

Revisiting WTO Subsidy Rules in a Changing Global Landscape: Problems and Prospects

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Abstract: Growing concern for economic security, intertwined with geopolitical tensions, has triggered a heightened risk of subsidy race among major economies, such as the US, the EU and China. Yet, the WTO subsidy rules are mostly ineffective in regulating emerging subsidies, because of their unclear definition of “subsidy”, rigid identification criteria for “unacceptable” subsidies, lack of services subsidy rules and weak remediation and grievance redressal mechanisms. These deficiencies underline the need for a more comprehensive set of multilateral disciplines on subsidies to enable us to respond better to the complex realities. The new subsidy rules in recent preferential trade agreements (PTAs) could serve as a useful stepping stone towards WTO subsidies reforms. However, very limited progress has yet been made on the WTO level due to the diverging views of WTO members. This paper argues that enhancing transparency disciplines is a more realistic reform direction to consider. In this way, members can promote dialogue and build trust, develop a better understanding of the impacts of subsidies and, consequently, reach a consensus on new and improved subsidy rules in the interests of all.

Keywords: Subsidy Rules, Agreement on Subsidies and Countervailing Measures (ASCM), WTO Subsidies Reform, Subsidy Disciplines

I. INTRODUCTION: SUBSIDIES ON THE RISE

Subsidies are considered a critical policy tool that can be used by a state to achieve various policy objectives, such as promoting infant industries, safeguarding sanitation services, lowering prices for consumers, or encouraging a green transition, many of which do not usually generate trade friction.¹

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¹ Simon Leste, The Problem of Subsidies as a Means of Protectionism: Lessons from the WTO EC — *Aircraft Case*, *Melbourne Journal of International Law*, Vol. 12, No. 2, 2011, p. 4; Gary Horlick and Peggy A. Clarke, Rethinking Subsidy Disciplines for the Future: Policy Options for Reform, *Journal of International Economic Law*, Vol. 20, No. 3, 2017.

While subsidies can have a positive function in redressing market failures or addressing social difficulties, they may also create unfair competitive advantage, creating legal and political complexities in international trade and investment. The potential vicious cycle of subsidy competition among countries will multiply market distortions. Companies may redirect investment to where they can take greater advantage of governmental support. Ultimately, taxpayers and governments with insufficient fiscal resources may face greater challenges, finding it more and more difficult to retain exports or investments, thus potentially losing faith in global trade.²

The Global Trade Alert (GTA) database³ shows that subsidies have been an increasingly preferred instrument of state intervention since 2009. Over the last few years, along with rising geopolitical tensions and global collective problems (climate crisis, Covid-19 pandemic, etc.), countries are resorting to industrial policies more than ever. Subsidies are frequently being deployed for protectionism or non-trade objectives. Overall, the return of “fiscal activism” and “big government” is gaining considerable traction once again in the Western world.⁴

Notably, in 2022, the US government passed two extensive subsidy packages for boosting green energy and for protecting the semiconductor industry respectively: the Inflation Reduction Act (IRA)⁵ and the CHIPS and Science Act,⁶ with a total of around \$700 billion in subsidies authorized in the form of grants, tax credits, or loans. These new laws indicate the US government’s departure from trying to get other countries to cut subsidies. Instead, it is starting to create its own large-scale subsidy architecture “with the kinds of local content rules that American officials once railed against”.⁷ On top of that, the two

2 OECD, *Industrial Subsidies and Levelling the Playing Field*, <https://www.oecd.org/trade/topics/levelling-the-playing-field/> (Last Visited on September 10, 2023).

3 Global Trade Alert was launched in November 2008, for providing timely information on the use of subsidies and related state intervention tools that are likely to disrupt global commerce, but no effort is made to assess the effects of subsidies, <https://www.globaltradealert.org/> (Last Visited on August 25, 2023).

4 Simon J. Evenett and Johannes Fritz, *Subsidies and Market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States*, The 28th GTA Report, 2021, p. 6, <https://www.globaltradealert.org/reports/gta-28-report> (Last Visited on August 25, 2023).

5 Inflation Reduction Act of 2022, Pub. L. No. 117-169 (2022).

6 CHIPS and Science Act of 2022, Pub. L. No. 117-167 (2022).

7 What America’s Protectionist Turn Means for the World, *The Economist*, January 9, 2023, <https://www.economist.com/finance-and-economics/2023/01/09/what-americas-protectionist-turn-means-for-the-world> (Last Visited on September 10, 2023).

political branches of the US have acted in unison and showed little restraint in developing legislation with explicitly WTO-inconsistent provisions, which has become a serious concern for the stability of the rules-based multilateral trading system.⁸ Chinese officials criticized these acts as protectionism and trade bullying, because they contravene the WTO non-discrimination principle and seriously affect the international economic order.

According to the IRA, a consumer can receive tax credits up to \$7500 for purchasing green energy vehicles, but only if the entire vehicle is assembled in North America and certain raw materials are sourced from the US or its free trade partners. This is typical “local content requirements” prohibited by WTO rules. The IRA also provides substantial subsidies for green technology investments, especially in the solar energy sector, with the aim of incentivizing investors to relocate the clean energy capital to the US and boost local employment.

In the face of widespread use of discriminatory subsidies, the EU has also had to deviate from the “stick” approach and provide a “carrot” as well. One noteworthy move has been to develop the EU’s version of a green subsidy strategy. Some EU member states actively promote the relaxation of the EU subsidy restriction rules, while other members are concerned that states with less fiscal space would suffer from unfair competition created by a harmful subsidy race within the EU once the subsidy restrictions are eased.

Apart from that, the EU has begun to consider unilateral actions to counter subsidies from non-EU countries due to the unsound international disciplines on state intervention to support cross-border investments and procurement. On December 23, 2022, the EU adopted the Foreign Subsidies Regulation (FSR), which grants the European Commission *ex-officio* power of investigation and requires undertakings to make notifications about M&A deals and public tenders involving financial contributions from non-EU countries (if they meet certain criteria).⁹ The FSR entered into force on January 12, 2023, and has

8 John Magnus, Another Thing Spiking in 2022 America: Harm to the WTO, International Economic Law and Policy Blog, September 29, 2022, <https://ielp.worldtradelaw.net/2022/09/another-thing-spiking-in-2022-america-harm-to-the-wto.html> (Last Visited on September 10, 2023).

9 Liliane Gam and Argyrios Papaefthymiou, The EU Foreign Subsidies Regulation: Green Subsidies Treading the Line between the FSR, State Aid, and WTO Law, Competition Policy International Blog, May 22, 2023, https://www.competitionpolicyinternational.com/the-eu-foreign-subsidies-regulation-green-subsidies-treading-the-line-between-the-fsr-state-aid-and-wto-law/#_ftnref16 (Last Visited on September 10, 2023).

been formally implemented since July 12, 2023.¹⁰ Regarding the potential applicability of the FSR to the IRA, the EU Competition Commissioner highlighted that it remains an option “to launch a dispute settlement procedure at WTO”.¹¹

The current subsidy turmoil is becoming increasingly pertinent to the global economy, calling for collective efforts to improve international disciplines on both the use of domestic subsidies and the national responses to address foreign subsidies. As of now, the subsidy issue has become one of the core concerns both inside and outside the WTO. At the World Economic Forum Annual Meeting in January 2023, WTO Director-General Ngozi Okonjo-Iweala specifically instructed members to avoid the negative spillovers of a subsidy race.¹²

Against this background, it is necessary to review the existing WTO rules applicable to subsidies, as well as subsidy disciplines beyond WTO law, explore the weaknesses and developments of multilateral rules on subsidies, so as to address a few fundamental questions: Are the current WTO rules effective in addressing the recent proliferation of subsidies? Are there any WTO+ subsidy rules in the picture? Can we count on the WTO to reform its rules on subsidies?

II. THE DEFICIENCIES OF WTO LAW IN REGULATING SUBSIDIES

In the WTO context, industrial subsidies are mainly regulated by Article XVI (Subsidies) of GATT 1994, and the Agreement on Subsidies and Countervailing Measures (ASCM), which came into effect on January 1, 1995.¹³ But as

10 The mandatory notification requirement imposed on companies will only be effective as of October 12, 2023. Under this requirement, companies are obligated to submit relevant internal documents. Failure to notify particular subsidies as requested may result in significant fines.

11 European Parliament, *Answer Given by Executive Vice-president Vestager on Behalf of the European Commission*, March 23, 2023, https://www.europarl.europa.eu/doceo/document/P-9-2023-000441-ASW_EN.html (Last Visited on September 10, 2023).

12 See the WTO website, *WTO Must Bolster Cooperation in a Fragmented World — DG Okonjo-Iweala in Davos*, January 20, 2023, https://www.wto.org/english/news_e/news23_e/igo_20jan23_e.htm (Last Visited on September 10, 2023).

13 Around the same time, the Agreement on Agriculture, negotiated in the Uruguay Round, came into effect and it contains restrictions on subsidies for agricultural products.

practice shows, the ASCM is riddled with flaws in addressing emerging subsidies that have harmful effects in the global market. A number of academic studies and working papers have reached the conclusion that WTO subsidy rules are mostly ineffective and in great need of improvement. The main problems of the WTO subsidy regime can be categorized into four aspects: i) definitional difficulties, ii) classification challenges, iii) gaps in services subsidy rules, and iv) a lack of effective remediation and grievance redressal mechanisms.

A. Difficulties in Defining “Subsidy”

Although the term “subsidy” is widely used, the definition of subsidy is highly elusive. In view of Article 1 of the ASCM (Definition of a Subsidy) and the following regional trade agreements involving subsidy regulation, there appears to be agreement that a subsidy consists of three basic elements: first, the government or a public body as the granting authority;¹⁴ second, financial support granted to recipients; and third, benefits resulting from the financial support.¹⁵ A subsidy cannot be deemed to exist if any of the above elements is missing.

However, the definition of “subsidy” may be subject to different interpretations when it comes to the details. It may be narrower or wider in terms of providers, recipients, or the forms and effects of financial support, such that a member may adopt different definitions for different policy purposes. Such flexibility in defining “subsidy” directly contributes to the poor record of compliance with the notification mandate under the WTO system.

With respect to granting authorities, the major conflict between WTO members is about the determination of what a “public body” is. In the *US — China Countervailing Duties* case,¹⁶ the Appellate Body held, *inter alia*, that WTO members cannot equate a state-owned enterprise (SOE) with the government and impose countervailing duties solely based on the majority government ownership/control test. Contrary to the claims of the US, the Appellate Body tends to examine whether the body was exercising regulatory authority

¹⁴ Article 1.1(a)(1)(iv) of the ASCM also provides for a situation wherein a private body may make financial contributions on behalf of the government.

¹⁵ Han Liyu, Investment Subsidies: Illusion or Reality, *Journal of Political Science and Law*, No. 2, 2022, p. 15.

¹⁶ Report of the Appellate Body, *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, December 18, 2014.

when granting benefits to the recipient(s). This stance has resulted in America's irritation with the WTO and has contributed to its intentional thwarting of the proper functioning of the Appellate Body.

Regarding financial support, Article 1.1(a)(1) of the ASCM enumerates three kinds of governmental financial contributions, including direct transfer of funds such as grants, loans, and equity infusions, indirect transfer of funds such as tax credits and fiscal incentives, as well as the provision of goods or services by the government. The ASCM refers mainly to "enterprise or industry", making no explicit reference to the transfer of funds to consumers. Accordingly, some argue that tax credits provided to consumers under the IRA may not be covered by the ASCM regulations. Others insist that, because of the existence of "price effect",¹⁷ no matter whom the subsidy is directly given to, producers of subsidized products should be deemed as relevant recipients within the scope of the ASCM. This is because the financial support generally lowers the cost of qualified products, making them more attractive relative to competing products, and thus conferring upon producers a "price-cut" benefit.

Also, the references to "within the territory of a member" and "within the jurisdiction of the granting authority" in the ASCM and to "its (a WTO member's own) territory" in Article XVI of GATT 1994, seem to preclude the applicability of these disciplines to foreign subsidies,¹⁸ which puts members with stricter subsidy control regimes at a disadvantage. To ensure a level playing field for all companies operating within the EU, the EU has introduced its own legislation called the Foreign Subsidies Regulation (FSR) in 2023 to counter distortive foreign subsidies. The issue of whether WTO rules apply to foreign subsidies is yet to be clarified by the WTO Dispute Settlement Body, the primary institution competent to interpret the WTO agreements.

By contrast, the forms of financial contribution are more extensive in the conception of subsidy proposed by other institutions, and the scope of application of subsidy regulations is likely to get wider. For instance, the Organization for Economic Cooperation and Development (OECD) describes "government

17 Report of the Panel, *European Communities — Measures Affecting Trade in Commercial Vessels*, WT/DS301/R, April 22, 2005, para. 7.73.

18 Foreign subsidies (or transnational/cross-border subsidies) refer to subsidies that are granted to recipients outside the granting member's territory.

support” as encompassing “any financial or regulatory measures that can affect costs, prices, or the profitability of market actors in any portion of the value chain, wherever they operate”, with “direct support to consumers” included as well.¹⁹

Last but not the least, the interpretation of the term “benefit” is also controversial. In light of WTO jurisprudence, the ordinary meaning of “benefit” encompasses some form of advantage. Numerous dispute settlement reports have confirmed that a “benefit” exists when the “financial contribution” makes the recipient “better off” than it would have been on the market without the support.²⁰ Further guidelines are provided in Article 14 (Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient) of the ASCM, in accordance with which a benefit is said to have been conferred where the recipient receives more adequate remuneration than what they would have received in the marketplace.

However, due to the complexity of global value chains, as well as state intervention programs, benefits in most cases are very difficult to measure. A government may impose tax burden on the same subsidy recipient, such that the benefits and the burden will cancel each other out.²¹ As Alan O. Sykes noted, governments usually benefit and burden domestic firms at the same time, and “the net impact of government on business activity in any context thus reflects a complex web of benefits and burdens”.²² Moreover, with the fragmentation of production worldwide, “the impacts of any one measure may trickle down the value chain or instead affect companies upstream that provide crucial

19 OECD, *Measuring Distortions in International Markets: The Semiconductor Value Chain*, OECD Trade Policy Papers No. 234, December 2019, pp. 56-57, https://www.oecd-ilibrary.org/trade/measuring-distortions-in-international-markets_8fe4491d-en (Last Visited on September 10, 2023).

20 For example, Report of the Panel, *Korea — Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, March 7, 2005, para. 7.427; Report of the Appellate Body, *Canada — Certain Measures Affecting the Renewable Energy Generation Sector/Canada — Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, May 6, 2013, paras. 5.224-5.228; Report of the Appellate Body, *United States — Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS/353/AB/RW, March 28, 2019.

21 Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, John M. Olin Program in Law and Economics Working Paper No. 186, 2003, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1515&context=law_and_economics (Last Visited on September 10, 2023).

22 Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, *Journal of Legal Analysis*, Vol. 2, No. 2, 2010, p. 473.

parts and components”,²³ hence making it a daunting challenge to determine the winners and losers of government support.

B. Difficulties in Drawing the Line between “Acceptable” and “Unacceptable” Subsidies

Once a government subsidy is confirmed as existing, the next fundamental issue of international subsidy rules is to identify and discipline “unacceptable” subsidies while leaving governments certain policy space to use subsidies for reasonable purposes.²⁴ Some scholars describe this as distinguishing between “good” and “bad” subsidies.²⁵ Nevertheless, identifying which activity constitutes unacceptable or particularly detrimental subsidy is not an easy task. In fact, what one member sees as a “good” subsidy could be negatively objected to by its trading partners and may incur tit-for-tat state behavior. Thus, it becomes necessary to revisit the scope of “unacceptable” subsidies that ought to be restricted.

There is no clear notion in the WTO regime of what constitutes an “acceptable” or “unacceptable” subsidy. The ASCM has made an effort by prescribing limits in respect of the “unacceptable” subsidies by adding “specificity” as one of the criteria and placing dividing lines between prohibited (red light),²⁶ actionable (yellow light)²⁷ and non-actionable (green light) subsidies.²⁸

1. The “Specificity” Criteria

According to Article 1.2 of the ASCM, as well as relevant dispute settlement practices, only “specific” subsidies shall be subject to discipline by way of pro-

²³ *Supra* n. 19, p. 104.

²⁴ *Supra* n. 22, pp. 498-499.

²⁵ *Supra* n. 1, Simon Leste (2011), p. 3; See also Bernard Hoekman and Douglas Nelson, Rethinking International Subsidy Rules, *The World Economy*, Vol. 43, No. 3, 2020, p. 3111.

²⁶ According to Part II of the ASCM, two types of subsidies are categorically prohibited, namely subsidies contingent upon export performance (export subsidies) and subsidies on the use of domestic over imported goods (import substitution subsidies). Prohibited subsidies are considered to be highly market-distortive and, thus, are not permitted by the WTO. The IRA is arguably a textbook case of prohibited subsidies under Article 3(1)(b) of the ASCM, as it is conditional on meeting local content requirements, and hence accords to domestically-assembled electronic vehicles treatment more favorable than that accorded to “like” imported electronic vehicles.

²⁷ According to Part III of the ASCM, actionable subsidies are permitted by the WTO, but shall be subject to countervailing measures if they cause adverse effects or serious prejudice to the interests of other WTO members.

²⁸ See Part IV, the ASCM.

hibition or countervailing duties. In the case of *US — FSC*, the Panel explicitly stated that “a subsidy is subject to the provisions of the SCM Agreement only if it is specific within the meaning of Article 2”.²⁹ The principle behind this design is that a broadly available or generally applicable subsidy within an economy is presumed to have none or negligible distortive effects on the allocation of resources, while a specific subsidy often relates more to protectionist intent and negative spillovers. Within the meaning of the ASCM, “specificity” is divided into four categories: enterprise-specificity, industry-specificity, regional specificity, and prohibited subsidies.³⁰

As regards the meaning of “specificity”, Article 2.2 states that “a subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific”. It follows that, whether the beneficiaries constitute “certain enterprises” is the key issue in specificity determination.

The chapeau of Article 2.1 of the ASCM considers “certain enterprises” as “an enterprise or industry or group of enterprises or industries”. In practice, however, the breadth of the term “industry” is likely to cause confusion in determining “specificity”. The ASCM does not offer any clarity about the breadth or narrowness of the meaning of “industry”. Hence, as the Panel in the *US — Upland Cotton* case pointed out, “whether a subsidy is specific can only be assessed on a case-by-case basis”.³¹ In any event, the narrower the category of recipients, the more “specific” a subsidy is regarded to be. A broad category of recipients are often related to “general” subsidies.³²

2. Non-actionable Subsidies and the Applicability of the GATT 1994 Exceptions Clause

Recent subsidies are increasingly linked to “high-tech” and “green-tech”

29 WTO Analytical Index, SCM Agreement — Article 2 (DS reports), p. 22, https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art2_jur.pdf (Last Visited on September 10, 2023).

30 See the WTO website, *Overview of Agreement on Subsidies and Countervailing Measures*, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm (Last Visited on September 10, 2023); Article 2.3 of the ASCM provides that “[a]ny subsidy falling under the provisions of Article 3 (prohibited subsidies) shall be deemed to be specific”.

31 Report of the Panel, *US — Subsidies on Upland Cotton*, WT/DS267/R, September 8, 2004, para. 7.1142.

32 WTO, World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO, p. 50, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf (Last Visited on September 10, 2023).

industries that can generate higher value in global trade, which is pertinent to the non-actionable subsidies provisions in the ASCM.

According to Article 8 of the ASCM, very limited types of subsidies would be non-actionable and only upon meeting certain requirements, including research subsidization, regional development subsidization, and environment-oriented subsidization.³³ The rationale behind the permission for the above-mentioned subsidies lies in the facts that these subsidies have significant social benefits, and that governments should be allowed to retain reasonable regulatory space to make policy decisions that best fit its needs and collective preferences, as long as disproportionate harmful spillover effects are avoided.³⁴

However, Article 8 of the ASCM has a 5-year trial period which expired on December 31, 1999, since WTO members reached no consensus on extending its legal force.³⁵ This means that no subsidy programs are explicitly protected as non-actionable subsidies nowadays under the ASCM regime. The subsidy behavior commonly accepted to be legitimate or necessary to address market failures can now face WTO litigation challenges, limiting governments' flexibility to craft their own public policies.

For WTO members, the immediate answer to this problem would be resorting to Article XX of GATT 1994. GATT 1994's Article XX provides general exceptions to GATT 1994 obligations and commitments if it is necessary for members to realize important objectives of common interest, such as protecting public morals, human and animal life, or exhaustible natural resources. WTO jurisprudence shows that the analysis of a measure under Article XX is two-tiered. First, it must be seen as to whether or not the measure falls under at least one of the ten exceptions listed in paragraphs (a) to (j) of Article XX; second, it must be seen as to whether or not the measure in question satisfies the Chapeau requirements of Article XX.³⁶

³³ The so-called "green box subsidy" provided in the Agreement on Agriculture serves a similar function. It exempts subsidies deemed as not trade-distortive, or that have the least distorting effects, covering direct income support for farmers, environmental protection and regional aid programs.

³⁴ Marios Tokas, *Looking Back into the Future: The Legal Standard of Prohibited Subsidies in SCM Agreement through WTO Case Law, Ahead of Reforms*, *Trade, Law and Development*, Vol. 14, No. 2, 2022, p. 315.

³⁵ See WTO Committee on Subsidies and Countervailing Measures, *Minutes of the Special Meeting Held on December 20, 1999, G/SCM/M/22*, February 17, 2000.

³⁶ See for example, Report of the Appellate Body, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, December 3, 2007, para. 139.

In spite of this, it is always disputed as to whether or not the general exceptions clause can apply to a violation of the ASCM as a self-standing agreement.³⁷ Supporters claim that it is clear from the development and explanations of Article XVI of GATT 1994, that the ASCM is compatible with GATT 1994, rather than the two being mutually exclusive; thus, it is argued, the GATT 1994 exceptions clause should also apply to infringement of obligations prescribed by the ASCM.

Conversely, others argue that GATT 1994's Article XX is available only for GATT 1994 violations, or when Article XX has been incorporated into another WTO agreement by clear reference. For instance, in accordance with the customary rules of interpretation of public international law codified in the Vienna Convention on the Law of Treaties (VCLT), the Panel in *China — Raw Materials* found no reference to the GATT 1994 exceptions clause in Paragraph 11.3 of China's Accession Protocol and thus concluded that "the wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defense of GATT Article XX for violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol", otherwise, it would "undermine the predictability and legal security of the international trading system".³⁸

In addition, some WTO agreements, such as the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), specifically refer to GATT 1994's Article XX in their texts and clarify the relationship between GATT 1994's Article XX and non-GATT 1994 agreements.³⁹ Compared to that, the ASCM contains no GATT 1994 Article XX-like exceptions, nor makes any reference to the GATT 1994 exceptions clauses. This omission could thus indicate that the ASCM does not intend GATT 1994's Article XX to be applied as defense for violation of the ASCM imposed obligations.⁴⁰ This presumption

37 Fernando Piérola, The Availability of a GATT Article XX Defence with Respect to a Non-GATT Claim: Changing the Rules of the Game? *Global Trade and Customs Journal*, Vol. 5, No. 4, 2010; Virginia R. Hildreth, Renewable Energy Subsidies and the GATT, *Chicago Journal of International Law*, Vol. 14, No. 2, 2014.

38 Report of the Panel, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, July 5, 2011, paras. 7.158-7.159; Report of the Appellate Body, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, February 22, 2012, paras. 284-287.

39 Preamble and Article 2.4, the SPS Agreement.

40 Marie Wilke, Feed in Tariff and Renewable Energy and WTO Subsidies Rules (ICTSD), Issue Paper No. 4, 2011, p. 21.

may be further supported by Article 3.1 of the ASCM which explicitly incorporates exceptions clauses from other agreements, stating that “except as provided in the Agreement on Agriculture, the following subsidies ... shall be prohibited...”. Apparently, if the ASCM intended to include GATT 1994’s Article XX-like exceptions as well, it would have made it clear the way Article 3.1 did.

Consequently, members have relatively narrow policy space to pursue non-trade objectives within the scope of the ASCM obligations.⁴¹ There is certainly discontent among WTO members in this respect. Many developing countries, such as India, Venezuela, and Cuba, strongly advocate for the revival of non-actionable subsidies so that they are capable of deploying subsidy programs to achieve legitimate policy goals.⁴²

C. Gaps in Services Subsidy Disciplines

The ASCM was developed for trade in goods only, and as such it cannot be applied to subsidies pertaining to trade in services.⁴³ This regulatory gap is significant if one considers that services today are growing apace, accounting for more than 50% of the economy in most developed countries.

A recent GTA report shows that in 2021, a total of 4564 subsidy awards granted by China, the EU and the US governments were in the service sector, compared to 2171 in the agricultural sector and 10814 in the manufacturing sector.⁴⁴ Given that trade and investment in services can hardly be affected by traditional border-restriction-tools such as tariffs or antidumping measures, it’s not surprising that subsidy instruments have been used more intensively and extensively in case of services. In particular, investment-diverting subsidies aiming to support investments (through commercial presence, services are traded) in domestic clean-energy or high-tech sectors have sparked the most controversy worldwide.

41 Aaron Cosbey and Petros C. Mavroidis, A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO, *Journal of International Economic Law*, Vol. 17, No. 1, 2014.

42 WTO, Improved Rules under the Agreement on Subsidies and Countervailing Measures — Non-actionable Subsidies: Proposal by Venezuela and Cuba, TN/RL/W/41/Rev.1, March 10, 2003.

43 Pierre Sauvé and Marta Soprana, Disciplining Service Sector Subsidies: Where Do We Stand and Where Can We (Realistically) Go? *Journal of International Economic Law*, Vol. 21, No. 3, 2018.

44 *Supra* n. 4.

Under the current WTO regime, trade in services is regulated mainly by the General Agreement on Trade in Services (GATS). GATS contains a set of stipulations relevant for services subsidies, such as the most-favoured-nation treatment in Article II, domestic regulation in Article VI, subsidy negotiations in Article XV, national treatment in Article XVII, and non-violation proceedings in Article XXIII. But it does not restrict members from implementing harmful services subsidies in any material way.⁴⁵ In practice, government subsidies are likely to go unregulated through a “limitation on national treatment”, potentially distorting market competition.⁴⁶ Moreover, despite the general transparency obligation imposed by the GATS, the number of WTO members that have notified their subsidies affecting trade in services is pitifully small.⁴⁷

Similar to the challenge of defining and identification faced by subsidies in case of trade in goods, the questions about what are service subsidies and which of them make up trade-distorting services subsidies are far from settled. Some members and studies propose that the definitions and criteria in the ASCM can be borrowed when developing services subsidy rules, because trade in goods and trade in services are increasingly interconnected, and that the definition of subsidies should be consistent throughout the WTO agreements.⁴⁸ Other members, such as the US, highlight the differences between trade in services and trade in goods, considering it inappropriate to fully transplant the definition of subsidies for trade in goods.⁴⁹

Although Article XV of the GATS expressly recognizes the distortive effects of subsidies and demands WTO members develop multilateral disciplines for services subsidies, little progress has been made. A footnote to Article XV stipulates that “a future work programme shall determine how, and in what time-frame, negotiations on such multilateral disciplines will be conducted”. However, as yet, no specific time-frame has been adopted to advance the negotiations,

45 Victor Crochet and Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law, *World Trade Review*, Vol. 20, 2021.

46 Bernard Hoekman, Subsidies, Spillovers and WTO Rules in a Value-chain World, *Global Policy*, Vol. 7, No. 3, 2016, p. 7.

47 Pierre Sauvé, An Introduction to Service Subsidies, Global Subsidies Initiative (IISD), October 29, 2006, <http://www.iisd.org/gsi/commentary/introduction-service-subsidies> (Last Visited on September 10, 2023).

48 *Supra* n. 15, p. 17.

49 Ai Su-jun, Suggestions for Legislative in Terms of Subsidies on Trade in Services under the Framework of WTO, *Journal of Shanghai University (Social Sciences)*, Vol. 29, No. 2, 2012, p. 57.

and the process is basically stagnant at present.⁵⁰ Article XV of the GATS, as one of build-in agenda, is considered to be only a “best effort” clause.⁵¹ Within the GATS rule-making framework, most members give higher priority to market access, domestic regulation, and emergency safeguard issues than to subsidy disciplines.

Considering the complex characteristics and public good sensitivity of services trade, the new subsidy disciplines for services trade are no doubt more difficult to establish. For a sector as diverse as services, it’s almost impossible to find a “one size fits all” solution. And most importantly, WTO members seek to preserve ample domestic regulatory power and discretion “in a trading environment characterized by significant and rising global market contestability”.⁵² Hence more attention and discussions are needed to reach a better understanding of services subsidy issues.

D. Lack of Effective Remedial Mechanisms

In terms of remedies for the negative impacts of “unacceptable” subsidies, the WTO regime provides two approaches, namely, countervailing duties (CVDs) as a unilateral remedy, and the WTO Dispute Settlement Procedure as a multilateral remedy.⁵³

In practice, WTO members are more willing to tackle harmful subsidies by imposing countervailing duties in accordance with Part V of the ASCM. As

50 The discussion on services subsidies started in 1996. Since then, this issue has been on the agenda of each formal meeting of the Working Party on GATS Rules. The Chairman of the Working Party prepared a Checklist of Issues in 2001 (which brought together relevant items raised by members) for WTO members to conduct negotiations in a more systematic manner. This Checklist includes issues such as the definition of services subsidies, the concept of trade-distorting services subsidies, the impact of existing rules on services subsidies, and the flexibility needed by developing countries in services subsidies negotiations. See WTO, Negotiations on Subsidies, Report by the Chairperson of the Working Party on GATS Rules, S/WPGR/10, June 30, 2003.

51 “Build-in agenda” refers to future work for continuing negotiations of certain issues set out in existing WTO agreements, which reflects the fact that agreement on those issues was not possible during the Uruguay Round. See the WTO website, https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/04agen_e.htm (Last Visited on September 10, 2023). The “best effort” clause here means that when WTO members fail to reach multilaterally acceptable solutions on services subsidies, Article XV does not authorize the members to resort to the WTO dispute settlement mechanism.

52 *Supra* n. 43.

53 Robert Howse, Making the WTO (Not So) Great Again: The Case against Responding to the Trump Trade Agenda through Reform of WTO Rules on Subsidies and State Enterprises, *Journal of International Economic Law*, Vol. 23, No. 2, 2020.

of the end of 2019, 115 members had notified the SCM Committee of their respective domestic countervailing duty legislations pursuant to Article 32.6 of the ASCM (Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations).⁵⁴ But this kind of remedy can hardly be applied to counteract the effect of import substitution subsidies because there are no “subsidized imports” in this event. Still, the yet-to-be-clarified WTO rules relating to subsidy identification and calculation of benefits may result in abusive applications of countervailing measures. In addition, the GATS does not provide for ASCM-like countervailing duties as a remedy, because tariff or duty measures are not applicable to trade in services, and the statistics on trade in services as well as the amount of services subsidies are highly difficult to measure. Given the shortage of legislations and implementation experience, countervailing measures of trade in services may easily evolve into protectionist tools, thereby hindering the liberalization process of international trade in services.

The multilateral approach means that a member can challenge another member’s subsidy measures as WTO-incompatible through the WTO Dispute Settlement Procedure. For example, regarding the discriminatory measures that favor domestic producers over foreign competitors under the IRA of the US, any affected member can lodge complaints before the WTO claiming that the US is in violation of the WTO principles of most-favored-nation and national treatment, as well as the ASCM prohibition on import substitution subsidies. However, since the WTO Appellate Body has been paralyzed since 2019, the subsidizing members could frustrate such an effort through appeal in case of an unfavorable ruling, which may lead to unilateral retaliation by the complaining members. Besides, the WTO law functions at the state-to-state level instead of at the level of private persons, so companies that believe there has been a violation of the ASCM need to persuade their governments to take actions. And the affected companies have to withstand the uncertainty inherent in the long and complicated process of the WTO dispute settlement.

⁵⁴ WTO, Report (2019) of the Committee on Subsidies and Countervailing Measures, G/L/1341, November 20, 2019, p. 4.

To counter the inadequacies of the remedies provided by the WTO, some members have adopted domestic legislations, such as the FSR of the EU, to increase the costs for subsidizing members. In particular, under the FSR, countervailing measures can be applied to companies in a third country based on the attribution theory. For instance, the EU Commission has imposed a definitive countervailing duty on imports of certain products originating in Egypt, irrespective of the fact that the subsidies in question were granted by the Chinese government. This controversial issue was brought before the EU General Court by an Egyptian company. The Court delivered its judgment on March 1, 2023, accepting the Commission's countervailing measures. According to the Court, the definition of subsidy in the FSR "does not rule out the possibility that, even if the financial contribution does not come directly from the government of the country of origin or export, that contribution may be attributed to it", otherwise the effectiveness and purpose of the FSR would be undermined.⁵⁵ Both the Court and some scholars agree that the expression "within the territory of a Member" in Article 1 of the ASCM in fact provides a remedial recourse against any WTO member granting subsidies, even if the financial support is provided to recipients outside the granting member's territory.⁵⁶

In another recent case challenging the EU Commission's countervailing practice, the plaintiff insisted that the Commission's decision on attribution should be substantiated by objective and concrete evidence rather than a simple presumption.⁵⁷ Domestically, these disputes may be decided in appeals before the Court of Justice of the EU. At the WTO level, the issue of remedies against cross-border subsidies is apparently in need of clarification. In the absence of such clarification, the EU's unilateral approach would impose a costly burden on companies to track the financial support granted by foreign authorities for the sake of abiding by the FSR, and may also cause tense relationships between relevant members.

55 Case T-540/20, *Subsidies – Imports of Continuous Filament Glass Fibre Products Originating in Egypt*, Judgment of the General Court (First Chamber, Extended Composition), ECLI:EU:T:2023:91, March 1, 2023, paras. 51 & 58-59.

56 *Supra* n. 45, p. 349.

57 Renato Antonini et al., EU Court Recognizes Transnational Subsidies Are Countervailable, Global Trade Policy Blog, March 21, 2023, <https://www.steptoe.com/en/news-publications/global-trade-policy-blog/eu-court-recognizes-transnational-subsidies-are-countervailable.html> (Last Visited on September 10, 2023).

III. THE FUTURE OF WTO SUBSIDIES REFORM

We have seen the resurgence of subsidy competition among major members in the current changing global landscape, as well as the limitations of WTO subsidy rules in dealing with it. This situation strongly underlines the need for new multilateral regulations on subsidies.⁵⁸ For many years, WTO members have put forward various proposals to reform WTO subsidy rules, some of which have been incorporated into the provisions of recent regional trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and several bilateral agreements led by the EU. Considering this progress, it is time to read the room and move ahead on the way to further development of rules on subsidy issues at the WTO.

A. Extant WTO+ Subsidy Rules in Regional Trade Agreements

Although the vast majority of PTAs simply mirror the ASCM provisions, or do little to regulate subsidies, some recent PTAs have included provisions beyond what is mandated by the WTO. These additional provisions are often referred to as “WTO+” subsidy rules.⁵⁹ Looking across recent PTAs, the key changes observed are threefold.

First, a small share of PTAs, mostly EU PTAs, strengthen subsidy rules by explicitly bringing services subsidies into the scope of subsidy disciplines and expanding the list of prohibited subsidies.⁶⁰ For example, the definition of subsidy in the EU-Singapore Free Trade Agreement (EU-Singapore FTA, entered into force on November 21, 2019) is worded as “a measure which fulfils the conditions set out in Article 1.1 of ASCM, *mutatis mutandis*, irrespective of whether the subsidy is granted in relation to the production of goods or of services”.⁶¹ In addition, the EU-Singapore FTA incorporates two new forms of

58 Sacchidananda Mukherjee, Debashis Chakraborty and Julien Chaisse, Curtailling Subsidy Wars in Global Trade: Revisiting the Economics of World Trade Organization Law on Subsidies, *Syracuse Journal of International Law and Commerce*, Vol. 42, No. 1, 2014, p. 35.

59 *Supra* n. 46, p. 2.

60 *Supra* n. 34, p. 306.

61 Article 11.5, Chapter 11, the EU-Singapore FTA; In footnote 74, the EU-Singapore FTA further explains that the definition of subsidies “does not prejudice the outcome of future discussions in the WTO on the definition of subsidies for services”.

subsidies into the prohibited subsidy category, namely, unlimited guarantees⁶² and any support to insolvent or ailing undertakings without a credible restructuring plan.⁶³ Not only that, the EU-Singapore FTA demands that parties negotiate for other specific subsidies in relation to trade in goods and services that are not covered by the stated list of prohibited subsidies.

The EU-Japan Economic Partnership Agreement (EU-Japan EPA, entered into force on February 1, 2019)⁶⁴ and the EU-UK Trade and Cooperation Agreement (EU-UK TCA, entered into force on May 1, 2021)⁶⁵ both contain provisions similar to the EU-Singapore FTA. Notably, in order to minimize the negative effects of subsidies on trade between parties, the EU-UK TCA, in its Article 366, sets out detailed principles for parties seeking to use subsidies. These principles include considering the legitimacy of a specific public policy objective and applying a proportionality or necessity test. It's also worth noting that the Regional Comprehensive Economic Partnership Agreement (RCEP), which China has joined, includes provisions on review and consultations regarding subsidies for services. Accordingly, RCEP members should consider incorporating "any disciplines agreed under Article XV of GATS" into the Chapter on trade in services.⁶⁶ These tighter and more expansive subsidy disciplines indicate a step forward for subsidy disciplines through PTAs.⁶⁷

Second, some recent PTAs contain exemption provisions specifying that certain types of subsidies, generally related to public services with significant social benefits, are deemed to have only a tiny trade-distorting effect and are, thus, permitted. For instance, Article 364 of the EU-UK TCA is titled "Scope and Exceptions", providing that its subsidy disciplines do not apply to "subsidies granted to compensate the damage caused by natural disasters or other exceptional non-economic occurrences", "subsidies of a social character that are

62 Unlimited guarantees refer to subsidies that would guarantee an unlimited amount of debts or liabilities of certain undertakings, or which would guarantee a finite amount of debts or liabilities but over an indefinite period, whether in law or in fact.

63 Article 11.7, Chapter 11, the EU-Singapore FTA.

64 Chapter 12, the EU-Japan EPA.

65 Chapter 3, the EU-UK TCA.

66 Article 8.22, RCEP.

67 Aya Iino, Disciplining Subsidies through Free Trade Agreements (FTAs): Emerging Developments in Japan's FTAs and Their Implications, *German Law Journal*, Vol. 24, 2023, p. 197.

targeted at final consumers”, or “subsidies related to the audio-visual sector”, etc. Article 11.7(2) of the EU-Singapore FTA also stipulates that subsidies will not be prohibited if the granting authority demonstrates that the subsidy in question does not affect the trade or investment of the other party, nor will it be likely to do so. These provisions creating exceptions constitute a resurgence of the defunct non-actionable subsidies under the ASCM, turning away from the rigid restriction mode to a more effects-based approach.⁶⁸ In case of conflicts concerning these kinds of public-benefit-oriented subsidies, the parties generally resort to consultations instead of an actionable approach for a desirable solution.⁶⁹

Third, under the leadership of a few developed countries, particularly the OECD members, more and more PTAs are incorporating clear articles regulating the competition-distorting activities of state-owned enterprises (SOEs). The major concern is in relation to the crucial and growing role of SOEs as both recipients and providers themselves of financial support, which is beyond the focus of the WTO subsidy rules. A recent survey conducted by Rubini and Wang reveals that two-thirds of the assessed 283 PTAs contain language requiring SOEs to behave in accordance with commercial considerations.⁷⁰ Specifically, Chapter 17 of the CPTPP introduces the concept of “noncommercial assistance”, banning government support on non-commercial terms to the commercial activities of SOEs, so as to prevent adverse effects to the interests of another party. The “noncommercial assistance” clause focuses not only on trade in goods, but also on trade in services and investment, establishing a comprehensive subsidy system that targets SOEs. The EU has proposed to put these SOEs-related disciplines onto the WTO reform talks agenda since 2018, mainly out of concerns about the lack of competitive neutrality in China.⁷¹ Some other WTO members, like the US and Japan, share the same concerns over the negative

⁶⁸ *Supra* n. 60.

⁶⁹ Luca Rubini, Chapter 15 – Subsidies, In *Handbook of Deep Trade Agreements*, Edited by Aaditya Mattoo et al., Washington, DC: World Bank, 2020, pp. 452-453.

⁷⁰ Luca Rubini and T. Wang, Chapter 16 – State-owned Enterprises, In *Handbook of Deep Trade Agreements*, Edited by Aaditya Mattoo et al., Washington, DC: World Bank, 2020, pp. 465-503.

⁷¹ Peter Draper et al., Industrial Subsidies, Market Competition, Global Trade and Investment: Towards A Research Agenda, Institute for International Trade Working Paper 01, April 2020, p. 12.

impact of subsidies provided to and by SOEs.⁷² In September 2021, China formally applied to join the CPTPP, which may indicate the potential inclusion of the principle of competitive neutrality at this multilateral forum.

In short, the development of subsidy-related rules in recent PTAs implies “a minimum line of how far countries can agree”, and could provide a valuable starting point for the attempts to reform WTO subsidy rules or fill the gaps in WTO rules through PTAs.⁷³ However, the actual effects of the application of these new subsidy disciplines remain to be seen.

B. Challenges Confronting WTO Subsidies Reform

Though the new disciplines in PTAs provide a basis for WTO reform, it seems incredibly hard for the WTO to update its subsidy rules because of the diverging views of members and the inherent complexities of the multilateral trading regime.

The biggest challenge the WTO has faced in decades is undoubtedly the conflicting views of WTO members towards WTO reform. Most members advocate the rewriting of WTO subsidy rules, yet their focuses differ and are sometimes basically opposite to each other. As professor TU Xinquan concludes, “there is a big difference between developed and developing members, and even within the two country groups there are disagreements”.⁷⁴

For example, members with insufficient resources, as well as some highly developed members, are not in favor of the revival of non-actionable subsidies under the ASCM out of concerns that harmful subsidy races in the field of research and development may be unbounded, and that members may mislabel other forms of subsidies as non-actionable subsidies for protectionist purposes. On the other hand, large developing members (including India and China),⁷⁵

72 United States Trade Representative, 2023 Trade Policy Agenda and 2022 Annual Report of the President of the United States on the Trade Agreements Program, March 2023, <https://ustr.gov/sites/default/files/2023-05/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL.pdf> (Last Visited on September 10, 2023), p. 188.

73 *Supra* n. 67.

74 Siqi Li and Xinquan Tu, Reforming WTO Subsidy Rules: Past Experiences and Prospects, *Journal of World Trade*, Vol. 54, No. 6, 2020, p. 858.

75 China proposes that the provisions on non-actionable subsidies should be reinstated and their coverage expanded. See WTO, *China's Proposal on WTO Reform*, WT/GC/W/773, May 13, 2019, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0 (Last Visited on September 10, 2023).

generally welcome such reforms to make certain subsidies non-actionable in order to gain more domestic policy space. In practice, subsidies in critical industries, like semiconductors and green energy, may be costly, but they do generate positive effects, such as an increase in local employment. Criscuolo et al. found that a 10% increase in investment subsidies generates about a 10% increase in manufacturing employment and a 4% decrease in aggregate unemployment, which can be considered a politically rational policy choice for local governments.⁷⁶ These domestically efficient policies imply the difficulty of achieving international cooperation on making strictly applied “hard” law.⁷⁷

Furthermore, the US, the EU and Japan have collectively constituted the Trilateral Cooperation Group and have held several ministerial-level meetings since 2017. Among other matters, the trilateral group actively proposes stronger WTO rules on industrial subsidies and new disciplines governing SOEs, seeing China as the main target.⁷⁸ As to industrial subsidies, the trilateral group emphasizes on adding new types of prohibited subsidies covered by Article 3.1 of the ASCM, including not only unlimited guarantees and subsidies to insolvent or ailing enterprises, but also “subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity” and “certain direct forgiveness of debt”.⁷⁹ Aside from this, the trilateral group creates a reversal of the burden of proof by demanding that it be the subsidizing member that must prove the absence of serious negative impacts caused by its subsidies. This is especially applicable when the related subsidies are considered harmful, such as “excessively large subsidies” or “subsidies creating massive manufacturing capacity”. In other words, these subsidies are presumed to be prohibited and should

76 Chiara Criscuolo et al., Some Causal Effects of an Industrial Policy, *American Economic Review*, Vol. 109, No. 1, 2019, p. 49.

77 In this respect, some scholars argue that it is overwhelmingly difficult to assess the impacts of subsidies, especially in a highly developed global value-chains context. The vertical specialization and fragmentation of production activities across the world means that subsidies will benefit foreign interests as well as local ones. See *supra* n. 46, p. 358.

78 Office of the United States Trade Representative, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union> (Last Visited on September 10, 2023).

79 *Ibid.*

be withdrawn immediately unless contrary evidence is provided.⁸⁰

On the contrary, in China's Proposal on WTO Reform published in May, 2019, China expressly opposes discriminatory rules on SOEs, stating that enterprises of different ownership should all operate in an environment of fair competition, and "no special or discriminatory disciplines should be instituted on SOEs in the name of WTO reform".⁸¹ China also does not agree that the overcapacity in certain sectors is the result of government subsidies. At the same time, China has indicated its willingness to join talks as long as subsidies in all sectors (from industrial to agricultural) are included, but the trilateral group prefers to discuss the two separately.⁸² In all respects, it is unlikely that China will accept a WTO reform that is, in essence, "China reform".

The conflicts over subsidy reform proposals primarily reflect conflicts of national interests and the different levels of development of WTO members, rendering it very difficult for members to reach a consensus on the interpretation and updating of WTO subsidies rules in the short term. The current deadlock in multilateral negotiations also exposes the lack of trust between members, which obviously is not the answer to the urgent need for regulating the proliferation of subsidies over the past few years.

IV. CONCLUSION: THE WAY FORWARD

In view of the current tensions over subsidy races among major economies, this paper explores the effectiveness of WTO law in regulating the explosive growth of subsidies as well as the relevant efforts to fill the gaps, either by way of unilateral measures or through PTAs. In an era of nationalism and de-globalization, the issue of international subsidy regulation reform has become more pressing. Given the diverging views of WTO members, it seems difficult to formulate new subsidy rules at the WTO level. Nevertheless, consistent policy dialogue and information-sharing are always the first steps towards change. So, enhancing transparency disciplines is a better and more realistic

⁸⁰ *Supra* n. 53, p. 372.

⁸¹ *Supra* n. 75.

⁸² *Supra* n. 67, p. 180.

direction of reform to consider.

Transparency requirements are already embedded in the ASCM. Accordingly, each member shall notify the SCM Committee annually of the effects and nature of any subsidy (as defined by the ASCM) granted or maintained within its territory. This notification requirement contributes to compliance with established WTO subsidy rules and provides a valuable source of information regarding the potential effects of members' subsidy practices. However, WTO members have a rather poor record of reporting subsidies as required. Peter Draper's team found that less than 50% of members fulfill their subsidy notification commitments regularly.⁸³ Some members lack the capability to collect and assess data, while others simply are afraid of self-incrimination. The elusive definition of "subsidies" is another key reason behind the poor compliance record. These reasons suggest that, first, greater assistance should be given to developing and the least-developed members to help them gather and collate data and improve their compliance capabilities; second, the rules on punishments should be strengthened; and third, priority should be given to clarifying the definition of "subsidies" in future negotiations.

During the WTO negotiations, both developed and developing members have highlighted the need for greater transparency of subsidy programs. China has proposed that transparency of investigations into countervailing measures should be enhanced, and more consideration should be given to the special situations of developing countries.⁸⁴ Moreover, many members urge the WTO to punish late or incomplete subsidy notification.⁸⁵ The Trilateral Cooperation Group specifically advocates that non-notified subsidies that are identified instead by trading partners should be deemed to be prohibited. The joint report released by the WTO, OECD, IMF, and World Bank also underscores the need for greater transparency in matters of implementation of international subsidy rules, so as to promote cooperation between governments and help develop new subsidy rules governing SOEs, climate change, public health, trade in services

⁸³ *Supra* n. 71, p. 13.

⁸⁴ *Supra* n. 75.

⁸⁵ WTO, Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/204/Rev.5, June 25, 2021. This series of documents recognizes that developing countries may need assistance in fulfilling notification obligations.

and the digital economy, among others.⁸⁶

Regarding other critical subsidy matters as mentioned above (clarifications on substantive ASCM rules, establishment of services subsidy rules, etc.), members are advised to engage in regular dialogue through thematic sessions of the SCM Committee, or adopt an “open plurilateral” approach (commonly referred to as “Joint Statement Initiatives”) with the outcomes benefiting all members on a most-favored-nation basis.⁸⁷ Either way, it’s wise to reach out to specialized international organizations, think tanks, and the business community, solicit their expertise, knowledge and opinions on the identification of subsidies, as well as their participation in data collection and sharing. Above all, when designing subsidy programs, each member should adhere to the principle of good faith, considering the potential impact their subsidy can have on the trade interests of other members, as far as possible.

⁸⁶ See IMF, OECD, World Bank and WTO, Subsidies, Trade, and International Cooperation, 2022/001, 2022, <https://thedocs.worldbank.org/en/doc/0534eca53121c137d3766a02320d0310-0430012022/original/Subsidies-Trade-and-International-Cooperation-April-19-ci.pdf> (Last Visited on September 10, 2023).

⁸⁷ *Supra* n. 74, p. 870.