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ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor–International Trade Law and State Intervention in the Economy in the Covid Era

The Covid 19 Exogenous Shock and the Crafting of New Multilateral Trade Rules on Subsidies and State Enterprises in the Post-Pandemic World

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Abstract

This Article discusses existing WTO rules on subsidies and state enterprises, relevant caselaw and reform prospects in light of key geopolitical developments and changes in the global economy emerging in the aftermath of the Covid-19 pandemic. Following a general introduction, the Article critically analyzes present WTO rules on industrial subsidies, focusing *inter alia* on the new problems raised by activist industrial policies pursued by global trading powers, foreign subsidization, the climate change shock and environmental exigencies. It then shifts attention to the application of WTO rules on subsidies to the state sector and the increasing demands for new international trade rules on non-subsidies measures to address the negative spillover effects on trade from government influence on state-owned enterprises (SOEs). With respect to each of these matters, the Article first clarifies the terms of the problem in relation to existing WTO rules and caselaw, and next examines the question of how, and to what extent, "deeper" free trade agreements (FTAs)—those that experts designate as models for WTO reforms on the matter—establish new rules that permit to adequately address the trade concerns raised by SOEs' commercial and financial activities. Based on this multi-layered analysis, the article concludes by examining prospects of reform of WTO rules on state interventionism.

Keywords: Covid-19 Pandemic; WTO Reform; Geostrategic Competition; Industrial Protection; Green Transition; Climate Change; State Enterprises; Subsidies

A. Introduction

Geostrategic rivalry is once again a prominent feature of the international system, "with far-reaching implications for the stability of the existing political, security, and economic order."[1]

[1]Vinod K. Aggarwal & Andrew W. Reddie, *Economic Statecraft in 21st Century: Implications for the Future of the Global Trade Regime*, 20(2) World Trade Rev. 137, at 137 (2021). See also Gregory Shaffer, Emerging Powers and the World Trading System. The Past and Future of International Economic Law (2021) 5; and Petros C. Mavroidis & André Sapir, China and the WTO: Why Multilateralism Matters (2021).

Amid such challenges, the WTO has been progressively facing pressures,[2] with few if any chances to modernize its rulebook without agreement on new substantive and procedural rules between USA, China and the EU,[3] the three world's largest traders. In fact, the relations among these powers are the setting where several tensions rise in the multilateral trading system. As explained in the introductory piece to this Special Issue, direct government intervention in the economy[4] in the form of subsidization policies and the activity of state enterprises–i.e., business entities over which the state has influence beyond the use of general policy tools like regulation[5]–stand out among the sources of such tensions. Together with trade restrictions and new legislation designed to impact cross-border investment, mergers, and acquisitions, the use of subsidies and countervailing measures by governments[6] and trade-distorting effects of state-owned enterprise (SOEs)[7] have lately caused harsh controversies within and outside the WTO among its members. In turn, such antagonisms contributed to the semi-paralysis of WTO Dispute Settlement System (DSS) since 2019, and culminated in the US-China trade war,[8] only further aggravated by the Covid-19 pandemic.

There is no sign on the horizon suggesting that trade tensions over such matters will decrease in the near future.[9] Quite to the contrary, discontentment is growing such that some governments

[2]*See* Giorgio Sacerdoti & Leonardo Borlini, *Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System*, in this Issue, and the literature referred to therein.

[3]This position is voiced, among several others, by Joel P. Trachtman, *Functionalism, Fragmentation, and the Future of International (Trade) Law*, 20(1) The Journal of World Inv. & Trade, 15 (2019); Shaffer, *supra* note 1; Bernard Hoekman, Xiquan Tu, & Robert Wolfe, *China and WTO Reform*, EUI Working Paper 7 (2022).

[4]Broadly speaking, government intervention refers to the government's deliberate actions to directly or indirectly influence resource allocation and market mechanisms. It can take many forms, from regulations, taxes, subsidies, to monetary and fiscal policy. In some cases, the government also sets maximum and minimum price limits on the market. The main reasons of such intervention are diverse too: among other things, the government normally provides the legal and social framework within which the economy operates; maintains competition in the marketplace; provides public goods and services; redistributes income; corrects market failures; and takes certain actions to stabilize the economy. As it is known, the relative weight and diversity of direct and indirect forms of government intervention mainly depends on the type of economic system, with peaks of intervention under a command or planned economy system; the minimization of intervention in a free-market economy; and mixed economy systems with more diverse interventions than in a market economy, but not as extreme as a command economy. For a comparative analysis of the different systems, see the seminal work by Steven Rosefielde, Comparative Economic Systems: Culture, Wealth, and Power in the 21st Century (2015).

[5]Going more into detail, in this article, I will use the term state enterprises as opposed to state-owned enterprises (SOEs) to designate in a general fashion a range of business entities over which the state has influence beyond the use of general policy tools like regulation. In using the term state enterprises, I leave open the question of what level of state involvement or influence, and what kind, is involved. Conversely, negative spillover effects on trade are often caused by commercial and financial operations of SOEs, that is undertakings owned or controlled by States, to which I will specifically refer to when addressing these particular kinds of problems and entities.

[6]Allegedly trade-distorting subsidies conferred on domestic industries by WTO members have been a long-standing issue of contention in trade policy circles.

[7]*See*, among others, Mitsuo Matsushita & Chin Leng Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules* 19(3) World Trade Rev. 402 (2021); Matthias Goldmann, *Object and Purpose Control in Trade Disputes: Lessons from the CJEU for WTO Reform* (2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3997057.

[8]Aljoscha Nau, *World Trade in 2020: The Show Must Go On! 19 Pandemic, Trade Wars and the Deadlock at the WTO: Rule-Based Trade is under Pressure and the EU Must Take the Lead*, IW-Policy Paper Nr. 9 29 (2020). An insightful analysis of, and detailed data about, recent trade wars are offered by Matthew C. Klein & Michael Pettis, Trade Wars are Class Wars. How Rising Inequality Distorts The Global Economy and Threatens International Peace 19-40 (2020).

[9]It is telling that one of the WTO Appellate Body's three very last reports settled a dispute about the legality of certain countervailing duties, imposed by the US in 2015, with respect to allegedly subsidized imports of supercalendered paper from Canada. Appellate Body Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/AB/R, (March 5, 2020). Moreover, it was only in mid-June 2021 that the US and the EU agreed to a truce in a 17-year trade dispute over aircraft subsidies for Boeing and Airbus. Also, in July 2021 the EU requested consultations with Russia in the WTO regarding certain measures that restrict or prevent EU companies from selling goods and services to Russian SOEs through procurement for commercial purposes. See European Commission, *EU Launches WTO Dispute against*

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are increasingly "providing subsidies to companies outside their jurisdiction, "buying their way" into other countries' markets" and undermining "competition therein as they do so."[10] With the internationalization of state enterprises, concerns about unfair advantages they may have over private firms because of government support have spilled across national borders and fueled protectionist measures.[11] Besides, the COVID-19 pandemic has accelerated shifts in several countries' industrial policies, while creating challenges of its own, *inter alia*, by raising questions regarding the right policy mix in terms of diversification of domestic and external sources of supply and the build-up of strategic production capacities and reserves; and determining a significant increase in government support and involvement in the economy.[12]

Meanwhile, competition between governments "to stimulate domestic economic activity through 'make it here' policies" is rising.[13] Even more basically, new political interferences with trade flows is caused by industrial programs aimed at actively supporting domestic industries, building capabilities in broadly understood strategic sectors, granting to domestic producers preferential access to government procurement, and ensuring domestic ownership of advanced technological companies by screening acquisitions from abroad.[14] The resulting weaponization of international trade by many states[15]—a process intensified in response to the Russian invasion of Ukraine–"appears set to reconstruct global economic governance."[16]

In such a dynamic context, absent reforms, the WTO will be poorly equipped "to assist major Members to attenuate economic conflicts"[17]and address the growing tensions arising out the increasing politicization of trade flows. The different proposals advanced by WTO members over the last few years confirm that the adoption of new international trade rules to limit the negative spillover effects on trade from government intervention in the economy is a central piece of the *modernization* puzzle.[18]

Discriminatory Procurement by Russian State-owned enterprises (July 19, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3748.

[10]Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law*, 20(3) World Trade Rev. 343, at 343 (2021).

[11]*See* Leonardo Borlini, *Economic Interventionism and International Trade Law in the Covid Era* in this Issue.

[12]Ibid., §A.

[13]Hoekman, Tu, and Wolfe, *supra* note 3, at 8.

[14]Sacerdoti & Borlini, *supra* note 2, §B.

[15]Tania Voon, *The Security Exception In WTO Law: Entering a New Era*, 113 AJIL Unbound 45, 45 (2019); J Benton Heath, *The New National Security Challenge to the Economic Order*, 129 Yale L. J. 79 (2020); Yong-Shik Lee, *Weaponizing International Trade in Political Disputes: Issues under International Economic Law and Systemic Risks*, 56 J. World Trade 405 (2022).

[16]Anne Orford, *How to Think about the Battle for the State at the WTO*, in this Issue.

[17]Hoekman, Tu, and Wolfe, *supra* note 3, at 7.

[18]*See, e.g.*, European Commission, Concept Paper on WTO Modernization, (Sept. 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786; USTR Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union (May 31, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting; WTO General Council, General Council – Strengthening and modernizing the WTO : Discussion Paper - Communication from Canada, JOB/GC/2018 (September 14, 2018); China, *Record of the Press Conference on the Eighth WTO Trade Policy Review, State Council Information Office*, (October 28, 2021), http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/44687/47307/index.htm#top; European Commission, Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System, COM(2021) 66 final ANNEX, February 2, 2021. Furthermore, the EU and the US made a clear commitment at their June 2021 summit to reform the WTO to make it fit for the reality of the 2020s and beyond, stating that they will work together cooperatively to: "(. . .) Seek to update the WTO rulebook with more effective disciplines on industrial subsidies, unfair behavior of state-owned enterprises, and other trade and market distorting practices (. . .)." European Commission, EU-US Relations. EU-US Cooperation on Reforming the World Trade System (2021), https://trade.ec.europa.eu/doclib/docs/2021/june/tradoc_159643.pdf. Also noteworthy is that the WTO in cooperation with the IMF and the OECD is actually undertaking studies on different types of subsidies ahead of rulemaking. See IMF, OECD & WTO, *Subsidies, Trade, and International Cooperation. Prepared by staff of IMF, OECD, World Bank, and WTO* (2022).

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This article contributes to the debate about what trade rules may be needed to remedy the enduring problems and emerging shortcomings of existing WTO disciplines on subsidies and state enterprises, and, hence, lay the ground to investigate the direction taken by future possible reforms. Following the present introduction, Part B analyses existing WTO rules on industrial subsidies[19] in order to clarify their main shortcomings, understand the criticism made over the past few years, and lay the ground to investigate the direction taken by possible reforms. It situates such analysis in the context of the present geopolitical setting, looking at the challenges States have to address in the post-pandemic world. Specifically, after explaining how the inherent ambivalence of subsidies has been reflected in the GATT/WTO system of control, Part B examines extant WTO disciplines in light of the emerging changes in global economy and environmental concerns, *inter alia* pointing at new problems raised by foreign subsidization and the need for well-defined rules on subsidies for green transition.

Part C moves from the consideration that tensions that now exist about the appropriate approach to state enterprises in international trade law focus on two main issues, namely, the application of WTO rules on subsidies to the state sector, and increasing demands for new rules on non-subsidies measures to address the negative spillover effects on trade from government influence on SOEs. The latter argument goes on that these rules need to be based on a concept of competitive neutrality that would somehow require states to establish a level playing field between state and private capitalism. Part C critically discusses the two issues separately. With respect to each matter, it first clarifies the terms of the problem in relation to existing WTO rules and case law. Secondly, it addresses the question of how, and to what extent, "deeper" FTAs—those that experts designate as models for WTO reforms on the matter—establish new rules that permit to adequately address the trade concerns raised by SOEs' commercial and financial activities.

Based on this multi-layered analysis, Part E concludes by reflecting on reforms of WTO rules on state intervention in the economy with regard to each of the main problematic areas examined in the previous parts.

B. International Trade Rules on Industrial Subsidies in the Post-Covid Era

I. The Inherent Ambivalence of Subsidies as Reflected in the Original GATT/WTO System of Control

New WTO rules on industrial subsidies are advocated by Members and experts alike.[20] Relatedly, over the past fifteen years, regulation of subsidies has played an increasing role in free trade agreements (FTAs) concluded outside the WTO and often expanding on the multilateral disciplines on

[19]As it is known, the Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 provides for special rules for agricultural export subsidies and domestic agricultural support measures. *See further* JOOST H.B PAUWELYN, ANDREW GUZMAN, & JENNIFER A. HILLMAN, INTERNATIONAL TRADE LAW, 646–648 (2016), and DANIEL C. K. CHOW, THOMAS J. SCHOENBAUM, GREGORY C. DORR, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS, § III.4 (4th, 2022).

[20]*See* the different proposals advanced by WTO Members referred to *supra* note 18, and, among scholars, Andrew J. Green & Michael Trebilcock, *The Enduring Problem of WTO Export Subsidies Rules*, in LAW AND ECONOMICS OF CONTINGENT PROTECTIONS IN INTERNATIONAL TRADE 116 (Kyle W. Bagwell, George A. Bermann & Petros C. Mavroidis eds., 2010); Thomas Cottier, *Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?* 5(1) RENEW. ENERGY LAW POLICY 40 (2014); Aaron Cosbey & Petros C. Mavroidis, *A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO*, 17(1) J. INT'L. EC. L., 11 (2014); Gary Horlick & Peggy A. Clarke, *Rethinking Subsidy Disciplines for the Future: Policy Options for Reform* 20(3) J. INT'L. EC. L. 673 (2017); Jennifer A. Hillman & Chad P. Bown, *WTO'ing Resolution to the China Subsidy Problem*, 22(4) J. INT'L. EC. L. 557 (2019); Bernard Hoekman & Douglas Nelson, *Rethinking International Subsidies Rules*, 43 THE WORLD ECONOMY 3104 (2020); Siqi Li & Xinquan Tu, *Reforming WTO Subsidy Rules: Past Experiences and Prospects* 54(6) J. WORLD TRADE 853 (2020).

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the matter.[21] Obviously, the growing emphasis on the need for new international trade rules on subsidies does not solely reflect a sudden increase in awareness of their importance, including as a source of trade disputes.[22] Rather, mounting concerns of their use (and abuse) as a tool for strategic competition between countries and a careful consideration of the role of public aid to address key societal challenges are major determinants for the prospects of reforming existing WTO rules, particularly the Agreement on Subsidies and Countervailing Measures (ASCM).[23]

Yet, "no question in international trade law is as contentious, and as complicated, as the question of subsidies."[24] Part of the reasons are exquisitely technical: the definition itself and measurement of subsidies turn out to be extraordinarily complex. Beyond that, the question is intrinsically political: with subsidies, what is ultimately involved is a confrontation between different ideological, political, and social conceptions of the role of the state in the economy.[25] The present analysis cannot thus disregard a certain teleology—that is, a discussion of the goals of (both) subsidies and international rules on subsidies control. Besides, a difference in focus regarding the goals can have a practical influence "on how rules actually work."[26] An investigation of the enduring shortcomings and possible reforms of the WTO rules on subsidies points to the very reasons for offering subsidies and, at the same time, to the goals of their regulation: "Why do governments in reality offer subsidies (*positive question*) and why should governments have an interest in preserving policy space to offer subsidies (*normative question*)?"[27]

In response, the literature does not yield a strong consensus.[28] For the limited purposes of the present analysis, I only sketch the contours of the issue with general remarks.[29] International

[21]Today, trade-related agreements have grown in number, breadth, and scope. As remarked by: Kathleen Claussen, *Next-Generation Agreements & the WTO*, 21(3) World Trade Rev. 380, at 380 (2022): "Nearly all WTO members readily conclude them." For an excellent mapping of the subsidy disciplines in such agreements I refer the reader to Luca Rubini, *Subsidies*, in Handbook of Deep Trade Agreements 427, 458 (Aaditya Mattoo, Nadia Rocha & Michele Ruta eds., 2000). See also Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in SOEs the EU Bilateral Preferential Trade Agreements*, 23 (3) Colum. J. Eur. L., 551, 553-576 (2017), investigating the main patterns of international regulation of subsidies emerging from the FTAs concluded by the EU.

[22]Since the creation of the WTO in 1995, subsidy disputes have generated more formal dispute resolution proceedings before the WTO than most other WTO agreements, including high-profile disputes such as the *Airbus–Boeing* dispute; the *Canada–US Softwood Lumber* dispute; the *Canada – Brazil Aircraft* dispute; the *Brazil –US Upland Cotton* dispute; and the *US–EU Foreign Sales Corporation* dispute. See Michael Trebilcock & Joel Trachtman, Advanced Introduction to International Trade Law Ch. 7 (2020).

[23]Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [Not reproduced in I.L.M.].

[24]Andreas F. Lowenfeld, International Economic Law, iv (2d ed. 2008).

[25]*See* Luca Rubini, The Definition of Subsidies and State Aid, 67-68 (2009).

[26]Ibid., at 67. See also Gary N. Horlick, *How Subsidies Rules Have Been Shaped*, in What Shapes the Law? Reflections on the History, Law, Politics and Economics of International and European Subsidies Disciplines 65, 65-67 (Luca Rubini & Jennifer Hawkins eds., 2016).

[27]Dominic Coppens, WTO Disciplines on Subsidies and Countervailing Measures. Balancing Policy Space and Legal Constraints, at 3 (2014) recalling the distinction between positive and normative theory of trade policy proposed by Avinash Dixit, *Trade Policy: An Agenda for Research*, in Strategic Trade Policy and the New International Economics 296 (Paul Krugman ed., 1986).

[28]For an influential position of early criticism to international forms of subsidies control, see Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2(2) J. L. Analysis 473 (2010). Sykes is the most prominent proponent of a skeptical view of the likelihood of a coherent response to the challenges that international trade regulation of subsidies poses.

[29]For the limited remarks made above, I have liberally drawn from several sources: Gary Horlick & Peggy Clark, *The 1994 WTO Subsidies Agreement*, 17 World Competition 41 (1994); Daniel K. Tarullo, *Norms and Institution in Global Competition Policy*, 94 Am. J. Int'l L. 478 (2000); Rubini, *supra* note 25, at 27-67; Andrea Biondi & Piet Eeckout, *State Aid and Obstacles to Trade*, in The Law of State Aid in the European Union 102 (Andrea Biondi, Piet Eeckhout & James Flynn eds., 2004); Economic Analysis of State Aid Rules-Contributions and Limits (Jacques Derenne & Massimo Merola eds., 2007); Paul R. Krugman & Maurice Obstfel, *International Economics: Theory and Policy* (2009); Robert Howse, *Do the World Organization Discipline on Subsidies Make Sense? The Case for Legalizing some Subsidies* in Bagwell, Bermann & Mavroidis, *supra* note 20, at 85; Alan O. Sykes, *The Limited Case for Subsidies*

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regimes on subsidy control are inextricably linked to the consideration of their effects, which must be understood from *at least* two perspectives. First, from a trade perspective, subsidies are frequently seen as undermining the market access prerogatives that result from tariffs and other trade concessions: domestic subsidies may directly offset the effects of a reduced or eliminated tariff, producing the same protective result.[30] Secondly, from a competition perspective, the deepest concern that subsidies raise is their possible negative impact on the competitive process.[31] Economic analysis shows that subsidies can distort market functioning and introduce inefficiencies at various levels.[32]

Still, subsidies are ambivalent, because they can produce positive effects and pursue legitimate goals too. Public expenditure seems in some way inevitable, and there is a robust economic and political case to maintain it.[33] Subsidies are a key instrument of government policy in virtually all States in the world, an instrument that is by no means necessarily inefficient,[34] and is "not viewed by economists as intrinsically trade-distorting or welfare-reducing."[35] As it is known, positive externalities and public goods, which are not internalized in market prices for particular products and services, may justify subsidization.[36] Subsidies "may create negative international externalities and distort global resource allocation. But they may also represent sensible policy responses to a range of market failures or play a useful role in addressing income inequality."[37] Schwartz and Harper express this when they remark that subsidies can correct the market process at least as much as they may distort it. [38] Also, in practice, subsidies often constitute a favored tool of industrial policy in several states.[39] Their inherent ambivalent nature explains why it is proposed that

Regulation, ICTSD, (2015), http://e15initiative.org/wp-content/uploads/2015/03/E15_Subsidies_Sykes_final.pdf; MICHAEL TREBILCOCK, ROBERT HOWSE & ANTONIA ELIASON, THE REGULATION OF INTERNATIONAL TRADE, 364–392 (4th ed. 2013); Coppens, *supra* note 27, at 5–17.

[30]Note, however, that a seminal 2006 economic analysis discussed the question whether outlawing subsidies might provide trading partners with less of an incentive to commit on the tariff front, suggesting that over-disciplining subsidies could make WTO Members reluctant to make tariff commitments in the first place. Specifically, Kyle Bagwell & Robert W. Staiger, *Will International Rules on Subsidies Disrupt the World Trading System?*, 96 AM. ECON. REV. 87 (2006) suggest that while no disciplines on subsidies would lead to fewer concessions on tariffs, as countries would be reluctant to bind tariffs if trading partners were free to cheat on concessions through targeted subsidies reducing the costs of competing domestic firms, too restrictive subsidies rules will also inhibit tariff.

[31]Rubini, *supra* note 25, at 56–57.

[32]Subsidies may lead to allocative inefficiency if resources are not used in the best fashion; productive inefficiency, when goods and services are not produced at least cost; dynamic inefficiency when firms are not encouraged to undertake the right type/amount of innovation; and X-inefficiency, in cases when public aid induces opportunism in the management and workforce and hence leads to reduced productivity. The inefficiency of public support causes a waste of public money to the loss of taxpayers. Moreover, subsidies easily stimulate emulation and races at the international level, producing a further waste of recourses to be added to the previous ones. GARY C. HUFBAUER & JOANNA SHELTON-ERB, SUBSIDIES IN INTERNATIONAL TRADE 19-21 (1984); JOSÉ GUILHERME MORENO CAIADO, COMMITMENTS AND FLEXIBILITIES IN THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES. AN ECONOMICALLY INFORMED ANALYSIS 61–98 (2019).

[33]*See* Sykes, *The Limited Case for Subsidies Regulation*, *supra* note 28.

[34]Jagdish N. Bhagwati & V. K. Ramaswami, *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy*, 71 J. POL. ECON., 44-50 (1963).

[35]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*, 23(2) J. INT. ECON. LAW 371, at 378 (2020).

[36]Lumping all subsidies under the same label is therefore problematic since subsidies might even constitute the best response to market distortions. See, among many, GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS 15 (2001).

[37]Sykes, *supra* note 28, at 473–474.

[38]Warren F. Schwartz & Eugen W Jr. Harper, *The Regulation of Subsidies Affecting International Trade*, 7 MICH. L. REV. 833 (1972).

[39]*See* Dani Rodrik, *Industrial Policy for the Twenty-First Century*, CEPR DISCUSSION PAPER No. 4767, 2004, https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/industrial-policy-twenty-first-century.pdf.

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any system of subsidy control that "pretends to be balanced should take into account (at least some of) the public policy objectives pursued and positive externalities produced by subsidies."[40]

In essence, the first objective of any international system of subsidy control is discouraging subsidies that can harm foreign competitors either by impairing their market access expectations or by affecting their competitive position.[41] But this is only part of the story. A well-balanced system of subsidy control should go beyond the producers' interests and also recognize the legitimacy of subsidies targeting market failures and pursuing public/societal goals. The framers of the General Agreement on Tariffs and Trade (GATT)[42] reflected subtly on the scope/justification structure.[43] The resulting discipline on subsidies was ambivalent: "On the one hand, their legitimacy as tools of public policy was affirmed while their capacity to distort trade was also acknowledged. On the other hand, self-help against such subsidies was permitted in the form of countervailing duties, provided that the subsidies caused 'material injury' to domestic industry in the importing country."[44] In a similar vein, GATT revived in the initial recognition by the ASCM of the three categories of non-actionable subsidies (including certain subsidies for research and development, certain types of assistance to disadvantaged regions, and certain subsidies for compliance with environmental regulations)[45] alongside with the rules to control industrial subsidies "as a potential non-tariff barrier to trade or a source of distortions in international trade that may undermine underlying comparative advantages or alternatively undermine tariff commitments."[46]

Importantly, according to the terms of the ASCM, the permissive list of non-actionable subsidies expired in 2000 when the WTO members were unable to agree on extending them. Since then, it was never revised or reestablished. Therefore, "today no subsidy programs are explicitly protected as non-actionable."[47] Moreover, the WTO subsidies code does not include a general exception rule such as Article XX GATT that allow explicit trade measures, which would be otherwise inconsistent with the substantive obligations of that agreement, to pursue a range of public policy objectives, including the life and health of humans, animals or plants, the conservation of natural resources, and public morals. As a result, with the expiration of the short list of subsidies that were explicitly carved out from the discipline, current rules drastically confine WTO members' flexibility to use subsidies as tools of public policy, the only limited concession being the more flexible rules Article 27 ASCM provides for developing country-members in recognition of the important role that subsidies can play in the economic development programs of these members.[48]

II. Enduring Problems and Emerging Deficiencies of the WTO Subsidies Rules

1. The ASCM Agreement and the Long Line of Subsidies Disputes

While well-rehearsed in the scholarly literature, it is useful to briefly review existing WTO subsidies disciplines in order to assess then their enduring problems, understand the criticism made over the past few years and analyzing emerging challenges. Such an analysis eventually provides

[40]Rubini, *supra* note 25, at 54.

[41]This primary goal is mirrored in the consideration that unilateral conduct creating negative effects should be controlled (the rationale of trade agreements) also by means of system of reaction.

[42]General Agreement on Tariffs and Trade (1947), 55 U.N.T.S. 194.

[43]Gene Grossman & Petros Mavroidis, *Here Today? Gone Tomorrow?*, in THE WTO CASE LAW OF 2001 170, 180-86 (Henrik Horn & Petros C. Mavroidis eds., 2003).

[44]Howse, *supra* note 35, at 376. See also Mereno Caiado, *supra* note 32, at 61–98.

[45]ASCM, Article 8.

[46]Michael Trebilcock, *Brief Reflections on the Subsidies Imbroglio in International Trade Law*, 23 J. WORLD TRADE 165, at 165 (2022).

[47]Howse, *supra* note 35, at 377.

[48]On the nature and extent of the special and differential treatment for developing countries see further PETER VAN DEN BOSSCHE & WERNER ZDOUC, THE LAW AND POLICY OF THE WORD TRADE ORGANIZATION, 950 (5th ed. 2021).

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the right conditions to investigate the direction taken by current proposals for reforming the ASCM. As observed above, before the Uruguay Round, the multilateral trading system "did not contain any enforceable legal disciplines on domestic subsidies."[49] Therefore, beside defining the green light category of non-actionable subsidies and placing export subsidies and domestic content requirements in the category of prohibited measures,[50] the Uruguay Round's ASCM introduced a third intermediate or yellow light class of domestic subsidies, deemed to be actionable, "where WTO members commit to avoiding the use of any subsidies *specific* to particular firms or industries that", in addition, "have the following *adverse effects* on the interest of any other member country":[51] an *injury to the domestic industry* (which may include price undercutting of a like product); a *nullification or impairment of benefits accruing directly or indirectly to other members*, in particular the benefits of bound tariff concessions (that is improved market access from tariff reductions is undercut by subsidization);[52] or a *serious prejudice to the interests* in terms of prices or volumes of its products in domestic or foreign markets (usually as a result of export displacement).[53]

These actionable domestic subsidies can be challenged in the WTO DSS. For the first time, the ASCM provided an explicit multilateral remedy against subsidization. Where a subsidy meets the criteria for actionability, a WTO member can thus pursue two different avenues: First, it may challenge the subsidy in the WTO DSS, seeking the remedy of removal of the offending measure. Alternatively, a state may countervail the subsidy *i.e.*, it may elect to respond to a subsidy with a countervailing duty (CVD).[54] Where a WTO member elects the first option, it must also demonstrate the existence of *adverse effects* (as defined above) on members other than the subsidizing member, including the complaining member.[55] If a member instead decides to impose a CVD, it must comply with the various procedural and substantive criteria established by the ASCM for such actions, including the requirement of showing "material injury". The same criteria apply also where a member is countervailing a prohibited subsidy as defined by Art. 3 ASCM.[56]

Since its entry into force the ASCM "has precipitated a number of high-profile subsidies disputes."[57] Moreover, in the 26-year period of its application from 1995 to 2021, a whole 385 CVDs have been imposed in total with the US being the most frequent user with 203 countervailing

[49]Howse, *supra* note 35, at 376.

[50]Pauwelyn, Guzman, & Hillman *supra* note 19, at 525-530.

[51]Trebilcock, *supra* note 46, at 167-168, italics added. More specifically, in order for a subsidy to be challenged in WTO DSS as "prohibited" or "actionable", it has to fall within the definition of "subsidy" in Article 1 of the ASCM, which means it must entail a *financial contribution* within the territory of a member by a government or a public body – a direct transfer of funds; revenue foregone; aid in kind; governmental facilitation of aid by private entities; and any form of price support. A second requirement is that a benefit is thereby conferred. *Benefit* is determined by comparison to what is available in the marketplace. See Appellate Body Report, *Canada – Measures Affecting the Sale of Civilian Aircraft*, WT/AB/R, (August, 20 1999). Moreover, according to ASCM Art. 1.2., a subsidy is not actionable unless it is *specific,* either *de jure* (legally targeted at a particular industry or enterprise or group of industries or enterprises) or *de facto* (in fact used only or disproportionately by a particular industry, enterprise, or group of industries or enterprises). Specificity is defined in ASCM Art. 2 as enterprise specificity; industry specificity; geographical specificity; and prohibited-subsidy specificity.

[52]*See* Appellate Body Report *Indonesia —Certain Measures Affecting the Automobile Industry*, WT/DS54, 55, 59, 64/Rm (July 23, 1998) [finding serious prejudice to the interests of the EU].

[53]This may include artificially increasing market share or displacing another country's exports to third countries.

[54]Pauwelyn, Guzman, & Hillman *supra* note 19, at 505–506.

[55]Art. 7.8 of the ASCM requires removal of the subsidy or its adverse effects. If this is not done, the ASCM authorizes countermeasures consistent with the degree and nature of the adverse effects.

[56]Van den Bossche & Zdouc, *supra* note 48, at 888-891.

[57]Trebilcock, *supra* note 46, at 168. According to Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2016 – A Statistical Analysis*, 20(1) J. INT. ECON. LAW 117 (2017), disputes regarding subsidies and countervailing duties accounted for 109 issues in dispute in formal trade proceedings between the creation of the WTO in 1995 and 2016 – more than any other GATT/WTO agreement aside from anti-dumping and the basic GATT itself. In contrast, tariff administration, reinforced by standardized valuation and classification protocols, generates very few disputes beyond rules of origin in preferential trade agreements.

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measures applied, followed by the EU and Canada that applied 46 and 40 CVDs respectively. Of the 385 anti-subsidy measures in force in 2021, 145 concerned imports from China, while India was subject to 60 countervailing measures.[58] Interestingly, in no other year of application of the ASCM the number of countervailing measures in force has been so high as in 2021. The 41 countervailing measures in force at the end of that year almost doubles the number in 2020 (24) and substantially exceeds those in force in 2019 (35).[59]

2. Current Challenges to the Existing WTO Subsidies Code: The Pandemic Exogenous Shock

Contemporary shifts in geopolitics and economy along with environmental exigencies make ever more clear that the conventional understanding of trade rules on subsidies as encapsulated in the ASCM is outdated. That understanding is overly limited to a large-scale agreement that focuses on subsidies as a potential non-tariff barrier to trade and as a source of distortions in international trade. Even more in light of the elapsing of the safe harbor for permitted categories of subsidies. Going forward, there are a number of reasons "for expecting subsidy disputes to escalate rather than diminish in number and significance"[60] and the ASCM not being able to measure up to challenges WTO members must address in the post-Covid-19 world.

To begin with, the Covid-19 global pandemic has challenged deep-structural aspects of the organization of the world, including established relationships between society and government as it has required unprecedented levels of state action and expenditure. The pandemic caused an exceptional exogenous shock to the global economy.[61] It has been and is currently still affecting organizations of all sizes and in many industries, as well as the life of people around the world. Experts have feared that, unlike previous exogenous shocks, the Covid-19 global pandemic "could affect the supply side of the economy through several channels and thus lead to a permanently lower level of potential output."[62] Hence, in the wake of the coronavirus pandemic, support for the use of fiscal measures to diminish the economic damage to workers and business activities—including by bailing out enterprises or sectors facing financial distress as a result of the pandemic—has been extensive in several countries of the world.[63] In addition, the Covid 19 pandemic has promptly induced many governments across the globe "to allocate substantial public resources to the development of vaccines and related medical resources."[64] While the immediate crisis has

[58]WTO, Countervailing Measures by Reporting Member 01/01/1995 - 31/12/2021, https://www.wto.org/english/tratop_e/scm_e/CV_MeasuresByRepMem.pdf.

[59]WTO, Countervailing Measures by Exporter 01/01/1995 - 31/12/2021, https://www.wto.org/english/tratop_e/scm_e/CV_MeasuresByExp.pdf . One can speculate that the late rise of CVDs in force is partly due to the semi-paralysis of the DSS, which clearly makes prospect of a formal dispute comparatively less attractive than countervailing reactions.

[60]Trebilcock, *supra* note 46, at 169.

[61]*See*, among many, the remarks made by Prof. Claudia Buch, Vice-President of the Deutsche Bundesbank and person accompanying the president at the ECB Governing Council, in the context of her Keynote Speech held at at the Hachenburg Symposium in September 2021. Claudia Buck, *The Coronavirus Pandemic as An Exogenous Shock to the Financial Industry*, (Sept. 10, 2021), https://www.bundesbank.de/en/press/speeches/the-coronavirus-pandemic-as-an-exogenous-shock-to-the-financial-industry-876256.

[62]Isabelle Moder & Natalia Martin Fuentes, *The Scarring Effects of COVID-19 on the global Economy*, (February 5, 2021), https://cepr.org/voxeu/columns/scarring-effects-covid-19-global-economy. Buch, *supra* note 61, notes that: "Unlike the global financial crisis of 2007-08, the shock during the pandemic did not originate in the financial system. Even so, the shock threatened to spill over into the financial sector by way of rising credit risk, as many enterprises and sectors of the real economy saw their liquidity and solvency directly jeopardised by lockdown measures."

[63]An impressive tracker of such policy actions grouped by country is offered by the International Monetary Fund (IMF), *Policy Responses to Covid 19*, https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19. The World Bank publishes a similar tracker focused on subsidies. See World Bank Group, *Tracker of Subsidies and State Aid to Mitigate the Covid-19 Effects*, https://dataviz.worldbank.org/views/AID-COVID19/Overview?%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Adisplay_count=n&%3AshowAppBanner=false&%3Aorigin=viz_share_link&%3AshowVizHome=n.

[64]Trebilcock, *supra* note 46, at 166.

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since been overcome, the global pandemic is not completely behind us just. One key lesson learnt is that both fiscal and monetary policy measures in response to the crisis were needed to shield the real economy and financial sector from the pandemic fallout. As observed by the Vice-President of the Deutsche Bundesbank, Claudia Buch, the features of future economic developments are already taking shape: "[s]tructural change in the real economy is likely to pick up speed—digital transformation, demographic change, and climate policies pose challenges for the real economy and the financial sector."[65] In a newly vulnerable macroeconomic setting, incentives exist for governments to promote *selected* domestic industries and "redress dependence on global supply chains where bottlenecks may preclude ready access to essential inputs"[66] (medical equipment, pharmaceuticals, semi-conductors, etc.). Existing WTO rules on industrial subsidies make it more difficult for members to engage in industrial policies that are needed to deal with the economic consequences of the COVID-19 pandemic and support ongoing changes in the real economy.

3. Geopolitical Rivalry, Securitization and Industrial Planning

Related is a second and broader problem with the existing WTO subsidies code. This concerns the rivalry between global powers "to establish the credibility of *new visions* for a planned global economy" through the language of "securitization",[67] and its practical implications in terms of geopolitical objectives, industrial planning, and related public spending. Commenting these dynamics, an author has recently posited that the WTO approach to subsidies "is now hampered by shifts in the share of global trade away from geopolitically aligned, wealthy states and the growth of global supply chains" and that "[t]hese pressures were magnified by the accession of China" to the WTO, "with its centrality to global trade and recurrent geopolitical tensions with the United States."[68] Whereas I share the opinion that contemporary changes in the global economy and China's economic rise and present centrality are reasons for the challenges in facing multilateral cooperation over subsidies, my own view is slightly different. Granted, for Western powers the "wake-up call regarding China has been a loud and disturbing one."[69] Its use of activist industrial policy tools to limit the kind of market access expected from its WTO commitments, and the resulting tensions with the US and other trade powers are persistent challenges for the multilateral trading system.[70] But the underlying problem is, at the same time, more profound and general. It is about a *newly and variously marked misalignment between strategic industrial policies* pursued by a number of WTO members, on the one hand, and the *form of economic integration enabled by the WTO agreements*, on the other.

The overly pragmatic approach to international trade law lately adopted by US officials is emblematic of such course. As Anne Orford maintains in her contribution to this Special Issue, today US officials and trade experts are offering "new languages and frameworks for envisioning the future international economic regime", suggesting that a "*new paradigm of industry protection*"[71]—the strategy that US Treasury Secretary Janet Yellen has called friend-shoring[72]—should supersede

[65]Buch, *supra* note 61.

[66]Trebilcock, *supra* note 46, at 169.

[67]Orford, *supra* note 16, § E, italics added.

[68]Robert Gulotty, *WTO Subsidy Disciplines* 21(3) World Trade Rev. 330, at 330 (2022).

[69]Howse, *supra* note 35, at 375. It is widely acknowledged that China's rise over the past several decades as the manufacturing powerhouse of the world is partly attributable to ubiquitous utilization of subsidies through complex and opaque networks of State agencies, the Communist Party, SOEs, and informal State, party, and private sector networks, often replicated in one form or another at the supranational level. See Mark Wu, *The "China Inc" Challenge to Global Trade Governance*, 57 Harv. J. Int'l L 261 (2016); and, more recently, Ming Du, *Unpacking the Black Box of China's State Capitalism*, in this Issue.

[70]*See* Mavroidis & Sapir, *supra* note 2, esp. Ch 2.

[71]Orford, *supra* note 16, § A, italics added.

[72]*Transcript: US Treasury Secretary Janet Yellen on the next steps for Russia sanctions and 'friend-shoring' supply chains,* New Atlanticist, April 13, 2022.

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the traditional approach of multilateralism, trade liberalization, and control of government unilateral conduct associated with the WTO.[73] In parallel with such developments in rhetoric, both the US Government and the Chinese Government have been committing substantial public resources to attempting to achieve preeminence in emerging high-tech sectors such as renewable energy, robotics, artificial intelligence, quantum computing and semiconductors.[74] Micron's $40 bn. investment in semi-conductor production *re-shored* in the US with help of the US Chips and Science Act (2022),[75] a federal law that allocates $52 billion to encourage more domestic semiconductor production,[76] is just a spectacular example. The EU and its members too have been attempting to obtain a competitive advantage in broadly understood strategic sectors leaning towards policies aimed at actively supporting these industries, reshoring production, and ensuring domestic ownership of advanced technological companies by screening acquisitions.[77] And, as evidenced by Aggarwal and Reddie, the use of economic statecraft across the globe as a tool for strategic competition between countries is by no means an exclusive prerogative or practice of the three world's largest traders.[78] Nor is the commitment to developing plans to reshore supply chains.[79] Policies of these sorts may require significant levels of state action and public spending. For example, in the case of 5G, as Western countries seek to "'decouple" from China in part for privacy and national security reasons, they may need "to develop rapidly their own substitute technologies",[80] which, depending on the context, may involve targeted industrial policies and sizeable subsidization. At the same time, a growing number of developing countries have gained the capacity to adopt industrial program that involve direct expenditure,[81] a transition that contributes to "reverse the typical constituency for subsidy reform."[82]

4. Foreign Subsidies

Thirdly, contrary to the past, foreign subsidies (i.e., financial contributions granted to an entity by a government other than that of the country where the receiving entity is established) are today "a growing source of concern as States increasingly subsidize their firms' expansion into other

[73]*See*, among others, Office of the US Trade Representative, *Remarks by Ambassador Katherine Tai on the Biden Administration's Commitment to Multilateral Engagement at the Washington Foreign Law Society's 2022 Annual Gala*, (Sept. 28, 2022); Linda Weiss, *Re-Emergence of Great Power Conflict and US Economic Statecraft*, 20(2) World Trade Rev. 153 (2021); Dani Rodrik, *The New Productivist Paradigm?*, Project Syndicate, July 5, 2022. As Gregory Shaffer has suggested, in such a dynamic context, it is primarily the US that 'now calls into question the trade law system it created, while emerging economies that long criticized that system for its bias in favour of US interests defend it'. Shaffer, *supra* note 1, at xii, cited by Orford, supra note 16.

[74]*See* Thomas Schoenbaum, *The Pandemic and The Biden Administration Trade Policy: Hopes and Realities*, in this Issue; and Du, *supra* note 69.

[75]Pub.L. 117–167, effective 9 August 2022.

[76]The White House, *FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China*, 9 August 2022, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/.

[77]Sacerdoti & Borlini, *supra* note 2, §B. *See* also European Comminssion, *European Industrial Strategy*, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-industrial-strategy_en.

[78]*See* Aggarwal & Reddie, *supra* note 1, at 137– 151 [offering case studies that examine the use of economic statecraft in the United States, China, India, Japan, and South Korea].

[79]By way of example, I recall that Japan was the first country to launch in 2020 and, later, in 2021 a Program for Promoting Investment in Japan to Strengthen Supply Chains in the context of the METI's Support Measures for Companies Concerning the Impacts of the Novel Coronavirus Disease, https://www.meti.go.jp/english/press/2021/0702_003.html.

[80]Howse, *supra* note 35, at 374.

[81]*See* Stephanie J. Rickard, *Welfare versus Subsidies: Governmental Spending Decisions in an Era of Globalization*, 74(4) *The Journal of Politics*, 1171–83 (2012), and, more recently, Id. Spending to Win: Political Institutions, Economic Geography and Government Subsidies Chapters 1–3 (2018). For a well-documented analysis of the use of industrial subsidies in developing countries for green transition seeTanya Leila Shaar & Rafael Leal-Arcas, *Fuel subsidy reform, decentralized electricity markets and renewable energy trade: evidence for a successful energy transition in the Middle East and North Africa Region*, *The Journal of World Energy Law & Business* 1 (2022), https://doi.org/10.1093/jwelb/jwac038.

[82]Gulotty, *supra* note 68, at 330.

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markets."[83] The EU has recently adopted a regulation to tackle foreign subsidization in its own market.[84] In fact, it is controversial whether, and to what extent, the WTO Agreements, and in particular the GATT, GATS and ASCM, provide an adequate avenue to address this concern multilaterally.[85] Among the very few authors that have explored the problem of foreign subsidization in-depth, Crochet and Gustafsson conclude that multilateral trade agreements fail to do so. Hence, states are "left to their own devices in addressing the issue of foreign subsidies", with the further complications that the ASCM forbids "WTO members from taking unilateral action against foreign producer subsidies", and that "leaving them without any remedy whatsoever in these situations seems to go against the negotiated balance"[86] of the same agreement. Van den Bossche's line of arguments on the issue is more nuanced. He claims that the ASCM retains a space of application, although a limited one. It does not apply to *most* industrial subsidies, *except* when they are prohibited under Article 3, viz. in the case of (foreign) export subsidies and import substitution subsidies (because in this case they are deemed to be specific under ASCM, Article 2.3).[87] Further, Van den Bossche recalls that there are no rules on subsidies to service suppliers in the GATS. Therefore, foreign subsidies to service suppliers are not prohibited or actionable. He then concludes that, where multilateral forms of control are not available, unilateral reactions are possible insofar as they are consistent with the GATT and GATS non-discrimination rules or can be justified by the General Exceptions provisions of GATT Article XX and GATS Article XIV.[88] Despite their differences as to the possible applications of multilateral remedies against imported goods receiving a foreign subsidization, both readings maintain that there exist significant gaps to bridge to achieve an appropriate system of international control of foreign subsidies, and, at the same time, reduce the legal uncertainty surrounding possible unilateral reactions.

5. Climate Change and Environmental Exigencies

Finally, the systemic shock of climate change is of central importance when assessing the adequacy of existing WTO rules on subsidies.[89] Climate change promises in terms of devastation make the recent trade wars look in comparison like a drop in the bucket. In recent years industrial policy aimed at green transition have come to focus, particularly in relation to reduction of GHG emissions and the transition to carbon-neutrality.[90] Yet, despite the desire of many people throughout

[83]Crochet & Gustafsson, *supra* note 10, at 365.

[84]Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market PE/46/2022/REV/1, *OJ* L 330, (December 23, 2022), p. 1–45. This Regulation entered into force on January 12, 2023.

[85]I owe much of the above considerations on the trade issues surrounding foreign subsidies to a discussion with Professor Peter Van den Bossche, following his lecture *Foreign Subsidies and WTO LAW. Some General Observation on WTO-Consistency of the Draft EU Foreign Subsidies Regulation*, held online at the Harvard European Law Society on November 22, 2022.

[86]Crochet & Gustafsson, *supra* note 10, at 365.

[87]The reasons for the ASCM limited scope of application to foreign subsidies are plain. As explained *supra*, the ASCM applies only to the subsidies that are "specific" that is "... specific to an enterprise or industry ... within the jurisdiction of the granting authority ..." (ASCM, ArtIicle 2.1). Foreign subsidies are not "specific" because the entity receiving the subsidy is not within the jurisdiction of the granting authority Hence, the ASCM does not apply to foreign subsidies except when the foreign subsidies are export subsidies or import substitution subsidies.

[88]This part of Van den Bossche's analysis resembles Crochet's and Gustafsson's one. Both interpretative solutions are based on a preliminary distinction, respectively, between foreign subsidies to producers of goods and foreign subsidies granted to service suppliers, and, between WTO rules on foreign subsidies and WTO rules on unilateral actions against foreign subsidies (viz. rules providing the legal discipline for possible reactions).

[89]*See*, among many, Cottier, *supra* note 20, at 40; Cosbey & Mavroidis, *supra* note 20, at 11.

[90]According to the data reported by James Bacchus, Trade Links. New Rules for a New World, 224 (2022), at 325, "eliminating fossil fuels subsidies could reduce global carbon dioxide emission by between 1 and 4 percent by 2030, and by 6 and 8 percent by 2050." With regard to these objectives, it is worth stressing that one of the targets for ensuring "sustainable consumption and production patterns" under Goal 12 of the UN Sustainable Development Goals is "[r]ationalize inefficient

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the globe for a green recovery from the pandemic, important pieces of legislation like the 2022 US Inflation Reduction Act passed,[91] and initiatives such as the EU Carbon Border Adjustment Mechanism close to finalization,[92] "[t]o date, government have committed far more Covid-19 funds to fossil fuels than to green energy."[93] Climate change adaptation, let alone mitigation, requires economic tools of state direction to manage the emergency,[94] including in the form of government aid for the development of new technologies reducing greenhouse gas emissions in different sectors of a country's economy and, possibly, in other countries.[95] WTO commitments may however limit the ability of its members to implement domestic policies and measures to address climate change, particularly "regulatory policies such as emission and energy efficiency standards, eco-labelling, voluntary measures (including contracts between governments and industries) and domestic emissions trading programs."[96]

Interestingly, to date, WTO disputes have addressed trade remedies relating to renewable energy and equipment, and biodiesel,[97] but, in none respondents directly invoked climate change as justification for trade measures taken.[98] Regarding public aid in particular, existing WTO rules on subsidies do not include any specific trade disciplines on fossil fuel subsidies. Nor have such subsidies ever been challenged before the DSS. Strikingly, all the challenges to energy subsidies in the WTO DSS have regarded subsidies for renewable energy.[99] Subsidies for solar and wind energy may indeed run afoul of both GATT Articles VI and XVI and the ASCM, as also recent cases suggest.[100] Subsidies

fossil-fuel subsidies that encourage wasteful consumptions by removing market distortions." Target 12.C, 'Transforming Our Word".

[91]Public Law No: 117-169, passed by the 117th United States Congress and signed into law by President Joe Biden on August 16, 2022. The Act makes a historic down payment on deficit reduction to fight inflation, invest in domestic energy production and manufacturing, and reduce carbon emissions by roughly 40 percent by 2030.

[92]The Carbon Border Adjustment Mechanism (CBAM) is an integral part of the EU strategy to achieve the ambitious target of a 55% reduction in carbon emissions compared to 1990 levels by 2030, and to become a climate-neutral continent by 2050. CBAM is a climate measure that should prevent the risk of carbon leakage and support the EU's increased ambition on climate mitigation, while ensuring WTO compatibility. In fact, carbon taxes and border tax adjustments may potentially violate GATT Articles II and III, if they go beyond off-setting domestic levies and are not the least trade restrictive measures, or are considered forms of disguised protectionism. The proposal for the CBAM was formally submitted by the European Commission (Commission) on July 14, 2021. Subsequently, on March 15, 2022, the Council adopted its general approach to the CBAM, and on June 22, 2022, the European Parliament adopted its own position on the CBAM. In order to agree on the final text of the CBAM regulation, the Council and the European Parliament are currently negotiating to align their diverging positions. The legislative process is expected to be finalized in the first part of 2023.

[93]United Nations Environmental Programme and Stockholm Environmental Institute, *The Production GAP: 2020 Report*, at 2. For example, available data show that, China's Covid-19 stimulus measures are more targeted at investing in carbon-heavy infrastructure for economic stability.

[94]Howse, *supra* note 35, at 375. See also Trebilcock, *supra* note 46, at 166.

[95]Dani Rodrik, *Green Industrial Policy*, 30(3) Oxford Review of Economic Policy 469 (2014). See also Joseph E. Stiglitz, *Getting Finance Onside for Climate*, Project Syndacate, (Sept. 20, 2021), https://www.project-syndicate.org/magazine/green-finance-depends-on-government-intervention-by-joseph-e-stiglitz-2021-09?barrier=accesspaylog.

[96]Rodrigo Polanco, Integrating Trade, Investment and Climate Change in Elgar Encyclopedia of International Economic Law 634, at 634 (Thomas Cottier & Krista Nadakavukaren Shefer eds. 2017). For an in-depth investigation of the limited policy space left to members by the existing rules see Andrew Green, *Climate Change, Regulatory Policy and the WTO: How Constraining Are Trade Rules*, 8(1) J. Int'L. EC. L. 143 (2005), and BJ Condon, *Climate Change and Unresolved Issue in WTO Law*, 12(4) J. Int'L. EC. L. 895 (2009).

[97]WTO, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (DS 413, 426, 2013); WTO, *European Union – Anti-Dumping Measures in Biodiesel from Argentina* (DS 472, 2013).

[98]Polanco, *supra* note 96, at 634.

[99]*See*, among many, Bacchus, *supra* note 90, at 226–227.

[100]For example, in September 2016, India dragged the USA to WTO dispute settlement mechanism over America's domestic content requirements and subsidies provided by eight states – namely, Washington, California, Montana, Massachusetts, Connecticut, Michigan, Delaware and Minnesot – in the renewable energy sector. The Panel established by the WTO Dispute Settlement Body ruled in favour of India finding that all of the measures at issue are inconsistent with Article III:4 of the GATT 1994 because they provide an advantage for the use of domestic products, which amounts to less favourable treatment for like imported products. WTO, Report of the Panel, *United States - Certain Measures Relating to the Renewable Energy*

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for solar and wind energy have found to be inconsistent with the WTO rules especially where they have included domestic content requirements,[101] "which discriminate in favor of domestic over import inputs into green energy products."[102] Upon close inspection, the caselaw confirms that what was included in the now defunct Article 8 of the ASCM was too narrow in scope.[103] That provision did not include an explicit and general recognition that certain subsidies "are much less of a concern than others", and, even more importantly, that "one of the tasks of governments is to address market failures—*including problems global in nature*"[104] such as the climate change crisis. Instead, international trade rules should be conditioned on what governments are planning to do, implying "asking what the underlying problem or objective is, and differentiating economic from non-economic goals."[105]

C. Disciplining State-Owned Enterprises in International Trade Law

I. Trade Concerns over SOEs and the Prospect of WTO Reforms

State enterprises have long constituted, and are likely to remain, an important instrument in any government's toolbox for a variety of economic and societal goals.[106] In addition, as explained in the introductory piece to this Volume, governments around the world have lately instructed their infrastructure state enterprises to deliver public goods and services more widely and equitably among the population, not only to minimize the pandemic's impact, but also to address the economic downturn. The significant extent of state ownership among the world's top companies,[107] SOEs' quantitative and qualitative transformation, their growing presence in international trade

Sector, WT/DS510/R (June 27, 2019). On August 15, 2019, the US notified the DSB of its decision to appeal to the AB certain issues of law and legal interpretations in the panel report. On August 20, 2019, India notified the DSB of its decision to cross-appeal. Less than two months later, on October 14, 2019, the Chair of the AB informed the DSB that regrettably the AB would not be able to circulate a report in this case within the required 90 days. A very recent case is the dispute between the EU and the United Kingdom regarding UK measures on the promotion of low carbon energy generation projects. In March 2022, the EU has requested WTO dispute consultations with the United Kingdom over such measures. The EU request was circulated to WTO members on March 30, 2022. The EU alleges that the United Kingdom is acting inconsistently with the national treatment obligation under GATT Article III:4 by making local content a criterion of eligibility for, and payment of, subsidies covering the difference between the cost of low carbon electricity generation and the regular market price.

[101]Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector. Canada – Certain Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R WT/DS426/AB/R (May 6, 2013). At the heart of the dispute was a measure adopted by the province of Ontario whereby producers of renewable energy would be paid a premium relative to conventional power producers. Japan challenged the measures claiming that it was a prohibited subsidy because payments were conditional upon using Canadian equipment for the production of renewable energy. Eventually, on appeal, in what appeared to many as a desperate effort, the AB gave them right only in part, finding that a local content requirement had indeed been imposed, but also that it lacked evidence to determine whether a subsidy had been bestowed.

[102]Bacchus, *supra* note 90, at 226.

[103]For an extensive and update analysis of the relevant caselaw, I refer the reader to Van den Bossche & Zdouc, *supra* note 48, Chapters 5 and 12.

[104]Hoekman & Nelson, *supra* note 20, at 16, italics added.

[105]Ibid.

[106]*See*, e.g., Edimon Ginting & Kaukab Naqvi, *Preface*, I, at xii–xiii, in Reforms, Opportunities, and Challenges for State-owned Enterprises (Edimon Ginting & Kaukab Naqvi eds., 2020): "Advocates [of state capitalism] claim that government involvement in the economy expedites the resolution of market failure. Some say that SOEs may be better placed to tackle the externalities associated with the provision of public goods. The social view underscores the achievement of societal objectives, which depart from purely profit-maximizing goals. Others favour SOE involvement in the production of basic commodities such as water, health care, and education while not necessarily providing them for profit. Governments also provide basic services on equity considerations, such as universal access to essential services, and create jobs in backward areas."

[107]While, in 2005 there was no single SOE among the top 10 firms of the Fortune Global 500 list, in 2013 there were three SOEs, Sinopec Group, China National Petroleum (two of China's national oil companies) and State Grid (a Chinese utility), among the top 10 (http://money.cnn.com/magazines/fortune/global500/2013/full_list/). In 2021, these three companies respectively rank fourth, five and second (http://fortune.com/global500/).

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and global value chains,[108] and hybrid nature[109] create an assortment of legal issues. In particular, the conflation of SOEs' economic governance with the political and legal order of the state raises the issue of their impact on international trade flows and the competitive process, giving rise to an extensive debate about the appropriate approach to these entities in international trade law.[110] Different proposals on WTO reforms point at two main problems surrounding SOEs' commercial and financial operations.

As is indicated, for example, in the Trilateral statement of January 14, 2020,[111] one problem is the application of subsidies rules in the WTO to the state sector; a concern largely caused by a controversial ruling of the then WTO AB that Chinese state-owned banks do not necessarily qualify as public bodies to whom subsidies disciplines apply.[112] This decision has been widely criticized and was in part qualified by the AB itself in a later pronouncement.[113] In related scholarship, several authors have explored its flaws in depth, and some have proposed different solutions, essentially in the (alternative) forms of a revision of the caselaw and additional treaty-making.[114]

Beyond the application of WTO rules on subsidies to SOEs, there is a more fundamental concern (and increasingly demands) that new international trade rules, mainly of prophylactic nature, are needed to address the negative spill-overs from government influence on SOEs and affecting firms from other countries.[115] The argument goes on that these rules need to incorporate (or be based on) a concept of competitive neutrality that "would in some way requires states to establish a level playing field between state and private capitalism."[116] The European Commission's position is emblematic of such an approach. In its 2021 Communication on "An Open, Sustainable and Assertive Trade Policy", the EU executive body asserts:

> The importance of SOEs is not yet matched with sufficient disciplines to capture any market-distorting behavior. *New international SOE rules* should focus on the behavior of *SOEs in their commercial activities*, in line with the disciplines already agreed in several free trade

[108] *See* Joshua Kurlantzick, How the Return of Statism is Transforming the World (2016).

[109] David A. Sappington & Joseph E. Stiglitz, *Privatization, Information and Incentives*, 6(4) J. of Policy Analysis and Management 567 (1987), [noting that state ownership makes government intervention less costly in terms of transaction costs relative to regulation and taxation; this creates a strong temptation to pursue policy, or political, objectives through influencing the decisions of SOEs].

[110] Ming Du, *China's State Capitalism and World Trade Law*, 63(2) International and Comparative Law Quarterly, 409, 418-426 (2014).

[111] USTR Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union, *supra* note 18. This proposal included broadening the concept of SOEs and overturning the restrictive interpretation of the term "public body" in the ASCM.

[112] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (March 25, 2011), WT/DS379/AB/R.

[113] *See, e.g.*, Thomas J. Prusa and Edwin Vermulst, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through*, 12 WTR 197, 227–8 (2013); and Joost H.B. Pauwelyn *Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China*, 12(2) World Trade Rev. 235 (2013).

[114] These two alternative positions have been lately supported, respectively, by Howse, *supra* note 35, at 821, and Mavrodis & Sapir, *supra* note 1, at 182-186.

[115] On this matter I refer the redar to the line of arguments raised, among others, by Simon Lester, *The TPP's Contribution to Public International Law*, 19(26) *ASIL Insights* (2015); Minwoo Kim, *Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements* 58(1) Harv. J. Int'l L 226, 229–34, 271–2, (2017); Julien Sylvestre Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership* 19(2) J. Int'l. EC. L. 445, 446-7 (2016); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are we Moving in the Right Direction?*19(3) J. Int'L. EC. L 657, 659 (2016).

[116] Robert Howse, *Disciplining Capitalism under International Economic Law: Non-Discrimination vs. Competitive Neutrality*, State Capitalism and Investment Law (Panagiotis Delimatsis, Georgios Dimitropoulos & Anastasios Gourgourinis eds., 2023).

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> and investment agreements. *Apart from industrial subsidies and SOE disciplines*, there is a need to reflect on what other elements could be part of new WTO rules aiming at ensuring the *principle of "competitive neutrality"* and promoting a level playing field.[117]

The following analysis examines these two issues separately. With respect to each matter, I first clarify the terms of the problem in relation to existing WTO rules and caselaw. Secondly, I consider whether, and to what extent, deeper FTAs—those that experts designate as models for WTO reforms on the matter—establish new rules that permit to adequately address the trade concerns raised by SOEs' commercial and financial activities. Specifically, I critically discuss how these treaties operate in relation to SOEs, paying attention to how their drafters have defined such entities not least to how they establish new and specific rules for SOEs (vis-à-vis private enterprises), and defined exceptions.

II. The Application of the ASCM to the State Sector

The application of the ASCM provisions to SOEs has proved highly problematic. In determining the existence of a subsidy, a central issue is the meaning of the term "public body" in the ASCM agreement. The question of how to determine whether an entity is a public body becomes particularly challenging when the entity involved is a SOE. According to Article 1.1. ASCM, a subsidy could be conferred by a government, a public body, or a private body that has been "entrusted or directed" by the government to make a financial contribution. But the boundary between a government and a public body is not crystal clear. In particular, it is controversial whether the two terms are functionally equivalent, or the term "public body" covers something that is not covered by the term "government".[118] Clearly, such characterization is key for the subsidy assessment under the ASCM: In many situations, the state confers a subsidy not through the government itself but through entities affiliated with, owned/controlled, or influenced by the government. Thus, SOEs may constitute a ready means for providing subsidies in an opaque way. As a matter of fact, the "SOE-as-provider" problem has raised intense conflict under the ASCM and attracted growing academic and policy debate. Within the limited scope of this article, recall that in the *US-Countervailing Measures* (China) the AB considered that a "public body" determination involves an assessment of the core features of the entity concerned and its relationship with government, particularly, whether the entity exercises authority on behalf of government.[119] Despite a certain ambiguity of the legal standard as formulated by the AB, as well as practical reasons for interpreting the rules on subsidies in a more adaptive way, the adjudicatory body of the WTO has subsequently reaffirmed the demarcations made by existing rules, explicitly rejecting the US argument that government-ownership may be a dispositive factor to making an entity a public body.[120]

The cautious approach taken by the AB was arguably a justifiable application of the law: the notion of "public body'" was understood as an entity that, although not institutionally a part of a government, still functions like one. As I argued in a previous work, "[t]his reading had an

[117]European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, Annex to Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 66 final, at 9-10 (February 18, 2021), italics added.

[118]Pauwelyn, Guzman, & Hillman, *supra* note 19, at 510–12.

[119]Appellate Body, *supra* note 112, paras. 317-322. The AB held that the concept of public body should be understood in light of the general rules of customary international law on state responsibility as codified in the ILC Articles on State Responsibility. Thus, it rejected the view of "public body" as an entity controlled by a government and instead focused on whether the latter possesses, exercises or is vested with government authority.

[120]Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, (Dec. 18, 2014).

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important corollary: the recognition that SOEs can be run as genuine commercial enterprises and operate on a level playing field with private enterprises."[121] The upshot of this is that SOEs should not be treated differently simply because of majority-ownership by a government.[122] The AB's narrow interpretation seems also to adhere to the original intent of the drafters, which presumably was not to extend the bound of government too widely. Yet, even if one assumes that this interpretation is correct, it leaves unaddressed the issues raised by SOEs as pass-through vehicles for subsidies. At the heart of the matter are the following questions: What is the standard of proof that a commercial entity is part of the state? Having refuted the formal ownership test, could the AB have clarified what else matters?

Case law shows that the AB insisted on drawing a malleable line, providing a multi-factor test to reply to the questions above.[123] Still, the additional evidence that may be required is not entirely clear at present. One of the last cases ruled by the AB before its demise in 2020 confirms this conclusion. In *US—Countervailing Duty Measures on Certain Products from China*,[124] the AB ruled (by majority) that the absence of an express delegation of governmental authority does not necessarily preclude concluding that an entity is a "public body" under ASCM Article 1.1(a)(1), allowing even private entities, under certain conditions, to be considered public bodies.[125] The AB further clarified that a public body inquiry under the same provision does no hinge on the conduct of the investigated entity, but rather on the core features of the entity itself and its relations with government, in light of the legal and economic environment in which the entity operates.[126] Once it is established that an entity is a public body, all conduct of that entity shall be attributable to the Member concerned for purposes of Article 1.1(a)(1).[127] For such an assessment a holistic approach is required. This should take into due account: (i) evidence that an entity is exercising governmental functions, especially if it is a sustained and systematic practice; (ii) evidence of the scope and content of the relevant government policies; (iii) evidence of the meaningful control over an entity by the government; and (iv) whether the conduct or functions of an entity are ordinarily classified as governmental in the legal order of the relevant Member. Accordingly, a public body determination must be conducted on a case-by-case basis.[128]

A final remark. "SOEs-as-providers" can be captured by ASCM Article 1.1(a)(1)(iv) that include private bodies which have been entrusted or directed to carry out the functions that constitute potential subsidies (such as transfer of funds).[129] Yet, this application of the ASCM relevant provisions is no decisive solution to the problem. In fact, not all governmental measures vis-à-vis a private intermediary would necessarily amount to "entrustment" or "direction", as both terms demand a significant degree of command-and-control authority on the side of the government.[130] Moreover, the use of private vehicles poses more of an evidentiary challenge for Panels, as they

[121]Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, 22 35 LEIDEN J. INT'L. 313, at 318 (2020).

[122]For a more recent application of the same test see Panel Report, *United States–Countervailing Duty Measures on Certain Pipe and Tube Products from Turkey*, WT/DS523/R & WT/DS523/R/ Add.1, (December, 18 2018) paras. 7.34–7.50, a finding that, not surprisingly, was appealed by the US on January 25, 2019.

[123]*See, e.g.*, Appellate Body Report, *United States–Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, , WT/DS436/AB/R, (Dec. 8, 2014), para. 4.43

[124]Appellate Body Report, *United States–Countervailing Duty Measures on Certain Products from China–Recourse to article 21.5 of the DSU by China*, WT/DS437/AB/RW, (July 16, 2019).

[125]Ibid., paras. 5.93–5.94.

[126]Ibid., para. 5.100. Therefore, the AB rejected China's argument that the focus of a public body investigation is on the conduct alleged to constitute a financial contribution.

[127]Ibid., paras. 5.100 and 6.3.

[128]Ibid., para. 5.96.

[129]Appellate Body Report, *United States—Countervailing Duty Investigation on DRAMS from Korea*, WT/DS296/AB/R, (27 June 2005), para. 113.

[130]Ibid., para. 116.

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have to examine how the seemingly private conduct can be ascribed to a government entity, which will not necessarily be eager to disclose that relationship to the rest of the world.[131]

III. How Deeper FTAs Address the Problems of Subsidies Involving SOEs

How, and to what extent, is the problem of the application of international rules on subsidies to the state sector addressed by FTAs concluded outside the WTO?

Most FTAs have provisions on subsidies.[132] Deep(er) FTAs also have adopted approaches to deal with SOEs.[133] Comparative treaty analyses suggest that, leaving aside the peculiar disciplines established by EU FTAs that incorporate for both SOEs and private enterprises the EU competition law rules on public aid and the language of Article 106 TFEU, specifying that entities charged with public tasks are subject to competition rules if this does not preclude them from performing their public service obligations, the most advanced formulation of international trade rules on SOEs are contained in two treaties, namely the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[134] and the United States-Mexico-Canada Agreement (USMCA).[135] Their approach on subsidies involving SOEs is based on two central elements, namely, the definition of SOEs and a general prohibition of providing state support on non-commercial terms to the commercial activities of SOEs.

As to the scope *ratione personae*, both agreements include a broad and, at the same time, precisely demarcated definition of SOEs, which details the relevant notion of ownership/control. Article 17(1)(3) CPTPP defines an SOE as an enterprise that is primarily engaged in commercial activities and has one or more of the following features: the contracting party (i) directly owns more than 50 per cent of the stocks of the enterprise; (ii) controls the enterprise through the ownership of more than 50 per cent of its voting rights; or (iii) has the right to appoint the majority of the members of the executive board or any other decision-making body. More comprehensive is, however, the notion of control as embodied in Article 22(1) USMCA, which expands the definition of the CPTPP "by including also indirect ownership of more than 50 per cent of share capital" and—inserting a sort of "decisive influence" test—"the power to control the enterprise through any other ownership interest, including indirect or minority ownership."[136] A footnote to the same provision further clarifies that this power exists if, through an ownership interest, the government can determine or direct important matters affecting the enterprise, excluding minority shareholder protections and that, in determining whether a party has it, all relevant legal and factual elements shall be considered on a case-by-case basis. Another important definitional aspect is that both trade agreements regulate for-profit institutions only, requiring that SOEs "must be" those "principally engaged in commercial activities."[137] Thus, the CPTPP and the USMCA adopt clear-cut rules based exclusively on quantifiable proxies, including SOE size and threshold revenues,[138] and eliminate uncertainties by suggesting a binary means of assessing the commercial

[131]Mitsuo Matsushita; Thomas J. Schoenbaum; Petros C. Mavroidis & Michael Hahn, The World Trade Organization: Law, Practice, and Policy (3rd ed., 2015), 314–315.

[132]Rubini, *supra* note 21, at 429–461.

[133]Luca Rubini & Tiffany Wang, *State-Owned Enterprises*, in Aaditya Mattoo, Nadia Rocha & Michele Ruta, *supra* note 21, at 465–503.

[134]Signed in Santiago, Chile, on 8 March 2018. The TPP-11 is a separate treaty that incorporates, by reference, the provisions of the original Trans-Pacific Partnership (TPP), defunct after the United States withdrew its signature, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng.

[135]Entered into force on July 1, 2020, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

[136]Borlini, *supra* note 121, at 327.

[137]CPTTP, Art. 17.1

[138]*See* CPTTP, Art. 17(2)(2); and UNMCA, Art. 22(13)(5).

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nature of SOEs activities for the application of the relevant international obligations upon governments. As a result of the broad definitions of SOEs they establish, these treaties address the two problems affecting the relevance and applicability of the pre-CPTPP rules to the current developments in international trade: the lack of unambiguous tests provided to determine *ex-ante* government control, and an implicit requirement of state action.

Yet, as I argued previously, clear-cut definitions of this sort "may be counterproductive and in effect weaken SOEs disciplines."[139] A problem with quantitative thresholds defining ownership/control in the CPTPP is that they fail to consider the many other, lower levels of ownership or board appointment that can actually be structured so as to retain governmental control, as well as situations of indirect control. Furthermore, there is no provision on interlocking directorates.[140] Also, rigid rules provide actors with incentives to reframe a control/ownership pattern in order to dodge their application—not an implausible hypothesis, given contemporary corporate practices. Additionally, the threshold revenues that SOEs must reach are problematic, given the several inventive accounting techniques that could be used to avoid meeting these minimal requirements. Alongside transfer pricing manipulations, this can result in transfers between intra-group related entities that may not appear as revenue.

There is another element that impacts on the scope *ratione personae* and *ratione materiae* of the CPTPP and USMCA rules regarding SOEs, i.e., the exemptions, exceptions and carve-outs included in the relevant texts. Consider the text of the CPTPP. Exemptions regard specific categories of state entities. The extensive number of exceptions and carve-outs included in such treaties confirms that countries have different views on the legitimate role of the state, and which of those purposes should be subject to international discipline. Acceptance of such difference is embedded in the new trade regimes. However, while certain exclusions are quite sensible, (such as, the exemptions of smaller SOEs and government procurement), others are controversial, and may undermine the anticipated benefits of the new regimes. Notable examples are the sweeping exemption for SOEs that a sub-central level government owns or controls; the already mentioned state-owned domestic service providers; and Sovereign Wealth Funds (especially if one considers some Asian countries are actively discussing the potential transformation of their SOEs into SWFs).

The second key element of rules on subsidies involving state enterprises is the inclusion of a general ban on provision of state support on non-commercial terms to the commercial activities of SOEs. Thus, the CPTPP and USMCA are the only treaties that incorporate new rules on non-commercial assistance (NCA), the main aim of which is to prevent adverse effects or injury to the interest of other parties as a result of advantages that SOEs obtain because of their proximity to the government. While rules on NCA are not covered in earlier trade agreements,[141] these provisions should be essentially considered as an expansion of the WTO-based approach. This is because the new rules espouse the basic principles of the ASCM and, at the same time, "extend those disciplines to cases not covered by the same treaty, such as NCA provided with respect to trade in services."[142] Indeed, many overt and covert advantages SOEs may enjoy over private enterprises boil down to a direct or indirect subsidization by the government. Hence, the new rules prohibit a contracting party from causing an adverse effect or injury to other contracting parties through NCA[143]—generally defined as any assistance to an SOE by virtue of its government ownership or control—in purchase, and sale of goods and services and investments.

[139]Borlini, *supra* note 121, at 327.

[140]For a reasoned assessment of how the CPTPP definition of SOEs can capture complex cross-holding structures, see Matsushita & Lim, *supra* note 7, at 413 – 415.

[141]Fleury & Marcoux, *supra* note 115, at 459.

[142]Borlini, *supra* note 121, at 330.

[143]CPTPP, Art. 17(1); USMCA, Art. 22(1).

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The CPTPP and USMCA lay out very specific instances where NCA is deemed to adversely affect the interests of another party or cause injury to its domestic industry, making investigations of the violation easier. Indeed, the two treaties define these conditions more narrowly than the ASCM.[144] Despite the fairly lengthy character of these provisions, the bottom line is that the substantive discipline does not generally inhibit NCA as such. Instead, the new rules aim at controlling certain negative effects that may arise from such assistance.[145] If a given form of NCA is causing adverse effect or injury to another party, the providing country needs to take appropriate action to remove those effects or withdraw the assistance concerned. Otherwise, it will be confronted with the countermeasures permitted under the two treaties' dispute settlement procedures.[146] Central in the new regime, is the use of the word "indirectly" to qualify the provision of NCA to SOEs.[147] As is explained in a footnote to Article 22(6) USMCA, which echoes Article 1.1(a)(1)(iv) of the ASCM, "indirect provision includes the situation when a Party entrusts or directs an enterprise that is not a state-owned enterprise to provide non-commercial assistance."

Even more meaningfully, both treaties clarify that SOEs, just like states themselves, are prohibited from providing NCA to other SOEs when it causes adverse effect or injury to another party.[148] Therefore, SOEs cannot serve as pass-through vehicles for direct and indirect subsidization to other SOEs, even when they would not match the definition of "public body"under the current interpretation of ASCM by the AB. Thus, the prime benefit of the new NCA rules is their application to cases where governmental assistance slips through the net of ASCM. Another such case is when SOEs engage in trade of services: in the absence of WTO comprehensive subsidy disciplines connected to trade in services, the impact of the CPTPP and USMCA rules in this area is, for the respective parties, potentially vast. However, the NCA rules do not apply to a service supplied by a SOE within the territory of the subsidizing party.[149] A result of intense negotiations, this compromise muddles all domestic services, irrespective of whether they have public goals or not, and seems to flatly contradict free market principles and the objective of the international contestability of markets.

Importantly, as in the GATS, the NCA rule does not apply to services supplied in the exercise of governmental authority.[150] Clearly, the very definition of services supplied in the exercise of governmental authority, which supposedly safeguards the sovereign power of states to carry out public functions, reveals the neo-liberal vision of a laissez-faire economy, (minimalist) state, and society. Moreover, the prohibition of NCA to SOEs does not apply to services that are supplied neither on a commercial basis, nor in competition with one or more services suppliers. Similar exemptions have attracted intense criticism for its limited scope in that many predominantly government-provided services, for example health care, education, and water distribution, are provided in actual or potential competition with private providers, and so may fall outside its scope. Not surprisingly, the proposed text for the Trade in Services Agreement (TiSA),[151] which incorporates the same exemption in Article I-1:3, has been criticized as a tool to further reduce the area of public services. For these reasons, Uruguay eventually withdrew from the TiSA negotiations.[152]

[144]*See* CPTPP, Arts. 17(7), 17(8); USMCA, Arts. 22(7), 22(8).

[145]The USMCA also contains an unconditional prohibition to three qualified forms of NCA provided to an SOE primarily engaged in the production of goods other than electricity.

[146]CPTPP, Art. 28(20)(3); USMCA, Art. 31(19)(1).

[147]CPTPP, Art. 17(6)(1); USMCA, Art. 22(6)(2)-(4), (6).

[148]CPTPP, Art. 17(6)(2); USMCA, Art. 22(6)(5).

[149]CPTPP, Art. 17.6.4.

[150]CPTPP, Art. 17(2), and USMCA Art. 22(2)(4).

[151]Leaked text is available at: https://trade-leaks.org/tisa/.

[152]Viviana Barreto & Daniel Chavez, *TiSA and State-owned Enterprises. Lessons from Uruguay's withdrawal for other countries in the SouthI*, TNI, 18 April 2017, at: www.tni.org/en/publication/tisa-and-state-owned-enterprises.

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As for the procedural provisions, the CPTPP and USMCA rules do not contain a mechanism of countervailing duties. Also, they do not clearly indicate an alternative approach. For example, they do not incorporate a mechanism somewhat akin to the undertakings system envisaged under ASCM Article 18. In essence, the complaining party is given wide discretion and control over all the counteracting processes.[153]

To conclude, NCA rules are not without problems. Even leaving aside the issue of the nature and relevance of exceptions and carve-outs, which has been widely explored in the literature,[154] some significant lacunae remain under the NCA rules. While the CPTPP rules seek to cover NCA that may remain uncaptured by the ASCM (e.g., assistance provided by a state enterprise not vested with governmental authority), they do not contemplate the situation where the assisted exports adversely affect the industry of another party operating within that party's domestic market, i.e., the case that would be subject to countervailing duties under the ASCM.[155] Thus, if assistance is provided in a form that does not fulfil the definition of subsidy under WTO law, the importing party may have no means to address the adverse effects upon its domestic industry caused by assisted exports.[156] Moreover, the CPTPP and USMCA rules do not cover situations where assistance is provided by SOEs to private enterprises. Hence, the "SOE-as-provider" problem is only partially addressed. Under the two agreements, these entities could still represent means for providing subsidies in an opaque way where the final recipients are private enterprises and the ASCM does not apply. Finally, some of the NCA provisions in the two FTAs are quite complex and introduce for the first-time central concepts such as the "adverse effect" requirement and the "cause injury" standard. Besides, there are further provisions that provide exceptions to those injury standards.[157] This reduces the utility of reference to past WTO practice. As history of the ASCM demonstrates many central terms and methodologies were clarified and developed through the interpretation of the Panels and the AB. The same is likely to be true for the CPTTP and USMCA. For this reason, the new NCA rules require the concurrent development of a functioning dispute settlement mechanism. If this is not achieved the SOE regulation under such treaties will result in a *lex imperfecta*,[158] "with individual parties interpreting more obscure terms in accordance with their preferences and interests."[159]

IV. Incorporating "Competitive Neutrality" in the Legal Order of International Trade

To ensure that the decision-making of state trading enterprises (STEs)—state enterprises or private enterprises operating under state-conferred monopolies or privileges—would be subject to non-discrimination norms, the drafters of the GATT included a provision, Article XVII, that frames non-discrimination in terms of such enterprises basing their purchase and sales decisions

[153]The CPTPP and USMCA do not introduce any revolutionary mechanism in this respect, but in attempting to ease the evidentiary issues, they provide that, in case of non-cooperation in the information-gathering process by the respondent, the panel established to settle the dispute should draw adverse inferences in making findings of fact in its initial report. Also, in terms of countermeasures, the two treaties provide that a successful party may suspend benefits of equivalent effect.

[154]*See* Matsushita & Lim, *supra* note 7, at 414–418.

[155]CPTPP, Art. 17(7)(1)(b)(i) only contemplates the situations where sales of covered investments or imports from a third party, but not product of the domestic industry of an importing party, are displaced or impeded from the markets of the party importing assisted products. See also USMCA, Art. 22(7)(1)(a).

[156]The importing party can only react to the importing of goods produced by assisted SOEs where the assistance leads to a significant price undercutting, significant price suppression, price depression or the phenomenon of lost sales: Art. 17(7)(1)(c)(i) CPTPP indeed refers to "the market of the Party" (and "in the same market") with no limitation upon what constitutes the affected market.

[157]E.g., CPTPP, Arts. 17(6)(4), 17(7)(5)–(6).

[158]William Michael Reisman, Folded Lies: Bribery, Crusades and Reforms, at 29 (1979), writes that *lex imperfecta* is often "a conscious operator or elite design for dealing with aggravated myth system and operational code discrepancies."

[159]Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev 4, at 53 (1983)

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on "commercial considerations."[160] In addition to Article XVII, as one GATT panel stated, "the note to Articles XI, XII, XIII, XIV and XVIII provided that throughout these Articles the terms "import restrictions" and "export restrictions" include restrictions made effective through state-trading operations."[161]

The GATT acquis is arguably of limited use in regulating the magnitude of today's state capitalism.[162] First, STEs are only a subset of SOEs.[163] Secondly, not only is its application restricted to the above-referred commercial transactions of subset of SOEs, but it seems also marked by some uncertainty with respect to the principle of national treatment.[164] Thirdly, case law has been weakened by the finding that it suffices for STEs to act in a non-discriminatory manner to comply with the provision.[165] Thus, whatever the precise meaning of "commercial" here, Article XVII "has been interpreted by the WTO Appellate Body as establishing non-discrimination as an obligation of result in respect of "state trading enterprises."[166] While it is questionable whether in so doing, *ipso facto*, STEs act also in accordance with commercial considerations and afford competitors adequate opportunity to compete for participation—and economic logic would not support this view of the AB[167]—this interpretation is by now water over the dam, as "there is not one single deviation from this case law".[168] Finally, according to the then WTO AB, GATT Article XVII does not apply to an STE's transactions when no foreign enterprise is directly involved.[169]

GATT Art. XVII marked the beginning of international trade regulation on state enterprises which has lately evolved into complexed free trade agreements that contain far-reaching obligations on non-discrimination and non-commercial considerations. The latter kind of obligations incorporate the "competitive neutrality principle" advocated, among others, by the European Commission. I discussed this concept as a normative foundation of new international trade rules on SOEs in an earlier work. In that context, I argued that competitive neutrality, is "a highly condensed form of rhetorical material" that "has come to seem real and part of legal routine in current trade negotiations."[170] Moving from a critical approach to the debate surrounding this notion, I eventually concluded that in order to fully capture the approaches of contemporary FTAs to the regulation of SOEs "[p]articularly clarifying is the recognition that there are two goals at work [. . .] simultaneously. On the one hand, negotiators seek the creation of the conditions for internationally contestable markets, while simultaneously permitting domestic constituencies to maintain sufficient policy space for using SOEs to contribute to important public goals."[171] Here, it is important to add that, as evidenced by Howse's systematic engagement with relevant GATT/WTO caselaw, "under existing GATT rules on non-subsidies measures claimants have often been

[160]Howse, *supra* note 116, § II.

[161]GATT Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, adopted 22 March 1988, BISD 35S/37, para 4.24.

[162]*See*, among many, Andrea Mastromatteo, *WTO and SOEs: Article XVII of the GATT 1994*, 16(4) World Trade Rev. 601 (2017); and Petros C. Mavroidis & André Sapir, *The WTO at the Crossroads: How to Avoid the China Syndrome?* 21 World Trade Rev.359 (2022).

[163]Ibid., 363.

[164]Panel Report *Canada–Measures Relating to Exports of Wheat and Treatment of Imported Grain*, adopted 6 April 2004, WT/DS276/R, paras. 6.48, 6.50. The panel confirmed that the principle of non-discrimination at Art. XV includes also the most favored nation clause, but did not elaborate on the national treatment obligation.

[165]Appellate Body Report *Canada–Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R (August 30, 2004), paras. 89, 93–106. The AB rejected the argument that Art. XVII:1(b) establishes a separate, general competition-law-type obligation on STEs to follow 'commercial considerations' in all of their purchases and sales.

[166]Howse, *supra* note 116, § II.

[167]Petros C. Mavroidis, The Regulation of International Trade. Volume I: GATT, 410–412 (2016) discusses the case law to this effect.

[168]Petros C. Mavroidis & Merit E. Janow, *Free Markets, State Involvement and the WTO: Chinese State-Owned Enterprises in the Ring*, 16(4) World Trade Rev. 571, at 573 (2017).

[169]Appellate Body, *supra* note 165, para. 157.

[170]Borlini, *supra* note 121, at 321.

[171]Ibid., at 323.

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successful in obtaining rulings against protectionist discrimination in the policies or practices of state enterprises or government treatment of them."[172]

Moving from these different orders of considerations, I now turn to assessing how and to what extent the introduction of "competitive neutrality" into the legal order of international trade in the form of new rules on non-subsidies measures would be an adequate alternative to existing multilateral rules in addressing ways in which government measures concerning SOEs create barriers to international trade of a protectionist nature that are not justified by legitimate non-protectionist public policy objectives.

The obligations of non-discrimination and commercial considerations are present in the CPTPP and USMCA. In subjecting SOEs to such requirements, the new rules are plainly rooted in the GATT rule on STEs. However, they significantly expand on such discipline. First, in both the CPTPP and USCMA, obligations extend to trade in services and investments from other parties.[173] Second, with a view to favoring the international contestability of markets, they also cover SOEs' activities *within domestic territory*. Third, the new rules dissolve any uncertainty with respect to the principle of national treatment, which is now explicitly incorporated, avoiding the confusion that exists concerning GATT Article XVII. Fourth, the same provisions, as they read, reverse the AB's interpretation of the same rule. As observed *supra*, the AB had long interpreted the duty of non-discrimination treatment and the commercial considerations rules as illustrative of each other. In contrast, like other deep FTAs, the CPTPP and USCMA put such obligations in two distinct provisions with no logical link between them.[174] A literal and contextual reading of these provisions would command that an SOE cumulatively satisfy both requirements in order for the party to comply. However, here one may notice a first ideological bias against SOEs: "Why *should* trade law be concerned with whether state enterprises act commercially as a general matter, apart from situations where the non-commercial behavior reflects an alteration in the conditions of competition that disadvantages imports?"[175]

Moreover, in defining "commercial considerations" as equivalent to those factors that a privately-owned enterprise in the same business or industry would also consider,[176] the CPTPP and USMCA incorporate a standard, absent in WTO law, that pretends to determine *in abstracto* whether a firm's buying or selling behavior is commercially sound. Here again, a seemingly ideological bias against SOEs shines through. "Why would the decision-making considerations of private firms be the baseline against which state enterprises should conform themselves?"[177] As Joseph Stiglitz argues, "the distinction between competitive and non-competitive (including bureaucratic) forms of economic organization may be more important than the distinction between private and public ownership . . . ".[178] Accordingly, both public and private enterprises depend on managers/agents to achieve the goals of their principals, the owners. Different types of public and private enterprises exhibit different incentive structures for managers, some of these addressing agency costs better than others,[179] but, '"in any case, there is no systematic evidence of distortion of global competition from the way in which agency costs are managed in the incentive and monitoring structures of public firms as opposed to private ones."[180]

There are however elements of the new disciplines that appear to relax the standards of non-discrimination expected of SOEs. For example, insofar as the obligation to act in accordance with

[172]Howse, *supra* note 116, §II.

[173]CPTPP, Art. 17(4); USMCA, Art. 22(4).

[174]CPTPP, Art. 17(4)(1); USMCA, Art. 22(4)(1).

[175]Howse, s*upra* note 116, §V.

[176]For example, CPTPP general definition of "commercial considerations" includes any "factors that would normally be taken into account in the commercial decisions of a privately-owned enterprise in the relevant business or industry."

[177]Howse, *supra* note 116, § I, §V.

[178]Joseph E. Stiglitz, Selected Works of Joseph Stiglitz Vol II Information and Economic Analysis, 33 (2013).

[179]Ibid., 33–34.

[180]Howse, supra *note* 116, §V, [adding provocative and insightful arguments to better substantiate his case.]

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commercial considerations is concerned, the CPTPP seems to allow SOEs the right to sell at different prices and even allows them to refuse to sell, which at first glance seems to authorize violation of the MFN and national treatment principles. However, contrary to what has been claimed elsewhere,[181] my take is that these provisions do not introduce a systemic loophole in SOE rules. Instead, they seem to reduce the bias against SOEs: privately-owned enterprises, by definition, are not subject to a duty of non-discrimination. In fact, as for ownership-neutrality in the GATT/WTO, it is only the motivation and behavior in the market that matters. If a state-owned firm behaves in a commercial manner, the argument might go, its ownership structure would be irrelevant. Hence, like its privately-owned competitors, it should enjoy contractual freedom.

In my view, the main technical problem with the obligations of commercial considerations remains that there is no clear-cut economic test to determine whether a firm's behavior is commercially rational, despite any effort to provide clarifications. Actions such as selling at very low prices to hook customers can be practiced by commercially motivated firms and those with further motives alike.[182] As I have pointed out elsewhere, "[i]t would be easier to test between conduct and motivations if there were a clear alternative hypothesis: what, precisely, is it that SOEs would do if they did not act commercially?"[183] The answer is likely to vary with the relevant market and business. Given the silence of the legal texts and the likely complexity of relevant cases, the examination of single instances of conduct would greatly benefit from the progressive stratification of interpretative practices (read: case law) at either the international or domestic level. However, at this time, neither agreement is endowed with a functioning dispute settlement mechanism, and to divine whether they could ever effectively work is impossible. Further, there is another obstacle for new rules on state enterprises to go further than the WTO acquis. Commercial rationality in a state-centered economy that needs to shoulder various transitions and crises cannot arguably exist in a uniform way. It is almost by necessity a matter of perspective.

D. By Way of Conclusion: Reflecting on Reforms

I. Tensions Regarding the Future Design of Subsidies and SOEs Treaty Regulation

The tensions that now exist regarding the future design of subsidies and SOE treaty regulation are usually portrayed as part of a political and ideological contest. And, indeed, deciding on the international trade rules that should govern these prominent forms of state intervention in the economy raise "fundamental questions concerning the nature and degree of government involvement in commercial affairs and the right of other governments to inquire into that involvement."[184] Central tenets of a state economic system and basic beliefs concerning its governance are radically involved under the cover of technical notions like allocative efficiency, contestable markets, market failures, or regulatory neutrality. Against this backdrop, it is hardly surprising that decades of negotiation to reform the GATT/WTO system to address subsidies[185]—with the recent supplement of growing demands to deal with trade-distorting effects of SOEs—"have never produced the sort of uniform, scheduled rules that apply to tariffs or even

[181]Colin B. Picker, *The Coherent Fragmentation of International Economic Law: Lessons from the Trans-Pacific Partnership Agreement*, in Paradigm Shift in International Economic Law Rule-Making TPP as a New Model for Trade Agreements? 39 (Julien Chaisse, Henry Gao & Chang-Fa Lo, eds. 2017).

[182]Philip I. Levy, *The Treatment of Chinese SOEs in China's WTO Protocol of Accession* 16 (4) World Trade Rev. 635, 641-642 (2017).

[183]Borlini, *supra* note 121, at 330.

[184]Richard R. Rivers & John D. Greenwald, *The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences* 11 Law & Pol'y Int'l Bus. 1447, at 1448 (1979).

[185]MC12 secured, however, the conclusion of a new multilateral agreement on fisheries subsidies, the second new agreement since the WTO began operations in 1995. Agreement on Fisheries Subsidies, Ministerial Decision of June 17, 2022 (WT/MIN(22)/33, WT/L/1144). This is the first WTO agreement to focus on the environment and the only multilateral agreement, together with the WTO Agreement on Trade Facilitation, concluded after the Uruguay Round of negotiations.

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services."[186] Instead, WTO members developed rules to demarcate between tolerable and intolerable subsidization, and regulate self-help against such subsidies that are presumed or proved to be impermissible.

In this paper, I argue that existing WTO rules on subsidies and state enterprises—which represent a necessary piece of the interface mechanism designed to allow different economic systems to trade together without excessive tensions—are not suitable to ease, to say nothing of solving, recent controversies caused by the resilience of the state as an economic actor and the related increasing politicization of trade relations. Moreover, I submit (and demonstrate) that this system of rules is poorly equipped to assist states in addressing the substantial challenges they face in the post-pandemic world. In fact, extant rules on state intervention in the economy may make it more difficult for WTO members to engage in industrial policies that are needed to deal with the economic consequences of the COVID-19 pandemic, support desired changes in the real economy, and address the climate change shock. My approach is openly analytical: I explain and discuss existing multilateral rules and relevant caselaw on subsidies and state enterprises in light of the present geopolitical shifts, emerging changes in global economy, and environmental concerns. The ultimate goal is to dissect the enduring problems and emerging deficiencies of this system of rules, and, hence, lay the ground to investigate the direction taken by future possible reforms. However, if we now venture beyond the analytical account to the normative, some concluding considerations can be drawn from the foregoing work in relation to the main problematic issues explored and related prospects of reform.

II. Expanding, Reinforcing and Refining Extant WTO Rules on Industrial Subsidies

The first order of considerations is about the expansion, strengthening and refinement of existing multilateral trade rules on industrial subsidies. Some scholars view disciplines beyond rules preventing the nullification and impairment of tariff commitments as both needed and *feasible*. Exemplars of this assessment of the future position of subsidies disciplines are two works by distinguished international trade experts: Chad Bown and Jennifer Hillman,[187] on the one hand, and Gary Horlick and Peggy Clarke,[188] on the other. At the risk of obscuring different gradations of their analysis, key "common themes emerge in their proposed reconfiguration"[189] of extant WTO rules on subsidies, ranging from expanding the category of prohibited subsidies by including, *inter alia*, subsidies to the fossil fuel industry that aggravate risks of climate change; extending the scope of public bodies in the ASCM so as to include SOEs; reinstalling a green light category of non-actionable benign subsidies; and finding new institutional arrangements for enforcing subsidies rules.[190] These studies offer very sensible suggestions, some of which are clearly mirrored in the recent EU proposal.[191] To be fair, one cannot disregard that, although recent, the two articles at issue were published in a period where the crisis of the WTO did not appear as severe as it is today. As widely discussed in different contributions to this Volume, the situation has dramatically changed over the last few years. At present, in few other areas, divergence between the major trade powers as to the priorities accorded to the subject of reform is as profound as in the area of subsidies.[192] Moreover, in

[186]Gulotty, *supra* note 68, at 330.

[187]Hillman & Chad, *supra* note 20, at 557.

[188]Horlick & Clarke, *supra* note 20, at 673.

[189]Trebilcock, supra note 46, at 168.

[190]Examples of such institutional arrangements are strengthening notification requirements and strengthening remedies in the case of noncompliant subsidies by making remedies not only prospective (as at present), but also retrospective by requiring recipients of such subsidies to reimburse them.

[191]European Commission, Reforming the WTO: Towards a Sustainable and Effective Multilateral Trading System, *supra* note 18.

[192]Hoekman, Tu, and Wolfe, *supra* note 3, at 9–10 document such divergence. It is not by accident that the issue of reforming the disciplines on industrial subsidies remained unaddressed in the 12th Ministerial Conference (MC12) that was held in Geneva from 12-17 June 2022.

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the aftermath of the financial crisis and the Covid-19 pandemic shock, the struggle for what counts as normal relations between state and market has taken new colors and intensity—with the United States "steadily moving from a commitment to economic and political liberalization in its foreign policy",[193] and new paradigm of industrial protection spreading among other WTO members.[194] Therefore, in the current geopolitical setting one cannot be but skeptical about the prospects of any consensus within the WTO on new multilateral rules on subsidies in the foreseeable future. As I observe above, *any* modification of the current rules necessarily entails the *re*-definition of the confines between illegitimate state intervention in the market and legitimate, hence "normal"/normalized, level of state actions.

This is why authors like Hoekman and Nelson view(ed) the launch of a broader international work program on subsidies in the 12th WTO Ministerial Conference as a *necessary preliminary step* to—at least this is the second step I can safely infer from/add to their analysis—*subsequent plurilateral negotiations*, which, in turn, could *respond to the consensus problem.* In that perspective, the WTO would provide a platform "to members willing to invest resources into a work program to compile information and analyze existing subsidy programs in systemically important economies,"[195] including in sectors where multilateral rules do not exist (e.g., services). This program would build a more solid evidence base on the magnitude, purpose and effects of subsidy policies and remedy to a significant (and widely acknowledged) information gap about the use of these tools by WTO members. With that evidence at their disposal, members would be able to *identify shared objectives* and *mutual gains* in relation to possible reforms,[196] which, most likely, could take place through plurilateral agreements. Regrettably, such an approach was not considered during the last Ministerial Conference, the result being the remaining focus on piecemeal efforts like unilateral action (e.g., the EU regulation on foreign subsidies) and FTAs subsidies rules (some elements of which are portable at the multilateral level, while the overall disciplines are too narrow in scope and focus).

Still, I argue that an international form of cooperation promoted by and within the WTO to gather and analyze information on subsidies in systemically important (and cooperative) economies could effectively assist also other responses to the consensus problem on multilateral reforms. This is the case, for instance, of the proposal advanced by Michael Trebilcock who posits that, within the multilateral system, "there is a strong case for abandoning one-size-fits-all subsidy disciplines for all member countries across all economic sectors."[197] Rather, he favors a more flexible system, viz. an approach "that draws on the negotiating modalities adopted in the General Agreement on Trade in Services (GATS)."[198] Such a system, transposed to international trade in goods, would entail member countries of the GATT/WTO having the latitude of opting-in to different subsidies disciplines on an à la carte basis. Commitments on the use of subsidies "(akin to opening offers in tariff negotiations) would form the basis for future international negotiations on subsidies disciplines, along with appropriate tariff adjustments."[199] In case "of agreement (which, like tariffs, may not necessarily be symmetric), countries would be committed to not subsequently adopting or expanding their subsidy policies at variance with negotiated commitments, causing or threatening injury to producers in another country in domestic or foreign country."'[200] Clearly, an

[193]Orford, *supra* note 16, §E. See also Schoenbaum, *supra* note 74, and among others, Henry Gao, *China's Changing Perspective on the WTO: From Aspiration, Assimilation to Alienation* 21(3) World Trade Rev. 357 (2022).

[194]*See supra* §B. II.

[195]Hoekman & Nelson, *supra* note 20, at 23.

[196]I unhesitatingly subscribe the view that "WTO members simply do not have sufficient information to develop a common understanding of where new rules are needed and the form they should take". Ibid., at 23. See also Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115(4) American J. of Int'L., 622.

[197]Trebilcock, *supra* note 46, at 177.

[198]Ibid., at 177.

[199]Ibid., at 177.

[200]Ibid., at 177-178.

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approach of this kind would more closely align subsidies rules with tariff commitments, and complement rather than undermine them. Further, it would ultimately determine a graduation of WTO members' rights and obligations regarding subsidies through progressive regulation.

III. Reforming the ASCM to Address the Climate Change Shock and Green Industrial Transition

The second concluding remark concerns the climate change shock and the role of public spending to favor industrial green transition. Extant WTO rules that divide all subsidies into either prohibited or actionable categories are no longer fit for purpose. *Particularly* for the purpose of supporting WTO members in levelling the competition between fossil fuels and renewable fuels and make the needed transition to a decarbonized economy. Unless a close connection between climate change policy and the public aids employed is established, climate change subsidies may conflict with both GATT Articles VI and XVI, and the ASCM. Technically, modernization of rules in this area are not hard to conceive. There is wide agreement among experts that WTO rules need to be re-examined because of their inadequate flexibility for public policy.[201] In this article, I maintain that international trade rules on subsidies should be conditioned on what governments are planning to do, implying *determining what goal they pursue*, and differentiating economic from non-economic objectives. Theoretically, a sensible way to allow this sort of assessment would be the introduction in the ASCM of a general exceptions provision, akin to GATT Article XX, which relates to a range of legitimate public policy goals, including human, animal, and plant life and health, and the conservation of natural resources.[202] As observed above, an alternative option is the reinstallation of the category of benign permitted subsidies, including subsidies to renewable energies. Similar considerations about the technical feasibility of reforms in this area can be readily extended to fossil fuel subsidies with negative climate change externalities. But, again, the core problem is to reach consensus at the multilateral level.[203] This is accentuated by the refusal of some WTO members to separate reforms on subsidies to ease green transition and other changes in multilateral trade rules that may be equally or even more difficult to achieve.[204]

Late developments regarding fossil fuel subsidies are telling of existing challenges. At the 11th WTO Ministerial Conference in Buenos Aires in December 2017, twelve of the 164 members of the WTO launched an important initiative that could help commitment to fossil fuel subsidy reform under the Sustainable Development Goal 12 (c) of the 2030 Agenda. On this occasion, they issued a declaration expressing their desire to add specific disciplines to the existing WTO subsidies rules to rationalize and phase out inefficient fossil fuel subsidies. Their initiative

[201] *See supra* §B. II.

[202] As with other possible reforms of extant multilateral rules discussed here, the potentials of the introduction of such provision are inextricably linked to the proper functioning of the WTO DSS and the progressive formation and stratification of caselaw.

[203] *See*, among many, the recent contribution by Henok Asmelash, *The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System*, EUROPEAN J. OF INT'L. (2022), https://doi.org/10.1093/ejil/chac043, [examining the factors that brought the regulation of fossil fuel subsidies to prominence, and the prospects of, and challenges faced by the initiative to negotiate a plurilateral Agreement on Climate Change, Trade and Sustainability (ACCTS)]. In an effort to demonstrate how trade policy can be used to support climate and environmental objectives, the leaders of five countries—Costa Rica, Fiji, Iceland, New Zealand and Norway–launched the initiative on 25 September 2019. Switzerland joined later. See Joint Statement: Agreement on Climate Change, Trade and Sustainability (ACCTS) at MC12 (June 15, 2022), https://www.beehive.govt.nz/release/joint-statement-agreement-climate-change-trade-and-sustainability-accts-mc12.

[204] Consider, for example, that in a 2021 press conference related to its WTO Trade Policy Review, China conditioned its availability to start negations on new WTO rules on subsidies to the following circumstances: that agricultural subsidies are discussed at the same time as industrial subsidies to ensure fair competition in both important areas; that countervailing and anti-dumping rules are discussed to solve the alleged current abuse of trade relief measures; and finally, that the issue of restoring non-litigable subsidies is discussed, to leave policy space for members to cope with the epidemic and climate change. China Is Open to Talks on Industrial Subsidies, Xi Says, BLOOMBERG NEWS, (Nov. 4, 2021).

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is "aimed at achieving ambitious and effective disciplines on inefficient fossil fuel subsidies that encourage wasteful consumption."[205] These dozen members have since embarked on a diplomatic campaign to enlist the remaining 152 WTO members in new negotiations on how the trade rules should be amended to address the climate change shock. In December 2021, 19 WTO members issued a similar statement that reiterated the urgency of accelerating fossil fuels subsidies reform and promised to "elaborate concrete options" in the Ministerial Conference ahead.[206] Yet, no real step forward emerges from the official reports of the 12th Ministerial Conference.[207] And the whole membership of the WTO has yet to place this issue on the negotiating agenda. Adding it to the agenda is indeed highly problematic.[208]

IV. New Treaty Rules on Subsidies to the State Sector?

The third order of considerations is about appropriate reforms to address subsidies to the state sector. As I explain above, some recent FTAs contain more detailed rules relating to SOEs as either originator or recipient of government subsidies (rules on NCA). The CPTPP and USMCA, often regarded by international trade scholars as models for WTO reforms on the matter, exemplify such rules. I only recall here that these rules are not without problems, starting with the very definitions of SOEs they establish and the way exclusions and exceptions are made. Moreover, I doubt that transposing the CPTPP or USMCA rules on NCAs—and the related definitions of SOEs—at the multilateral level would adequately address the problem of state enterprises as providers of government subsidies. In the CPTPP these rules were inserted with China in mind. But, for one thing, as Mark Wu and Ming Du show, while China resorts to SOEs as tools of policy, its economic system is vastly more complex. There, the state has the capacity to model market behavior, even that of firms that are entirely private, through complex governmental and Communist Party networks hard to detect from outside.[209] For another, the exceptionalism of China "should not drive a general (...) tainting of state ownership or control of business activity"[210] in an organization whose membership count more than 160 States, especially when, in the aftermath of the last financial crisis, and in the wake of the Covid-19 global pandemic, the state has taken an even greater role as an investor in several countries.

Rather, I subscribe the view that a more adequate approach to the concept of "public body" in the ASCM is possible and opportune.[211] Importantly, in *US—Countervailing Duty Measures on Certain Products from* China, the then AB eventually qualified its previous caselaw and demonstrated openness in this respect.[212] In my view, the concept of public body is able to capture public

[205]WTO, Fossil Fuel Subsidy Reform Ministerial Statement, WT/MIN(17)/54 (December 12, 2017). The statement was made by Chile, Costa Rica, Iceland, Liechtenstein, Mexico, Moldova, New Zealand, Norway, Samoa, Switzerland, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and Uruguay. This Ministerial declaration was the first time, in dealing with fossil fuel subsidies, that WTO members asserted that there is "a link with trade." Ronald Steenblik, Jehan Sauvage, & Christina Timiliotis, *Fossil Fuel Subsidies and the Global Trade Regime*, in THE POLITICS OF FOSSIL FUEL SUBSIDIES AND THEIR REFORM, 121, at 132 (Jakob Skovgaard & Harro van Asselt, eds., 2018).

[206]Ministerial Statement on Fossil Fuel Subsidies, WT/MIN(21)/9/Rev.1 (Dec. 12, 2021).

[207]*WTO Members Share Early Results and Plans to Ramp up Action on Trade and Environment* (June 13, 2022), https://www.wto.org/english/news_e/news22_e/envir_13jun22_e.htm.

[208]*See* Bacchus, *supra* note 90, at 226-232, to whom I refer for in-depth illustration of the lasting obstacles to begin to negotiate new and specific disciplines on fossil fuel subsidies.

[209]*See* Wu *supra* note 69, at 261–324; and Du supra note 69.

[210]Howse, *supra* note 35, at 386.

[211]There is consensus among international trade scholars on the need for a different approach to the notion of public body. The proposed solutions differ. According to Howse, *supra* note 35, at 385–389, the WTO agreements do not need adjustment for a new approach to take place, being wrong the interpretation of "public body" by the AB. By contrast, Petros Mavroidis & André Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, in this Issue, §D.III propose that a new provision be inserted in the GATT and ASCM that establish that all SOEs are presumptively "public bodies", reversing thus, the burden of proof in subsidies disputes.

[212]*See supra* D.II.

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enterprises where government preserves means of control or influence (for example, through appointment of board members), but the company is a private enterprise in other respects. In all such cases, "a presumption of governmental involvement or influence is warranted where the enterprise is acting in a manner that deviates from the normal market conduct of a competing private firm."[213] Whereas Mavrodis and Sapir argues that such a presumption should be included in new version of the ASCM, I fall in with Howse that, in leaving the concept open (also to evolutionary interpretations) and, hence, broad, the drafters of the original GATT and later those of the ASCM display wisdom. They prevented excessive rigidity in a concept the meaning of which can vary over time, and eluded the arguably futile search for a new formula that would more appropriately capture the use of state enterprises as a tool of government policy.[214] It is sensible for the WTO to "defer to the decision of domestic agencies" that may presume, in economic systems like that of China, or where the peculiar context surrounding the activities of a given state enterprise suggests so, "that certain conduct has been influenced or guided by the state, even in the case of enterprises that are not formally charged with exercising governmental authority."[215]

V. Ensuring the Equality of Competitive Conditions

Finally, as to the additional obligations of commercial considerations included in the CPTPP and USMCA to ensure competitive neutrality between domestic and foreign firms—advocated as broader reforms for the multilateral trade system too—I only add a couple of remarks to my previous analysis. First, and noted here only briefly, the institutional designs of transparency rules in the SOEs chapter of the CPTPP and USMCA do not offer a useful corrective to the scarce information we have about the extent to which state action—the only thing subject to international trade rules—alters the terms of competition in relation to the operation of SOEs.[216] In the absence of reliable data, concerns with the potential for negative spill-overs on trade as a result of SOEs' commercial operations may appear to be ideological rather than empirical.[217] Secondly, the directives incorporated in the obligations of commercial considerations are designed to ensure that SOEs do not alter the terms of competition in domestic markets at the expense of foreign firms.[218] In the absence of compulsory rules regarding property ownership for parties to comply with, rules on commercial considerations reduce the incentives for state intervention in the economy by imposing on SOEs obligations to which private enterprises are not subject. Hence, as I explain above, they reveal a clear ideological bias against SOEs. In fact, the resulting difference in treatment is not substantiated by systematic evidence of distortion of global competition from the way in which agency costs are managed in the incentive and monitoring structures of state enterprises as opposed to private ones. Even leaving this issue aside, if it is the terms of competition the main concern, it remains controversial whether rules of this sort are the best option for future reforms. As Mitsuo Matshusita argues in his article for this Special Issue, this kind of problems should be addressed by competition law (*rectius*: by an interaction between international trade law and competition rules still to be shaped at the multilateral level).[219] However, in the enduring absence of a WTO antitrust code, the question remains why "competitive neutrality" should be introduced into

[213]Howse, *supra* note 35, at 386.

[214]Ibid, adding "[m] oreover, it is not clear that language different from that of 'public body' or that in GATT Article XVII would significantly enhance discipline of governmental influence over market decisions, the primary substantive policy concern that underlies the entire public body controversy."

[215]Ibid.

[216]For a critical assessment of these mechanisms, I refer to Borlini, *supra* note 121, at 331-2.

[217]Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs*?, 16(4), World Trade Rev. 713 (2017)

[218]*See supra* §C. IV.

[219]*See* Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this Issue.

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the trade order through new prophylactic rules focused on state enterprises as opposed to private enterprises instead of relying on a sound application of existing disciplines (particularly, WTO rules on non-discrimination) in cases where government policies toward state enterprises or their conducts effectively *distort international trade*.[220]

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[220]This position is voiced also by Howse, *supra* note 116, § IV, who observes that attempts to introduce "competitive neutrality" into the trade order appear as a reformulation of the criticism that "the WTO is hobbled in its capacity to ensure competitive global markets for lack of antitrust rules." But see *contra* Mavroidis & Sapir, *supra* note 211, §D.III.

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