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Analyzing Subsidies and Non-Commercial Assistance through Competition Related Provisions of Free Trade Agreements

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Analyzing subsidies and non-commercial assistance through competition related provisions of FTAs

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I. INTRODUCTION ON SUBSIDIES AND NON-COMMERCIAL ASSISTANCE

- State Interventions including **subsidies and non-commercial assistance** have the potential to **alter the correct functioning of markets** and **undermine the benefits of trade liberalization**.
- Subsidies and non-commercial assistance provided to **certain enterprises or domestic industries might affect negatively** fairness in business environment, competitiveness in global supply chains and overall fair competition that benefits consumers and boosts innovation.
- **Any level of governments should not grant subsidies** to either private or public enterprise **without justified reasons and transparent disclosures** if they negatively affect trade and the level playing field.
- **In the context of the economic crisis generated by COVID-19**, intervention of governments via subsidies might be **necessary and legitimate**. However, governments should plan carefully these interventions to minimize impact on competition and distort the level playing field.

II. SUBSIDIES AND NON-COMMERCIAL PROVISIONS IN FTAS

- A recent study by the World Bank found that about **95% of the FTAs include subsidy related provisions**. However, **the same study states that FTAs rarely define the objectives of subsidy control**, and when defined, they are usually very broadly phrased.
- **Non-commercial assistance provisions** surged as a complement to **non-discriminatory treatment provisions** and in response to address more adequately specific forms of support from states to State Owned Enterprises(SOEs).

III. CONCERNS FROM A BUSINESS PERSPECTIVE ON SUBSIDIES DS472 BRAZIL — CERTAIN MEASURES CONCERNING TAXATION AND CHARGES

On 19 December 2013, the European Union requested consultations with Brazil with respect to certain measures concerning tax advantages for exporters, taxation and charges in the automotive sector, the electronics and technology industry, and goods produced in Free Trade Zones. The European Union claimed that these measures were inconsistent with articles 3.1(a) and 3.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM), and with other articles of the GATT 1994 and the TRIMs Agreement.

The European Union argued that such measures affected several economic sectors, and, in some cases, these measures apply horizontally to broad categories of goods. These measures, provided preferences and support to Brazilian producers and exporters, by inter alia (1) providing export contingent subsidies, (2) imposing a higher tax burden on imported goods than on domestic goods, and (3) conditioning tax advantages to the use of domestic goods

Regardless the final report issued by the WTO Appellate Body on this case; from a business perspective, these are the kinds of concerns about measures that might tip competition in an unfair manner, creating inefficiencies, affecting prices and the entire supply chain.

IV. COMPARISON OF SUBSIDY RELATED PROVISIONS OF THE CPTPP, USMCA AND EVFTA

While **CPTPP** and **USMCA** incorporate **high-standard provisions** to discipline subsidies in relation to SOEs; **EVFTA** includes **strong commitments** that applies to specific subsidies to all enterprises, including public and private enterprises.

Topic	CPTPP (Ch. 17)	USMCA (Ch. 22)	EVSFTA (Ch. 10)
Definition of subsidy or non-commercial assistance	Art. 17.1	Art. 22.1	Art. 10.5
Scope	Art. 17.2	Art. 22.2	Art. 10.5
Principles	Art. 17.2	Art. 22.2	Art. 10.4
Transparency	Art. 17.10	Art. 22.10	Art. 10.7
Consultations	Art. 17.10	Art. 22.10	Art. 10.8
Enforcement	Art. 17.15 / Annex 17-B	Art. 22.15 / Annex 22-B	Art.10.13
Exceptions or specific subsidies subject to conditions	Art. 17.13	Art. 22.13	Art. 10.9
Adverse effects	Art. 17.7	Art. 22.7	-
Relationship with the WTO	-	-	Art. 10.6
Review	Annex 17-C	Annex 22-C	Art. 10.10

Source: Navarro, J. (Author) based on SOE chapters of CPTPP an USMCA and Competition Chapter of EVFTA

IV. COMPARISON OF SUBSIDY RELATED PROVISIONS

NON- COMMERCIAL ASSISTANCE PRINCIPLE IN SOE CHAPTER OF THE CPTPP AND USMCA

- **the CPTPP defines in Article 17.1 non-commercial assistance as assistance to SOEs** by virtue of the privilege of its special status in which assistance might be granted through the following ways: direct transfers of funds or liabilities, and goods or services on conditions more favourable than those commercially available.
- **USMCA defines the non-commercial assistance in Article 22.1 as “assistance that is limited to certain enterprises.”** In addition, Article 22.6 of USMCA states the ways that non-commercial assistance are prohibited if given to an enterprise primarily engaged in the production or sale of goods other than electricity.

IV. COMPARISON OF SUBSIDY RELATED PROVISIONS

TRANSPARENCY PRINCIPLE IN SOE CHAPTER OF THE CPTPP AND USMCA

- **Article 17.10 of CPTPP requires** each Party to provide its trading parties, or otherwise **make publicly available on an official website, a list of its state undertakings.** Additionally, this provision states that Parties agree to “**promptly provide**” **additional information on a written request** of another Party regarding the operations of a specific public enterprise and non-commercial assistance offered by a government to its enterprises.
- **Article 22.10 of USMCA follows the same approach** that the CPPTP applied. Moreover, USMCA, **in Article 22.10.9,** refers to the situation when a Party responds to a request for information under the Transparency article with the same content and language that the CPTPP did, but **the USMCA went further by adding** that when a Party responds to a request for information, to the maximum extent possible under its law, **the Party should not consider** the amount of the financial contribution associated with **the non-commercial assistance or equity capital to be confidential.**

IV. COMPARISON OF SUBSIDY RELATED PROVISIONS

THE EUROPEAN UNION-VIETNAM FREE TRADE AGREEMENT (EVFTA)

EVFTA dedicates section B in chapter 10 “Competition Policy” (from art. 10.4 to 10.10) to provide a framework about subsidies. Some contents that deserve attention are:

- **Article 10.4 “principles”** that states that certain **subsidies have the potential to distort** the proper functioning of markets and undermine the benefits of trade liberalisation. In this article, the **Parties agreed do not grant subsidies** to enterprises providing goods or services **if they negatively affect**, competition and trade.
- **Article 10.5 “definition and scope”** that defines a subsidy as a measure that fulfils the conditions set out in article 1.1 of the SCM Agreement irrespective of whether the subsidy is granted in relation to an enterprise manufacturing goods or supplying services.
- **Article 10.7 “transparency”** establishes that **each EVFTA member shall provide a report every four years** to the partners on the legal basis, the form, and to the extent possible, the amount and the recipients of subsidies granted by its government.

V. CONCLUDING RECOMMENDATIONS

- I. State Interventions including **subsidies and non-commercial assistance are employed for the legitimate purpose** but needs the discipline **not to cause the market distortion and hurt the equal opportunity** for all market participants.
- II. **High standard provisions** on subsidies and non-commercial assistance in FTAs **should be considered essential for offering an even playing field and eliminating the disadvantages** that other companies can face when competing against preferentially-treated entities (PTEs).
- III. **No rules on subsidies and non-commercial assistance** can have a negative impact in the marketplace, producing **adverse effects** on innovation, economic efficiency, competitiveness and economic growth.
- IV. The provisions on this discipline should be framed under the principles of **transparency, no discrimination and procedural fairness**, creating **certainty and predictability for both local and foreign companies**.

THANK YOU

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