemed to be specific
- Multilateral action
  - WTO Dispute Settlement Mechanism (panels and the Appellate Body)
    - Withdrawal of the subsidy
    - Countermeasures (suspension of concessions)
- National Action
  - Countervailing measures

# Actionable subsidies

- Subsidies that are not **red** light
- Not prohibited, but...
- Should not cause adverse effects to another Member:
  - Injury to its domestic industry
  - Nullification or impairment of benefits
  - Serious prejudice



# Remedies under the ASCM

## Multilateral

Establishment of  
WTO Panel

Adoption of  
Panel/AB Report

**Prohibited** Subsidy:  
*Withdraw*

**Actionable** Subsidy:  
*Withdraw subsidy or  
remove effect*

## National

Initiate anti-subsidy  
(CVD) investigation

Existence of subsidy,  
injury, causal link

Impose countervailing  
measures to offset  
subsidy

# Countervailing Measures

- In the case of prohibited or actionable subsidies
- That cause injury to the domestic industry that produces like products
- In accordance with the rules in the ASCM (including on SDT / *de minimis* subsidies / negligible volume of imports)

# Countervailing Measures at the WTO

- Substantive aspects
  - Determining the subsidy
  - Determining the injury and causal relationship
  - Imposition of duties
- Procedural aspects

# Existence of a Subsidy

- Determined in accordance with Part I of the ASCM agreement: (1) Financial Contribution; (2) Benefit; (3) Specificity
- Calculating the amount of the subsidy / Guidelines in Article 14 ASCM:  
(1) Equity infusions; (2) Loans;  
(3) Loan guarantees; (4) Provision of goods or services or purchase of goods

# Calculation of Countervailing Duties

- Calculations must be done program by program / subsidy by subsidy
- Determine the amount of the subsidy / received by the firm in question
- Analyze the subsidy to:
  - Allocate to specific companies, products or markets
  - Allocate **Benefits over time**
- Calculate the amount of the subsidy in the period of investigation / relevant sales (volume or value)

# Injury

- Material injury to a domestic industry (current injury)
- Threat of material injury to a domestic industry (future injury)
- Material retardation of the establishment of a domestic industry

# Domestic industry

- Who can file an application
- What information is relevant for the injury analysis

# Domestic industry

- Domestic industry\*
  - Domestic producers of the like product as a whole
  - Domestic producers whose collective output is a major proportion of the total domestic production of the like product

\* Domestic in the importing country



# Domestic industry

- What is a major proportion of the total domestic production?
  - An "Important, serious, significant" proportion
  - A major proportion of the total domestic production
  - Fragmented industries / Concentrated industries

# Domestic industry

- Excluded producers
  - Producers related to the exporters or importers
  - Producers that are importers of the allegedly subsidized product
  - Excluded producers may not be considered for the purpose of the injury analysis

# Domestic industry

- Effect of the subsidized imports shall be assessed in relation to the domestic production of like products
- If separate identification of that production is not possible, the effects shall be assessed examining the production of the narrowest group or range of products which includes the like product

# Injury determination

- An objective examination based on positive evidence
  - Volume of the subsidized imports
  - Effect of the subsidized imports on prices for like products in the domestic market
  - Impact of imports on domestic producers of like products

# Injury determination

- Volume of subsidized imports
  - Significant increase in imports, in absolute terms or relative to production or consumption in the importing Member

# Injury determination

- Effect of imports on the prices of like products in the domestic market
  - Significant price undercutting
  - Significant price depression
  - Significant price suppression

# Injury determination

- Impact of subsidized imports on the domestic industry
  - Evaluation of all relevant economic factors having a bearing on the state of the industry

# Injury determination

- Actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity
- Factors affecting domestic prices
- Actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes



# Injury determination

- Non exhaustive list / At least the factors in the list / Other relevant factors
- No isolated factor is decisive

# Threat of injury

- Based on fact and not merely on allegation, conjecture or remote possibility
- The application of countervailing measures must be considered and decided with special care

# Causal relationship

- No specific test
- Evidence that the subsidized imports are, through the effect of the subsidies, causing injury
- Injury caused by other factors must not be attributed to the subsidized imports

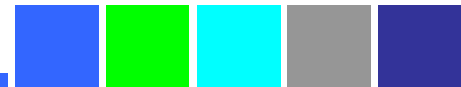


# Rules on local content



# Introduction

- The TRIMs Agreement establishes disciplines on certain types of investment measures applied to enterprises
- It prohibits the use of TRIMs that are inconsistent with:
  - **Article III** of GATT 1994 (National Treatment), or
  - **Article XI** of GATT 1994 (General Elimination of Quantitative Restrictions)



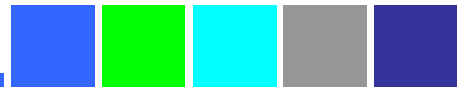
# Article III:4 of GATT 1994

- Imported products
- Shall be afforded treatment no less favourable than that accorded to ...
- Like products of national origin...
- In respect of all laws, regulations and requirements...
- Affecting their internal sale, offering for sale, purchase, transportation, distribution and use



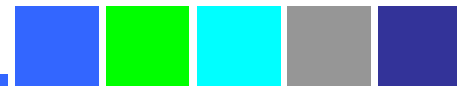
# TRIMs Agreement: main features

- Applies only to investment measures related to trade in goods (not trade in services)
- Focuses on the discriminatory treatment of products (imported/exported), not producers
- Does not regulate the entry of foreign investment or investors
- Concerns measures applied to both foreign and local firms



# TRIMs Agreement: Coverage (Art. 1)

- "Investment Measures"
  - *Indonesia-Autos*: Measures were "aimed at encouraging the development of a local manufacturing capacity" for cars and components
  - Need not be explicitly adopted as investment regulations
  - See *Canada - Renewable Energy / Feed-in Tariff (FIT) Program*
- "Trade-Related"
  - *Indonesia-Autos*: Local content requirements "necessarily trade-related" because they favour domestic over imported products





# Prohibitions

- National Treatment and Quantitative Restrictions (Article 2)
  - Prohibition on the application of any TRIM that is inconsistent with the GATT 1994 provisions:
    - ☐ Article III (National treatment), or
    - ☐ Article XI (General elimination of quantitative restrictions)



# The Illustrative List

- TRIMs Annex contains an Illustrative List of measures that are inconsistent with Articles III:4 and XI:1 of GATT 1994
- Mandatory measures and measures compliance with which is necessary to obtain an "advantage"
- The term "advantage" is not defined, but it is understood to encompass a wide range of benefits, including subsidies
- Non-exhaustive list



# Illustrative List: paras. 1(a) and 1(b)

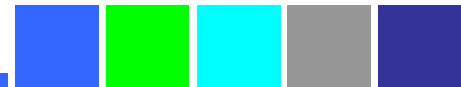
- TRIMs inconsistent with Article III.4 of GATT
  - 1(a): Measures that require the purchase or use of goods of domestic origin or from any domestic source
    - Local content requirements
  - 1(b): Measures that limit the purchase or use of imported products to an amount related to the volume or value of products exported by an enterprise
    - Trade-balancing requirements



# Illustrative List: paras. 2(a) and 2(b)

## TRIMs inconsistent with Article XI:1 of GATT

- 2(a): Measures that restrict the importation of products used in or related to local production, generally or to an amount related to the volume or value of the local production exported by the enterprise
  - **Trade-balancing requirements**
- 2(b): Measures that restrict the importation of products used in or related to local production, by restricting access to foreign exchange to an amount related to the foreign exchange inflows to the enterprise
  - **Exchange-balancing requirements**



# Illustrative List para. 2(c)

## TRIMs inconsistent with Article XI.1 of GATT

- 2(c): Measures that restrict the exportation or sale for export of products, whether in terms of particular products, volume or value of products, or proportion of the volume or value of the local production of the enterprise
  - **Export restrictions**

Note: export performance requirements are not affected, as they are not covered by Article XI.1 of the GATT



# Procurement - Article III:8(a) treatment

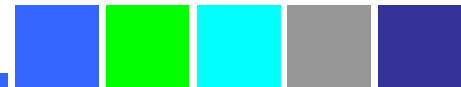
- The provisions of this Article (incl. III:4) shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale



# Subsidies to Domestic Producers

## Article III:8(b)

- The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products



# Relationship with ASCM

- Any “advantage” provided on the condition of satisfying LCRs is inconsistent with Art. III:4 GATT

(para. 1(a) Illustrative List)

- “subsidies contingent, whether solely or as one of several conditions, upon the use of domestic over imported goods” shall not be maintained

(Art. 3.1(b) ASCM)





# Exceptions

- Exceptions (Article 3)
  - Exceptions under GATT 1994 apply to the TRIMs Agreement



# Notification and transitional arrangements (Article 5)

- Notification of inconsistent TRIMs within 90 days of the entry into force of the WTO
- Transition period for elimination of notified TRIMs
  - 2 years (developed countries)
  - 5 years (developing countries)
  - 7 years (least-developed countries)
- 27 Members notified TRIMs under Article 5.1
  - All but one measure included local content aspects



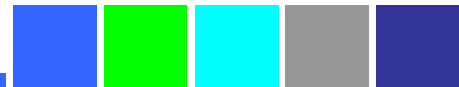
# Notification and transitional arrangements (Article 5)

- Possible extension of the transition period for developing countries demonstrating particular difficulties in implementing the Agreement
  - Extensions until end-2003 were granted to 7 Members:
    - Argentina, Colombia, Malaysia, Mexico, Pakistan, Philippines, Romania



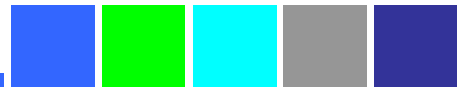
# 2005 Hong Kong Ministerial Declaration: Annex F

- S&D Decision on TRIMs Agreement
- LDCs allowed to maintain existing TRIMs until the end of a new transition period lasting 7 years:
  - Notify the CTG within 2 years, starting on 17 January 2006
  - Transition period may be extended by CTG, taking into account the individual financial, trade and development needs of Member in question



# Hong Kong Ministerial Declaration

- LDCs also allowed to introduce new TRIMs:
  - Notify to the CTG such measures within 6 months of their adoption
  - CTG to give positive consideration to such notifications
  - Duration of new measures not to exceed 5 years, renewable subject to review and decision by CTG
- All measures adopted under this decision shall be phased out by 2020
- No measures notified



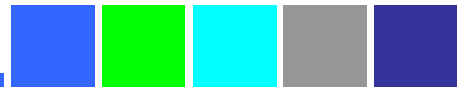
# TRIMs in Practice

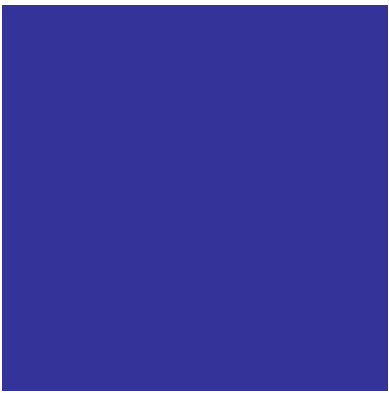
- Of the TRIMs discussed in the Committee:
  - Overwhelming majority principally involved local content issues (33/34)
- Measures related principally to developing and emerging economies:
  - Indonesia (7); Russia (6); India (4); Brazil and China (3); Argentina, Nigeria, Turkey and United States (2); Korea, Ukraine and Uruguay (1)



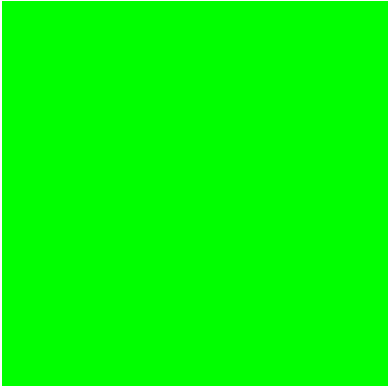
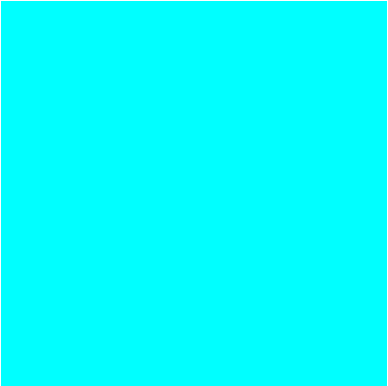
# Summary

- TRIMs Agreement applies to trade in goods
- Prohibits measures that are inconsistent with Articles III and XI of GATT 1994: local content; trade balancing, export restrictions
- Extensions of transition periods expired at the end of 2003
- 2005 HK Declaration: Decision in favour of LDCs





# Government Procurement





# An exception to national treatment - Article III:8(a)

- The provisions of this Article (incl. III:4) shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale



# WTO Agreement on Government Procurement

- Plurilateral agreement
- Currently, 19 parties comprising 47 WTO Members
- 32 Members are observers
- 10 Members are acceding



# WTO Agreement on Government Procurement

Agreement applies only to: (1) entities covered in Schedules; (2) for listed goods, services or construction services; (3) exceeding threshold values; and (4) subject to any exceptions

