

Reforming WTO Subsidy Rules: Past Experiences and Prospects

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Subsidies are a critical instrument in the toolbox that national governments use to address market failures and achieve a variety of policy goals. However, critics often arise to point out the inefficiencies and economic distortions that subsidies create, which raise the question of whether the existing WTO subsidy rules are adequate, and how to reshape WTO subsidy rules to address new emerging concerns especially in a global value-chain world. This article first reviews WTO Members' subsidy-related proposals under the Doha Development Agenda and then addresses key concerns on subsidy rules in the current broader discussion of the WTO reform, trying to figure out feasible approaches toward shaping a 'new generation' of subsidy rules under the aegis of the WTO.

Keywords: WTO, industrial subsidy, ASCM, Doha rules negotiations, transparency, public bodies, state-owned enterprises, harmful subsidies, non-actionable subsidies, special and differential treatment, plurilateral negotiation

1 INTRODUCTION

The World Trade Organization (WTO) has been playing a critical role in providing multilateral rules for regulating trade relations between countries. However, the centrality of the WTO in future trade liberalization is in serious jeopardy given the lack of progress in the Doha Round. In light of the inability to accommodate the rapid structural changes in the world economy through WTO negotiations, WTO Members have inspired discussions on the urgent need of WTO reform.

In current WTO reform discussions, one most important and contentious topic is the subsidy rules. Some key WTO Members, such as the United States (US)–European Union (EU)–Japan trilateral group has emphasized on restricting non-market policies and practices, one of which is the market-distorting industrial

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subsidies.¹ The EU and Canada also addressed industrial subsidies in their discussion papers on WTO reform. While these economies could negotiate more subsidy rules on a regional basis, the ‘free rider’ consideration ensures that multi-lateral efforts count the most.

Upon the establishment of the WTO, the Agreement on Subsidies and Countervailing Measures (ASCM) is a contribution to provide industrial subsidy rules that were intended to be clear and enforceable. However, since industrial subsidies have taken on new prominence in WTO Members’ policy toolkits especially after the financial crisis in 2008, the spillover effects of domestic industrial subsidies are getting more attention, with the reality that the continuing lack of progress on improving subsidy rules in the ASCM has impaired the ability of Member governments to formulate domestic policies that fully conform to WTO obligations.

Against the above backdrop, this article focuses on the reform of WTO industrial subsidy rules, providing insights on what it has been discussed before and more importantly, where it seems to be headed. This article is organized as follows: section II summarizes the negotiating positions of WTO Members on subsidy rules under the Doha Development Agenda (DDA). Section III presents key concerns on subsidy rules in the current round of WTO reform discussions. Section IV discusses possible approaches to reform WTO subsidy rules. Section V concludes. Besides, a summary of previous and current subsidy-related proposals is provided in Annex 1.

2 DOHA PROPOSALS ON THE WTO SCM AGREEMENT

The current discussion on industrial subsidies has its historical origin. The Doha negotiations aim for an improvement of the ASCM, around which WTO Members have raised a range of subsidy-related proposals. In the course of negotiations three camps emerged, whose stances could be categorized as pro-discipline, mixed position and anti-discipline.

2.1 MEMBERS WITH PRO-DISCIPLINE PROPOSALS: THE US AND THE EU

The US’s stance was pro-discipline. In support of greater subsidy rules,² the US proposed to:(1) expand the category of prohibited subsidies to include government interventions that have similarly distortive impacts on competitiveness or trade as do

¹ By Jan. 2020 the US, EU and Japan released seven trilateral statements addressing concerns including industrial subsidies.

² The US’ suggestions were reflected in: Negotiating Group on Rules, Subsidies Rules Requiring Clarification and Improvement, TN/RL/W/78; Expanding the Prohibited ‘Red Light’ Subsidy Category, TN/RL/GEN/94; Expanding the Prohibited ‘Red Light’ Subsidy Category Draft Text,

export and import substitution subsidies; (2) enhance remedies for prohibited subsidies, e.g. revising the requirement to show adverse effects of prohibited subsidies in countervailing duty proceedings; (3) equalize in the treatment of direct and indirect tax systems that, at least their subsidy-like effects have only superficial difference; (4) better identify ‘indirect subsidies’ such as the ‘entrusts or directs’ situation where government actions may not be clear or explicitly documented, and clarify the definition of ‘public body’; (5) enhance remedies for actionable subsidies, e.g. strengthening the remedy for subsidies with ‘serious prejudice’; (6) address government practices affecting natural resources and energy sectors such as the dual pricing; (7) improve the rules regarding government provision of equity capital. Besides, the US held a tough view in weakening the special and differential treatment (S&DT) provisions in the ASCM, and called for improvement of subsidy notifications.

The EU’s stance is pro-discipline but with relatively balanced views.³ On the one hand, the EU has common interests with the US in strengthening subsidy rules. First, the EU proposed to formulate more rules to address ‘disguised subsidies’, where the subsidy appears to be universal but in fact it is enjoyed by certain enterprises. Second, the EU shared similar opinion with the US that subsidy rules should cover entities which are covertly controlled by the state and acting on non-commercial terms, or, the rules should cover situations where the public direction is less apparent but nevertheless leads to non-commercial behaviours. Third, the EU proposed to expand the category of prohibited subsidies, covering the granting of subsidies in a manner inconsistent with the national treatment provision (Article III of the GATT1994). Forth, the EU proposed to establish clear and consistent rules for export financing. Last, the EU proposed to improve the notification compliance of WTO Members. On the other hand, the EU advocated the flexibility of subsidy rules, proposing to treat environmental subsidies as non-actionable subsidies, and to give positive consideration to S&DT for developing countries.

2.2 MEMBERS WITH MIXED-POSITION PROPOSALS: AUSTRALIA, CANADA AND BRAZIL

Australia’s proposals were to clarify the existing provisions in the ASCM.⁴ Australia proposed to:(1) clarify the evidentiary requirements for actionable subsidies with

TN/RL/GEN/146; Special and Differential Treatment and the Subsidies Agreement, TN/RL/W/33.

³ The EU’s suggestions were reflected in: Negotiating Group on Rules, WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures, TN/RL/W/30; Subsidies, TN/RL/GEN/135; Rules Negotiations -Transparency, TN/RL/W/260; EU Technical Paper in Follow-up of Its Transparency Submission (TN/RL/W/260), TN/RL/W/263.

⁴ Australia’s suggestions were reflected in: Negotiating Group on Rules, Comments and Views from Australia on Canada’s Submission on Improved Rules under the Agreement on Subsidies and Countervailing Measures (Document TN/RL/W/112), TN/RL/W/135; Further Contribution to

'serious prejudice'; (2) clarify the evidentiary requirement for de facto export subsidies; (3) clarify the remedies for prohibited subsidies; (4) incorporate the development dimension into non-actionable subsidies, e.g. introducing a similar test as the export competitiveness test in Article 27.6 of the ASCM if reinstating non-actionable subsidies.

Canada's stance is twofold.⁵ On the one hand, Canada proposed to raise the burden for demonstrating a subsidy, including: (a) clarifying the situation of benefit pass-through of a subsidy; (b) adding objective benchmark for determining the specificity of a subsidy; (c) strengthening the evidence requirements for de facto export subsidies. On the other hand, Canada proposed to strengthen remedies for a subsidy, including: (i) enhancing the effectiveness of dispute settlement for prohibited subsidies; (ii) reinstating the 'deemed serious prejudice' provisions in Article 6.1 of the ASCM and strengthening relevant remedies. Besides, Canada remained open to reinstate non-actionable subsidies.

Brazil's stance is mixed.⁶ For actionable subsidies, Brazil supported proposals of Australia and Canada to reinstate and elaborate the 'deemed serious prejudice' provision in Article 6.1 of the ASCM, but disagreed with Canada's proposal on increasing the burden of proof for the benefit pass-through and specificity of a subsidy. For prohibited subsidies, Brazil required stricter rules on de facto export subsidies, while arguing for less discretion on the rules of official export credits.

2.3 MEMBERS WITH ANTI-DISCIPLINE PROPOSALS: INDIA, EGYPT, VENEZUELA AND CUBA

India has taken perhaps the most explicit anti-discipline stance of all. India proposed to expand S&DT for developing Members in subsidy rules on a wide and permanent basis.⁷ Besides, India opposed to reinstate the environmental

the Discussion of the Negotiating Group on Rules on the Agreement on Subsidies and Countervailing Duty Measures, TN/RL/W/139; Comments from Australia on Venezuela's Submission on Non-Actionable Subsidies Under the Agreement on Subsidies and Countervailing Measures (Document TN/RL/W/41), TN/RL/W/61.

⁵ Canada's suggestions were reflected in: Negotiating Group on Rules, Benefit Pass-through, TN/RL/GEN/7; Benefit Pass-through, TN/RL/GEN/86; Specificity, TN/RL/GEN/6; Improved Rules Under the Agreement on Subsidies and Countervailing Measures and the Anti-dumping Agreement, TN/RL/W/1; Improved Rules under the Agreement on Subsidies and Countervailing Measures, TN/RL/W/112; Serious Prejudice, TN/RL/GEN/14; Re-instatement of Deemed Serious Prejudice Provisions of Art. 6.1, TN/RL/GEN/112/Rev.2.

⁶ Brazil's suggestions were reflected in: Negotiating Group on Rules, Serious prejudice, TN/RL/GEN/81; Benefit Pass-through, TN/RL/W/193; Specificity, TN/RL/W/191; De Facto Export Contingency, TN/RL/GEN/88; Treatment of Government Support for Export Credits and Guarantees under the Agreement on Subsidies and Countervailing Measures, TN/RL/W/177.

⁷ Negotiating Group on Rules, Proposals on Implementation Related Issues and Concerns - Agreement on Subsidies and Countervailing Measures/Anti-Dumping Agreement, TN/RL/W/4; Third

subsidies as non-actionable subsidies, believing it would place developed Members without financial constraints at an advantageous position compared with developing countries.⁸

Egypt's proposals are mainly responses to other Members' proposals, reflecting its anti-discipline stance.⁹ First, Egypt considered the EU's proposal unnecessary to distinguish between 'disguised subsidies' and other subsidies since the existing rules are sufficient. Second, Egypt opposed the EU's proposal to introduce stricter discipline of 'national treatment' provision to import substitution subsidies. Third, Egypt joined India to address an inverse S&DT issue about the reference to the 'The OECD Arrangement on Officially Supported Export Credits' in Item (k) of Annex I of the ASCM. Forth, Egypt raised questions on Australia's proposal to incorporate development dimension into non-actionable subsidies about how to evaluate the development dimension and how to adopt criteria to allow for more effective use of non-actionable subsidies. Last, Egypt opposed the EU's proposal to strengthen the notification system, arguing it is difficult to enforce.

Venezuela mainly paid attention to non-actionable subsidies. Commenting jointly with Cuba, Venezuela proposed to: (1) reinstate the category of non-actionable subsidies; (2) lower the benchmarks for non-actionable subsidies to benefit developing countries; (3) introduce new categories of non-actionable subsidies aimed at achieving legitimate development goals; (4) loosen possible rules for the assessment of non-actionable subsidies under the development dimension.¹⁰ Besides, Venezuela was reluctant to strengthen the notification rules.¹¹

Submission by India to the Negotiating Group on Rules, TN/RL/W/120; Amendment to Arts 27.2 and 27.4 of ASCM in Relation to Developing Countries Covered under Annex VII. 7, TN/RL/GEN/177; Improvement and Clarification in Art. 27.5 and 27.6 on the ASCM Regarding Export Competitiveness, TN/RL/GEN/136.

⁸ Negotiating Group on Rules, Intervention by India on the Proposal by the EC Captioned WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures (TN/RL/W/30), TN/RL/W/40.

⁹ Egypt's suggestions were reflected in: Negotiating Group on Rules, Egyptian Paper Containing Questions and Comments on the Contributions Submitted in the Framework of the Doha Negotiations on the Subsidies and Countervailing Measures Agreement, TN/RL/W/57; Preliminary Comments and Questions by the Arab Republic of Egypt on the Contributions Submitted in the Framework of the Doha Negotiations on the Anti-dumping Agreement and on the Agreement on Subsidies and Countervailing Measures, TN/RL/W/79.

¹⁰ Negotiating Group on Rules, Improved Rules under the Agreement on Subsidies and Countervailing Measures-Non-actionable Subsidies, TN/RL/W/41/Rev.1; Preliminary Answers of Cuba and Venezuela to the Questions Provided by Egypt Regarding Document TN/RL/W/41, TN/RL/W/108; Second Contribution by Cuba and Venezuela to the Negotiating Group on Rules Expanding on the Proposal Concerning Non-actionable Subsidies, TN/RL/W/131; Preliminary Replies to the Questions by Australia Contained in Document TN/RL/W/61, TN/RL/W/70.

¹¹ Negotiating Group on Rules, Observations and Comments by Venezuela on Document TN/RL/W/78 Submitted by the United States Concerning Prohibited Subsidies and Other Subjects under the WTO Agreement on Subsidies and Countervailing Measures, TN/RL/W/107.

In summary, apart from inherent complexities of multilateral negotiations, a certain degree of ambivalence typifies WTO Members' attitudes towards subsidy rules. There is a big difference between developed and developing Members, and even within the two country groups there are disagreements. The US and India are two distinctions with sharply diverging views confronting each other. The former is quite pro-discipline, proposing to tighten up subsidy rules and make trade remedies more effective; while the latter is very anti-discipline, strongly arguing for domestic policy space in the name of developing Members. Other developed Members, i.e. the EU, Australia and Canada, took more balanced stances, although they are more inclined to strengthen the subsidy rules. Certain developing Member, i.e. Brazil, took a mixed stance with both pro- and anti-discipline proposals, while Egypt and Venezuela took a more defensive stance to maintain or even weaken subsidy rules. So far, the pro-discipline supporters could not yet convince the rest of the membership to achieve concrete multilateral outcomes.

3 MAJOR CONCERNS IN CURRENT ROUND OF DISCUSSION

Currently, there is a renewed focus on industrial subsidies in WTO Members' WTO reform proposals. The ongoing work of the US-EU-Japan trilateral group is evidence of new political economy momentum to draft more subsidy rules in light of the perceived inability of the WTO to effectively regulate subsidies and the growing challenges of resurgence of subsidy instruments both in OECD countries and some leading emerging economies. Compared with wide-ranging issues covered in previous subsidy-related proposals under the DDA, current concerns concentrate on five aspects, i.e. transparency, public bodies and state-owned enterprises (SOEs), harmful subsidies, non-actionable subsidies and S&DT for developing Members. These concerns stem in part from previous concerns about WTO's systemic problems and, more importantly, from growing doubts on the growth of transitional economies, e.g. China, that do not fully conform to the western model of market economy. So far, these concerns are discussed in parallel country groups, though how the ongoing discussions will eventually be incorporated into a broader multilateral agenda is not very clear at this stage.

3.1 TRANSPARENCY

Transparency is a fundamental element to the correct functioning of WTO subsidy rules. Better information on subsidies is critical to help determine the incidence and magnitude of prevailing subsidies worldwide and to consider whether and how to redesign multilateral rules to discipline the use of subsidies that result in negative

externalities for the trading system.¹² However, there are continued notification failures by WTO Members, due to the lack of domestic institutional capacities, varied criteria on subsidy statistics, or the worries of being targeted in potential WTO disputes because of those voluntarily reported subsidies. Besides, the vagueness of what constitute a subsidy in the ASCM likely leads to different understandings by Members that they may notify only what they perceive as subsidies, or they may falsely notify subsidies that fall outside the scope of the ASCM without subjecting actual subsidies to the WTO scrutiny.

To address this fundamental transparency issue, current proactive proposals by WTO Members put forward detailed suggestions. The US–EU–Japan trilateral group called for improving transparency of subsidies through disincentives for WTO Members, e.g. defining any non-notified subsidies that were counter-notified by another Member as prohibited, unless the subsidizing Member provides required information in writing within set timeframes.¹³ Furthermore, the US–EU–Japan trilateral group submitted two transparency proposals to the WTO with other co-sponsors, proposing suggestions ranging from a series of administrative penalties for notification failures of WTO Members, to the encouragement for ‘counter notifications’, and the establishment of a Working Group to enhance notification compliance.¹⁴ The EU tabled proposals such as creating a ‘general rebuttable presumption’ according to which non-notified subsidies would be presumed to be actionable, unless the subsidizing Member demonstrates that the support to their entities does not constitute actionable subsidies.¹⁵ Canada highlighted the importance of transparency, while requiring a comprehensive review of the notification obligations to ensure they are not unnecessarily complex and burdensome.¹⁶

Developing Members also tabled their proposals. China expressed views in five aspects. First, developed Members should lead by example in submitting comprehensive, timely and accurate notifications. Second, Members should improve the quality of their counter-notifications. Third, Members should increase

¹² B. Hoekman & D. Nelson, *Spillovers, Subsidies and Multilateral Cooperation*, Bertelsmann Stiftung Working Paper (29 Feb. 2020).

¹³ Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Washington, D.C., 14 Jan. 2020).

¹⁴ Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from Argentina, Costa Rica, the European Union, Japan and the United States, JOB/GC/204 (JOB/CTG/14), 1 Nov. 2018; Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements: Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States, JOB/GC/204/Rev.1 (JOB/CTG/14/Rev.1) (1 Apr. 2019).

¹⁵ Negotiating Group on Rules, Improving Disciplines on Subsidies Notification: Communication from the European Union, TN/RL/GEN/188 (30 May 2017).

¹⁶ Canada: Strengthening and Modernizing the WTO: Discussion Paper (30 Aug. 2018).

exchange of their experiences on notifications. Fourth, the WTO Secretariat needs to update Technical Cooperation Handbook on Notifications as soon as possible and intensify training in this regard. Fifth, developing Members should endeavour to improve their compliance of notification obligations, with technical assistance and capacity building requirements.¹⁷ The African Group, Cuba and India stressed the capacity constraints of developing Members, thus strongly opposing to any transparency obligations that go beyond existing ones.¹⁸

3.2 PUBLIC BODIES AND SOES

Public bodies and SOEs are distinct features especially in some transitional economies. Relevant concerns mainly stem from three aspects.

3.2[a] *The Definition of Public Bodies and Its Relationship with SOEs*

The lack of a clear definition of ‘public bodies’ in Article 1 of the ASCM remains a disputable concern. Closely linked to this concern is the unclear relationship between public bodies and SOEs. In this respect, the WTO did attempt to clarify the definition of ‘public bodies’ in previous WTO disputes, revealing three interpretation approaches that were reflected in disputing parties’ arguments, third parties’ submissions, and WTO panel and Appellate Body (AB) ’s decisions.¹⁹ However, this definitional issue remains somewhat unsettled from the rule-making perspective since none of the three interpretations has been incorporated into the legal texts of the ASCM.

The first approach is the ‘government control’ interpretation, holding that the government control over an entity can be the criterion that determines whether an entity is a ‘public body’. In *United States–Definitive Antidumping and Countervailing Duties on Certain Products From China (DS379)*, WTO Members mainly expressed two views. The first view is that the government’s ownership or majority-state-share of an entity can be an adequate evidence of government control, which was proposed by the US and supported by third parties such as Argentina, Canada, EU and Mexico. The second view is that the majority-state-share is relevant but not determinative, and other evidences should also be specified. Australia supported

¹⁷ General Council. China’s Proposal on WTO Reform: Communication from China, WT/GC/W/773 (13 May 2019).

¹⁸ An Inclusive Approach to Transparency and Notification Requirements in the WTO: Communication from African Group, Cuba and India (Revision), JOB/GC/218/Rev.1 (JOB/CTG/15/Rev.1, JOB/SERV/292/Rev.1, JOB/IP/33/Rev.1, JOB/DEV/58/Rev.1, JOB/AG/158/Rev.1) (11 July 2019).

¹⁹ R. Ding, ‘Public Body’ or Not: *Chinese State-Owned Enterprise*, 48(1) J. World Trade 167–190 (2014).

this view. No matter which view is taken, logically a wider range of entities, especially SOEs in which the government definitely has a stake, would be captured as public bodies in the ‘government control’ approach.

The second approach is the ‘government function’ interpretation, holding that an entity is a ‘public body’ if it performs functions of a government character. China supported this approach and further elaborated the ‘government function’ as ‘a government-owned entity was exercising delegated authority to perform functions of a governmental character’ in *DS379*. Third parties including Brazil, India, Norway and Saudi Arabia supported for the general ‘government function’ approach, while not emphasizing on the ‘delegated authority’ requirement. This approach is more comprehensive than the ‘government control’ approach, but there remains ambiguity on how to define the ‘governmental character’ since sometimes the line between governmental and private functions is blurry, especially for SOEs which are in the middle between one extreme of government and another extreme of private bodies.

The third approach is the ‘government authority’ interpretation, holding that an entity is a ‘public body’ if it possesses, exercises or is vested with governmental authority. The AB in *DS379* finally adopted this approach. Specifically, the AB enumerated three circumstances when the ‘government authority’ may be inferred, including ‘a statute or other legal instrument expressly vests authority in the entity’, ‘evidence that an entity is, in fact, exercising governmental functions’ particularly in a sustained and systematic practice, and ‘evidence that a government exercises meaningful control over an entity’. The ‘government authority’ interpretation combines some aspects of the above two approaches, adopting a more flexible interpretation that considers all relevant factors in conjunction on a case-by-case basis.

Further, the AB clarified the ‘government authority’ approach in its *DS437* compliance report in two aspects. First, a public body inquiry must have due regard to ‘the core characteristics and functions of the relevant entity’, that entity’s ‘relationship with the government’, and ‘the legal and economic environment prevailing in the country in which the investigated entity operates’. The absence of an express statutory delegation of governmental authority does not preclude a finding that an entity is a ‘public body’; instead, a ‘public body’ inquiry may be based on different and specific evidences in each case. Second, the nature of an entity’s conduct or practice may certainly constitute evidence relevant to a ‘public body’ inquiry; however, a ‘public body’ inquiry does not necessarily need to focus on every instance of conduct in which the relevant entity may engage, or on whether each such instance of conduct is connected to a ‘government function’. In this sense, the legal standard for public body inquiry under Article 1.1(a)(1) of the ASCM does not prescribe a connection of a particular degree or nature that must

necessarily be established between an identified government function and the particular financial contribution at issue.

The AB's 'government authority' approach provided flexibilities to the 'public body' inquiry, requiring an investigating authority must 'evaluate and give due consideration to all relevant characteristics of the entity', and 'examine all types of evidence that may be pertinent to that evaluation'. In this regard, the US–EU–Japan trilateral group argued that such approach with broader evidentiary requirements would provide leeway for SOEs and other public entities to escape scrutiny, and agreed to work on a 'public body' definition that lowers the 'government authority' benchmark to better capture state enterprises as subsidizing entities.

3.2[b] *The Specific Rules on SOEs*

So far, WTO Members hold divergent perspectives on crafting rules for SOEs, with debates on the 'ownership neutrality' and 'competitive neutrality'.

On the one hand, incorporating specific SOE rules in the WTO may face opposition from the 'ownership neutrality' argument. The WTO recognizes different types of national economic systems and has been neutral insofar as the ownership of enterprises is concerned, reflecting the logic that regarding the performance of both SOEs and private-owned enterprises (POEs), ownership does not matter as long as the trading happens in competitive environments. China supports this view. In its recent proposal on WTO reform, China argues that SOEs could not be discriminated on the basis of ownership, holding that no special or discriminatory disciplines should be instituted on SOEs during discussions on subsidy disciplines in the name of WTO reform.²⁰

On the other hand, the emergence of 'competitive neutrality' principle led to arguments that specific regulations should be crafted for SOEs to eliminate their advantages that come from close government connections to ensure fair market competition. The idea of making distinction between SOEs and POEs was inspired by recent regional trade agreements that have gone further than the WTO in crafting disciplines on SOEs, with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) representing the most efforts at the mega-regional level. The CPTPP defines the 'government control' over SOEs in terms of voting right, equity share and appointment power, and further establishes separate disciplines on (1) financial advantages granted to SOEs under 'non-commercial assistance' provisions; and (2) the behaviour of SOEs under 'non-discrimination' and 'commercial consideration' provisions. While the SOE rules in the CPTPP offer insight into what participating countries presumably expect to be

²⁰ China's Proposal on WTO Reform, *supra* n. 17.

incorporated into the WTO, the process will never be easy due to the economic and political resistance in the broader WTO context from a wide range of countries especially those with large presence of SOEs in their economies.

3.2[c] *Additional Transparency Rules for Public Bodies and SOEs*

An important factor complicating possible distortive practices by public bodies and SOEs is their inherent lack of transparency, therefore additional transparency rules could be levied especially for public bodies and SOEs.²¹ For example, more information could be enclosed, including a listing of all SOEs on a public website, disclosure of the government's shareholding in SOEs, titles of government officials participating in the board of SOEs, annual revenues of SOEs, and detailed facts on any policy program that provides subsidies to SOEs.²²

3.3 HARMFUL SUBSIDIES

One strong argument pushing forward subsidy rules reform is the ineffectiveness of WTO remedies for harmful subsidies. In this regard, proposals are in three aspects. First, prohibition for subsidies can be the most effective discipline for addressing subsidization than other post-hoc, remedial approaches. To this end, the US–EU–Japan trilateral group proposed four types of unconditionally prohibited subsidies to be added to the ASCM, which are unlimited guarantees, subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan, subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity, and certain direct forgiveness of debt.

Second, a difficulty lies in establishing sufficient legal proof for actionable subsidies. To this end, the US–EU–Japan trilateral group proposed four types of conditionally prohibited subsidies, including excessively large subsidies, subsidies that prop up uncompetitive firms and prevent their exit from the market, subsidies creating massive manufacturing capacity without private commercial participation, and subsidies that lower input prices domestically in comparison to prices of the same goods when destined for export. The trilateral group argued that such subsidies have a harmful effect so as to justify a reversal of the burden of proof, so that the subsidizing Member must demonstrate there is no serious negative trade

²¹ Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, Paris (31 May 2018).

²² S. Katz, *How the U.S., the EU, and Japan Are Trying to Rein in China's State Capitalism*, Harv. Bus. Rev. (9 Nov. 2018), <https://hbr.org/2018/11/how-the-u-s-the-eu-and-japan-are-trying-to-rein-in-chinas-state-capitalism> (accessed 12 Dec. 2019).

or capacity effect and there is sufficient transparency about the subsidy, otherwise the subsidizing Member must withdraw the subsidy immediately.²³

Third, there are efforts to target subsidies that generate overcapacity. For instance, the US–EU–Japan trilateral group proposed to consider the situation where the subsidy distorts capacity as an additional type of serious prejudice linked to capacity, which should be specified by the Article 6.3 of the ASCM. Besides, along with the work of the Group of 20 Global Forum on Steel Excess Capacity on steel capacity, subsidies and other support measures, the US–EU–Japan trilateral group together with Mexico and Canada called for broader discussions in the WTO SCM committee on the role of subsidies contributing to overcapacity.²⁴ However, China argued that the SCM Committee is not the proper forum to discuss the overcapacity issue since it is a structural problem resulting from many factors, including trade protectionism.²⁵

3.4 NON-ACTIONABLE SUBSIDIES

China clearly suggests in its WTO reform proposal that ‘the provisions on non-actionable subsidies should be reinstated and their coverage expanded’.²⁶ The basic rationale to reinstate non-actionable subsidies is that certain subsidies can usefully address market failures and contribute to global public goods, suggesting that such subsidies should be treated separately rather than being subject to a generic form of discipline.²⁷ On the contrary, it is argued that if not well defined and controlled, such socially ‘good’ subsidies would also have market distortionary effects.²⁸ Hence the legitimate concern is whether the social benefits of these subsidies are significant enough to bear their potential distortionary effects so that make it worthwhile to relax the ASCM.

It is difficult to verify this concern in previous practice. During the five years in which the non-actionable subsidies were in effect, there was a lack of experience with Article 8 of the ASCM on non-actionable subsidies. The SCM Committee indeed made efforts to address notification and arbitration issues related to Article

²³ Joint Statement of the Trilateral Meeting, *supra* n. 13.

²⁴ Committee on Subsidies and Countervailing Measures, The Contribution of the WTO to the G20 Call for Action to Address Certain Measures Contributing to Overcapacity, G/SCM/W/569; Committee on Subsidies and Countervailing Measures, Role of Subsidies in Creating Overcapacity and Options for Addressing this Issue in the Agreement on Subsidies and Countervailing Measures, G/SCM/W/572/Rev.1.

²⁵ WTO, *Subsidies Committee Members Again Cite Concerns on Lack of Transparency* (Apr. 2019), https://www.wto.org/english/news_e/news19_e/scm_30apr19_e.htm (accessed 15 Nov. 2019).

²⁶ *Supra* n. 17.

²⁷ See G. Horlick & P. A. Clarke, *Rethinking Subsidy Disciplines for the Future: Policy Options for Reform*, 20 J. Int'l Econ. L. 673–703 (2017); Hoekman & Nelson, *supra* n. 12.

²⁸ A. Cosbey, *Green Industrial Policy and the World Trading System*, 17 ENTWINED Issue Brief (2013).

8. However, such procedures were never utilized, making it difficult to judge the actual effect of Article 8. Since there was little practical experience, the decision on non-extension of non-actionable subsidies seemed to be a political compromise rather than a technical consideration by the WTO SCM Committee back to 1999.

Nowadays, the divide between developed and developing countries over the revival of Article 8 still exists. On the one hand, most developing countries continue to view the revival of non-actionable subsidies as a move that would primarily benefit developed countries and some large developing countries without financial constraints. They are more inclined to enhance specific S&DT for themselves rather than reinstating non-actionable subsidies for all WTO membership. On the other hand, developed countries lack momentum to negotiate non-actionable subsidies that are more corresponding to the interests of developing countries.²⁹ This political factor will be key for renegotiating non-actionable subsidies in current and future WTO reform discussions.

3.5 THE S&DT ISSUE

Nowadays, the background of the S&DT is changing along with the shifting global economic landscape. On the one hand, the development divides between the groups of developing and developed Members still exist, with old divides have not been substantially bridged while new divides such as those in the digital and technological spheres are becoming more pronounced. Therefore, the developing Members are more in a defensive position to struggle for domestic policy space in order to compete in international arena. On the other hand, the rapid economic growth enjoyed by some large developing Members and their narrowing income gap with developed Members have made developed Members less willing to grant the same preferential treatment to the whole developing membership. Against this background, the S&DT is broadly debated.

The views of developed Members on the S&DT are not exactly the same. The US–EU–Japan trilateral group shares the view that overly broad classification of development combined with self-designation of developing country status inhibits the WTO's ability to negotiate new trade-expanding agreements, calling for advanced WTO Members claiming developing country status to undertake full commitments in WTO negotiations. Specifically, the EU proposed a new graduation system of countries from developing country status to developed country status to opt-out of S&DT.³⁰ The US proposed four groups of countries that can

²⁹ M. Wu, *Re-examining 'Green Light' Subsidies in the Wake of New Green Industrial Policies*, E15 Initiative: ICTSD and World Economic Forum (2015), www.e15initiative.org/ (accessed 30 Nov. 2019).

³⁰ The European Commission, *WTO Modernisation: Introduction to Future EU Proposals* (2018), https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (accessed on 17 Oct. 2019).

no longer enjoy S&DT: (1) A WTO Member that is a Member of the OECD, or a WTO Member that has begun the accession process to the OECD; (2) A WTO Member that is a member of the G20; (3) A WTO Member that is classified as a 'high income' country by the World Bank; or (4) A WTO Member that accounts for no less than 0.5% of global merchandise trade.³¹ Canada proposed to take a new approach that seeks the balance between reciprocity and flexibility based on previous experience of Trade Facilitation Agreement (TFA).³² Norway proposed to adopt a flexible approach to adequately respond to specific development needs of Members in different economic areas, rather than negotiating criteria for Members' access to S&DT.³³

There is also a divide among developing Members regarding the S&DT. The Brazil agreed to forgo S&DT in future WTO negotiations, for the exchange of US support for Brazil initiating the OECD accession procedure.³⁴ Korea decided not to seek S&DT in future WTO negotiations, given its enhanced global economic status.³⁵ By contrast, China, the African Group, India and certain developing Members reaffirmed the basic principles of the S&DT in the WTO that (a) Developing countries' unconditional rights to S&DT in WTO rules and negotiations must continue; (b) Developing countries must be allowed to make their own assessments regarding their own developing country status; (c) Existing S&DT provisions must be upheld; (d) S&DT must be provided in current and future negotiations.³⁶

Realistically, there is no viable prospect in the WTO to reach a consensus on fundamentally changing the current S&DT arrangement, given that any proposal aiming at depriving developing country status and diminishing the right to development would face strong opposition from most developing Members. What might happen over time is a process of individual developing Members

³¹ An Undifferentiated WTO: Self-Declared Development Status Risks Institutional Irrelevance: Communication from the United States (Revision), WT/GC/W/757/Rev.1 (14 Feb. 2019); Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO, WT/GC/W/764 (15 Feb. 2019).

³² Strengthening and Modernizing the WTO, *supra* n. 16.

³³ Pursuing the Development Dimension in WTO Rule-making Efforts: Communication from Norway, WT/GC/W/770 (26 Apr. 2019).

³⁴ *Joint Statement from President Donald J. Trump and President Jair Bolsonaro* (19 Mar. 2019), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-president-jair-bolsonaro/> (accessed 10 Nov. 2019).

³⁵ *South Korea to Give Up Developing Country Status in WTO Talks* (Reuters 25 Oct. 2019), <https://www.reuters.com/article/us-southkorea-trade-wto/south-korea-to-give-up-developing-country-status-in-wto-talks-idUSKBN1X401W> (accessed 5 Feb. 2020).

³⁶ Statement on Special and Differential Treatment to Promote Development: Co-sponsored by the African Group, the Plurinational State of Bolivia, Cambodia, China, Cuba, India, Lao People's Democratic Republic, Oman, Pakistan and the Bolivarian Republic of Venezuela, WT/GC/202/Rev.1 (14 Oct. 2019).

volunteering to forgo their S&DT in certain WTO agreements, as what we saw with Brazil and Korea.

4 THE WAY FORWARD FOR WTO INDUSTRIAL SUBSIDY RULES: MULTILATERALISM OR PLURILATERALISM?

In an environment that is difficult to reach meaningful multilateral deals in the WTO, one should not expect future subsidy rules to be negotiated in the same configuration as was the ASCM. Without foreseeable multilateral outcome, WTO Members may be induced to pursue a ‘variable geometry’ of plurilaterals. The choice between multilateralism and plurilateralism depends on whether WTO Members can find a viable way to break the deadlock in multilateral negotiations, and how WTO Members deliver their ambitions of improving subsidy rules.

4.1 A REVISED MULTILATERAL APPROACH

The renewed attention to subsidy rules may offer a window of opportunity for revitalizing subsidy negotiations in the WTO. However, it is hardly to expect such multilateral move to be ambitious given the divergent positions across WTO membership. Even though, the possibility of reopening such multilateral negotiation deserves attention and effort, with recalibrated negotiation objectives and well-designed flexibilities that are in accordance to varying expectations and capacities of WTO Members. Several dimensions should be considered.

4.1[a] *The Scope and Priority of a Possible Multilateral Subsidy Initiative*

The rationale of the Single Undertaking modality in the Doha Round is that concessions can be exchanged among otherwise unrelated sectors. However, the large scope of the Doha Package did not make negotiations easier, as the cross-issue bargaining was too complex that it slowed down the pace of negotiations. In this regard, it appears more practical that the subsidy rules to be negotiated as a stand-alone process and only to be tied with progress in related issues. For example, the industrial subsidy negotiation can be promoted in parallel with agricultural subsidy negotiation, making it possible for negotiation room between developed and developing Members. Furthermore, even within the industrial subsidy negotiations, trade-offs can be made between different subsidy categories, i.e. prohibited, actionable and non-actionable subsidies.

Regarding the priority, it would be practical to establish a work program on subsidies with the participation of Members willing to invest resources to compile

information on the incidence and magnitude of prevailing subsidies, conduct comprehensive analysis on the objective and spillover of subsidies, and diagnose the key gap in extant subsidy rules. This could facilitate in-depth conversations and develop common understandings of where new rules are needed, and which form they should take among WTO Members.³⁷ To revisit subsidy rules, several areas deserve an earlier consideration. First, areas where the disciplines of the ASCM appear sufficient but the implementation of these disciplines by Members is unsatisfactory such as transparency deserve high priority. Second, previous WTO dispute adjudications on the legality of specific subsidy concerns could be consolidated into an updated ASCM, with the focus on clarifying the ambiguities of the legal texts. Finally, if transparency of industrial subsidies can be improved, it could be conceivable to better categorize and measure different types of subsidies, considering the possibility to negotiate quantitative constraints on countries' total spending on subsidies with potential trade distortions. In this respect, previous experience in drawing WTO agricultural rules could be borrowed. The OECD has played an important role in developing new measurement on agricultural subsidies in terms of Producer Support Estimate (PSE) and Consumer Support Estimate (CSE). Then WTO Members relied on the OECD's analysis to finally agree on the Aggregate Measurement of Support (AMS) that provides the basis for the domestic support reduction commitment in the Agreement on Agriculture. Whether similar approach can be taken in industrial subsidy negotiations depends on technical factors that how to collect comprehensive data and develop scientific measurement techniques to measure and compare industrial subsidies across countries, as well as political factors that whether the WTO together with other international organizations, i.e. OECD and G20, can provide momentum to facilitate similar efforts in industrial subsidy arena.³⁸

4.1[b] *The Development Dimension of a Possible Multilateral Subsidy Initiative*

A useful lesson could be drawn from the experience in concluding the TFA that incorporates an innovative design of different implementation timeframes as well as mandatory technical assistance and capacity building for developing Members. The key to adopt a similar asymmetric commitment approach in subsidy rules is how to devise different levels of commitments, and ensure such 'differentiation' would not substantially undermine the effectiveness of the agreement. Two considerations are critical.

³⁷ B. Hoekman & D. Nelson, *Rethinking International Subsidies Rules*, Bertelsmann Stiftung Working Paper (17 Mar. 2020).

³⁸ R. Wolfe, *Yours Is Bigger Than Mine! How an Index Like the PSE Helps in Understanding the Comparative Incidence of Subsidies*, Bertelsmann Stiftung Working Paper (24 Feb. 2020).

The first consideration is how to differentiate among WTO Members. The ASCM generally differentiate among three categories of countries, which are developing country Members referred to in Annex VII,³⁹ other developing country Members, and Members in the process of transformation into a market economy. Such differentiation is too rough. In previous subsidy-related proposals, Members argued for more specific considerations according to their own circumstances. To this end, the key is what criteria should be used to differentiate. The literature referred to basic macro-economic indicators such as gross domestic product (GDP), GDP per capita, or gross national income. Are there other development-based indicators that should be involved? Also, if the differentiation affects a particular economic sector, one would argue that the specific performance of the sector is more important to be considered than the general national aggregates. In this regard, conditioning access to 'differential treatment' to objective and transparent criteria is critical for making asymmetric commitments. The needs assessment is one important element to achieve such goal. For example, an Expert Group could be established to help evaluating the situation of WTO Members claiming they have capacity gap, and the SCM Committee can provide opportunities for Members to specify their obstacles and inspire relevant discussions.

The second consideration is how to tailor commitments according to the differentiation among WTO Members. Since commitments valued in absolute terms tend to favour richer Members, commitments valued in relative terms that are more related to the relative position of the Member offering concessions *vis-à-vis* other Members would be more appropriate to address the individual Member's situation and mitigate in part the issue of poorer Members.

4.2 A FLEXIBLE PLURILATERAL APPROACH

Besides multilateral negotiations, the WTO offers alternatives for carrying out negotiations among a part of membership through plurilaterals. By gathering like-minded Members to negotiate new rules, such plurilateral process would be more ambitious to involve a deliberation not only on how to improve existing multilateral subsidy rules, but also on whether some of the rules, e.g. SOE rules, that are incorporated in regional and bilateral agreements can be developed under the WTO. Generally, there are two types of plurilaterals.

³⁹ The Annex VII of the ASCM refers to: (a) least-developed countries designated as such by the United Nations which are Members of the WTO; (b) certain countries whose GNP per capita has not reached USD 1,000 per annum.

The first type is the ‘open plurilateral’ under the WTO, taking place within groups of Members with the outcomes being implemented on a most-favored-nation (MFN) basis. In this respect, the benefits accruing under the agreement should potentially benefit all Members although the obligations only accrue to signatories. The second type is the ‘exclusive plurilateral’ under the WTO, taking place within groups of Members with the outcomes remaining confined only to the signatories. The WTO members have experiences in negotiating both types of plurilateral agreements, with the expanded Information Technology Agreement as an ‘open plurilateral agreement’ and the Government Procurement Agreement as an ‘exclusive plurilateral agreement’.

Comparing the two types of plurilaterals, there are reasons that for subsidy negotiations the ‘open plurilateral’ could be better than the ‘exclusive plurilateral’. First, subsidy rules are designed to reduce discrimination in a level playing field, which means once signatories of such plurilateral undertake subsidy obligations it would be non-discriminatory that benefit other Members on a wide basis. To this end, the ‘open plurilateral’ could be the better way to address this non-discriminatory feature. Second, the ‘open plurilateral’ can enhance the positive effects on the ‘insiders’ and eliminate the negative spillovers on the ‘outsiders’ to avoid the worries on the dichotomy of WTO membership. The transparency and inclusiveness are better addressed as features of the ‘open plurilateral’ to encourage the participation of ‘outsiders’ in possible future, once they have observed the benefits of undertaking additional subsidy obligations and would like to follow similar paths for goals such as eliminating their ineffective subsidies and locking in their economic transformation. Third, the ‘exclusive plurilaterals’ require extra procedural burden that there should be consensus among WTO Members to make ‘exclusive plurilateral’ to be appended to the WTO Agreement and to become legally binding. Once like-minded Members have come to an agreement, they need to submit the text to the WTO for *ex ante* scrutiny. If non-signatories believe that a negotiated agreement goes against their interest, they may veto the agreement. This type of *ex ante* consensus may complicate and delay the process of concluding ‘exclusive plurilaterals’.⁴⁰ By contrast, the ‘open plurilaterals’ are unlikely to meet significant resistance since all ‘open plurilaterals’ benefits are extended to non-signatories.

One more concern is how to ensure the effectiveness of plurilaterals, which may require the participation of key industrial powers to facilitate meaningful conversations, and a well-designed mechanism within the WTO to execute a working procedure for preparing, initiating and concluding plurilateral negotiations.

⁴⁰ R. Basedow, *The WTO and the Rise of Plurilateralism-What Lessons Can We Learn from the European Union’s Experience with Differentiated Integration?*, 21 J. Int’l Econ. L. 411–431 (2018).

5 CONCLUSIONS

While the political economy of subsidies is significantly changing in both developed and developing countries especially in the current global value-chain world, the WTO subsidy rules reflected in the ASCM have not substantially changed since its inception. Judging from previous and current debates, WTO Members need to rethink three questions to identify gaps in existing WTO subsidy rules. The first question lies in the definitional shortcomings of the term ‘subsidy’, i.e. what types of subsidies are most harmful that should be prohibited, and by contrast what types of subsidies are with *de minimis* distortionary effects that should be non-actionable. The basic understanding and categorization of different types of subsidies require better information collection and empirical research on the incidence and magnitude of prevailing subsidies worldwide to form solid theoretical foundation behind subsidy rules. The second question lies in how to develop clear, justifiable and practical subsidy rules. The ambiguity of certain rules leads to disagreements that WTO Members tend to interpret the rules in a way that suits their interests. The third question lies in how to treat S&DT in subsidy rules. Whether the existing S&DT is sufficient or should it be extended or diminished in future negotiations? Indeed, the current simple dichotomy between developing and developed Members as the basis of S&DT is questionable in shaping more sufficient subsidy rules.

In terms of future industrial subsidy rules negotiation, the choice between multilateralism and plurilateralism depends on how a compromise can be realized between those Members who want to negotiate deeper subsidy rules and those Members particularly from the developing world who are unwilling to renegotiate subsidy rules. So far, certain subsidy-related proposals have been discussed among different parallel groups, providing some directions for future negotiations. It remains to be seen which direction will become reality in the coming years, while a potential practical way that deserves to be carefully explored is resorting to the ‘open plurilateral’ in producing outcomes that apply on the MFN basis.

Annex 1: Summarized Information on WTO Members’ Subsidy-Related Proposals

	<i>Doha Proposals</i>		<i>Current Concerns</i>
<i>Article</i>	<i>Proactive Proposals</i>	<i>Defensive Proposals</i>	
Article 1 – Definition of a Subsidy			
Article 1.1	-make operational rules for ‘disguised’ subsidies when the link between subsidy	- European Community’s proposal on strengthening rules for	-whether SOEs can be defined as ‘public bodies’.
(a) – subsidy			

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>and recipient is concealed. (TN/RL/W/30) (EC)</p> <p>-clarify Article 1 to cover entities that are effectively controlled by the state and acting on non-commercial terms, or cover situations where the government direction is covert but leads to non-commercial behaviours. (TN/RL/W/30) (EC)</p> <p>-better identify 'indirect subsidies' where government action may not be clear. (TN/RL/W/78) (US)</p> <p>-clarify the definition of 'public body'. (TN/RL/W/78) (US)</p>	<p>'disguised' subsidies would be unnecessary since the 'disguised' subsidies are already covered by the ASCM. (TN/RL/W/57) (Egypt)</p> <p>-whether introduce specific rules for SOEs.</p> <p>-how to capture market distortions by 'non-public bodies'.</p>
Article 1.1(b)-benefit	<p>-establish appropriate rules and guidelines to clarify the situation of benefit pass-through of a subsidy. (TN/RL/GEN/7; TN/RL/GEN/86) (Canada)</p>	<p>-Canada's proposal on benefit pass-through would be unnecessary to make changes to the well-established subsidy definition in Article 1.1(b), and would be premature to introduce specific guidelines and methodologies to determine the pass-through. (TN/RL/W/193) (Brazil)</p>

*Doha Proposals**Current Concerns***Article 2 – Specificity****Article 2.1(a) – definition of ‘certain enterprises’**

-introduce the UN ISIC classification to qualify ‘enterprise or industry or group of enterprises or industries’. (TN/RL/GEN/6) (Canada)

-Canada’s proposal on the reference to ISIC should not be required as the sole source for assessing the wide and general availability of the subsidy. (TN/RL/W/191) (Brazil)

Article 2.1(c) – ‘de facto’ specificity

-the ‘de facto’ specificity should be based on the totality of the facts, and no one or several of them can necessarily give decisive guidance. (TN/RL/GEN/6) (Canada)
-clarify the situation of the granting of disproportionately large amounts of subsidy to certain enterprises. (TN/RL/GEN/6) (Canada)

-Canada’s proposal would be unnecessary to require the ‘de facto’ specificity be based on the totality of the facts. (TN/RL/W/191) (Brazil)

Article 3 – Prohibition

-consider practices listed in the Article 6.1 and additional subsidy types such as loans to uncreditworthy companies, provision of equity capital where the investment decision is inconsistent with the usual investment practice, and other financing to an enterprise or project that otherwise would

-unconditionally prohibit certain ‘harmful’ subsidies.
-conditionally prohibit certain ‘harmful’ subsidies unless the subsidizing member bears specific burden of proof.

	<i>Doha Proposals</i>	<i>Current Concerns</i>
<p>Article 3.1(a)- export subsidies</p>	<p>be unlikely to receive such financing from commercial sources, as prohibited. (TN/RL/GEN/94) (US)</p> <p>-consider (i) the provision by virtue of government action of goods to domestic production on terms and conditions more favourable than those generally available for such goods when destined for export, and (ii) the provision by virtue of government action of finance to a wide range of industries on terms and conditions inadequate to cover the long term operating costs and losses of such finance where this benefits exported goods, as prohibited. (TN/RL/GEN/135) (EC)</p> <ul style="list-style-type: none"> • de facto export subsidies <p>-a subsidy tied to actual or anticipated exportation to a particular country granted only to enable the fulfilment of exports contracts or agreements, or similar arrangements with an enterprise or government of another</p>	

<i>Doha Proposals</i>	<i>Current Concerns</i>
<p>country, shall be deemed to be de facto export subsidy. (TN/RL/GEN/88) (Brazil)</p> <p>-the export propensity should be taken into account together with other relevant factors to determine de facto export subsidies. (TN/RL/W/139) (Australia)</p> <p>- clarification of prohibited subsidies provisions such as the assessment of contingency on export performance, is required to ensure the equitable application of ASCM among Members. (TN/RL/W/1) (Canada)</p> <ul style="list-style-type: none"> • indirect tax rebate <p>-there should be greater equalization in the treatment of various tax systems that, at least with regard to their subsidy-like effects, have only superficial difference. (TN/RL/W/78) (US)</p>	<p>-EC's proposal would be unnecessary to link Article 3.1(b) to Article III.4 of GATT 1994 since the terms of Article 3.1(b) do</p>
<p>Article 3.1(b)- 'import substitution' subsidies</p>	

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	W/30; TN/RL/GEN/135) (EC)	not raise any interpretation issues. (TN/RL/W/57) (Egypt)
<i>Annex I—Illustrative List of Export Subsidies</i>	-clarify Item (j) to ensure that the practice where developed countries provide guarantees at below-market interest rate, to be deemed as conferring a benefit. (TN/RL/W/177) (Brazil) -establish clear and consistent rules for export financing activities. (TN/RL/W/30) (EC)	
<i>Annex II – Guidelines on Consumption of Inputs in the Production Process</i>	-consider capital goods and consumables as the goods that are consumed in the production process. (TN/RL/W/120) (India) -the sale of the entitlement to obtain the duty free imported inputs in substitution drawback schemes	
<i>Annex III – Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies</i>	would not be considered as a subsidy, provided such inputs are imported within two years and sale of such entitlement is not made at a premium. (TN/RL/W/120) (India) -consider a generalized and aggregate rate of	

<i>Doha Proposals</i>	<i>Current Concerns</i>
<p>remission of customs duty instead of each unit availing duty concessions to take into account the problems faced due to large number of small and medium enterprises in developing countries. (TN/RL/W/120) (India)</p> <p>-when the exemption or the reimbursement exceeds the real charge which the product would have to pay in the exporting country, the difference could be considered as constituting a subsidy. (TN/RL/W/120) (India)</p>	
Article 4 – Remedies	
Article 4.5-permanent group of experts	<p>-strengthen the functioning of Permanent Group of experts. (TN/RL/W/112) (Canada)</p> <p>- what constitutes withdrawal of the subsidy necessarily depends upon the facts and circumstances surrounding the granting of the subsidy, including but not limited to, whether the benefits of the subsidy are allocated to future production. (TN/RL/W/139) (Australia)</p>
Article 4.7-withdrawal of subsidy	

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>- constituting the meaning of 'withdrawal of the subsidy' should consider whether there should be a distinction between recurring and non-recurring subsidies, whether there is a need to quantify the level of serious trade effects of subsidy, and whether the 'withdrawal of the subsidy' should not go beyond the serious trade effects. (TN/RL/W/139) (Australia)</p> <p>- specify how the special timeframe for prohibited subsidies can be reconciled with the generally applicable timeframes in the DSU. (TN/RL/W/112) (Canada)</p>	
Article 4.12-accelerated time frames		
Article 6 -Serious Prejudice		
	<p>-delete footnote 15 to Article 6.1(a) with respect to civil aircraft subsidies; add a footnote to Article 6.1(c) to clarify that 'enterprise' includes any successor or affiliated enterprise; add a new Article 6.1(e) to capture subsidies to a firm in a start-up situation, if the overall rate of</p>	<p>-subsidies distorting capacity should be considered as one situation of 'serious prejudice'</p>
Article 6.1-serious prejudice		

<i>Doha Proposals</i>	<i>Current Concerns</i>
<p>subsidization exceeds 15% of the total funds invested during the start-up period; extend Article 6.1 to developing country Members by deleting Article 27.8. (TN/RL/GEN/112/Rev.2) (Canada)</p> <p>-delete footnotes 15 and 16 with respect to civil aircraft subsidies; elaborate Article 6.1(b) to clarify that subsidies to cover operating losses associated with a particular product line, as distinguished from operating losses across an enterprise as a whole, should be deemed to result in serious prejudice; clarify the terms 'long-term solutions' and 'acute social problems' in Article 6.1(c); add a new Article 6.1(e) that includes paragraph 4 of Annex IV and relevant footnotes. (TN/RL/GEN/81) (Brazil)</p> <p>-clarify the displacement and impedance causation. (TN/RL/W/78) (US)</p> <p>-apply the market share analysis in Article 6.4 to the causation assessment in Article</p>	

Article 6.3—the effect of subsidy

	<i>Doha Proposals</i>	<i>Current Concerns</i>
Article 6.5-pricing undercutting	<p>6.3(a). (TN/RL/GEN/14, TN/RL/GEN/112, TN/RL/GEN/112/Rev.1) (Canada)</p> <p>-make distinctions in evidentiary requirements between the sub-paragraphs of Article 6.3; specify the representative period within the meaning of Article 6.3. (TN/RL/W/139) (Australia)</p> <p>-consider what factors should be considered when making the price comparisons between the subsidized product and the non-subsidized like product supplied to the same market. (TN/RL/W/139) (Australia)</p>	
Article 6.7 – exception to displacement or impediment resulting in serious prejudice	<p>-consider what standards and other regulatory requirements would be captured by Article 6.7(f). (TN/RL/W/139) (Australia)</p>	
<i>Annex IV – Calculation of the Total Ad Valorem Subsidization (paragraph 1(a) of Article 6)</i>	<p>-replace the cost-to-government approach prescribed in paragraph 1 of the Annex IV for the calculation of the total <i>ad valorem</i> subsidization with a benefit-to-receipt</p>	

<i>Doha Proposals</i>	<i>Current Concerns</i>
<p>approach. (TN/RL/GEN/112/Rev.2) (Canada); (TN/RL/GEN/81) (Brazil).</p> <p>-examine the relationship between the 15% deeming level of start-up subsidies in paragraph 4 of Annex IV and the 5% deeming level specified in Article 6.1(a). (TN/RL/W/135) (Australia)</p> <p>-delete paragraph 4 of Annex IV as it can be moved to Article 6.1, and delete paragraph 8 of Annex IV. (TN/RL/GEN/112/Rev.2) (Canada)</p> <p>-consider more viable remedies for serious prejudice, especially for Members with relatively small domestic markets and for certain specialized industries. (TN/RL/W/1) (Canada)</p>	
<i>Article 7 – Remedies</i>	<p>-specify Article 7.8 that ‘in determining appropriate steps to remove adverse effects of serious prejudice, the benefit of subsidies that were fully disbursed prior to the expiration of the period for compliance with an adopted panel</p>

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>or Appellate Body report, shall be allocated over the total production of the products to which the subsidy is properly attributable under generally accepted accounting principles'. (TN/RL/GEN/14, TN/RL/GEN/112, TN/RL.GEN/112/Rev.1) (Canada)</p>	
<i>Annex</i>		
<i>V – Procedures for Developing Information Concerning Serious Prejudice</i>	<p>-provide guidance for WTO panels to conduct 'fact-intensive' serious prejudice investigations. (TN/RL/GEN/14) (Canada)</p> <p>-consider the revival of non-actionable subsidies. (TN/RL/W/1) (Canada)</p> <p>-launch an exploratory process to decide on the types of non-actionable subsidies. (TN/RL/W/41/Rev.1) (Venezuela and Cuba)</p> <p>-lower the benchmarks for non-actionable subsidies to better benefit developing countries, and introduce new categories of non-actionable subsidies aimed at achieving legitimate</p>	<p>-EC's proposal on reinstating environmental subsidies as non-actionable subsidies would place countries with financial constraints at a disadvantageous position compared to developed countries. (TN/RL/W/40) (India)</p> <p>-it is unnecessary in every instance to evaluate non-actionable subsidies from the development dimension and the</p>
<i>Article</i>		
<i>8 – Identification of Non-Actionable Subsidies</i>		<p>-whether reinstate and expand non-actionable subsidies</p>

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>development goals. (TN/RL/W/108) (Cuba and Venezuela)</p> <p>-consider how to approach subsidies for environment protection. (TN/RL/W/30) (EC)</p> <p>-consider the development dimension in any assessment of non-actionable subsidies, e. g. a similar test as the export competitiveness test in Article 27.6 of the ASCM. (TN/RL/W/61) (Australia)</p> <p>-consider how to evaluate the development dimension of subsidies and how to adopt criteria to allow effective use of non-actionable subsidies. (TN/RL/W/79) (Egypt)</p> <p>-facilitate greater involvement of the WTO Secretariat by regularly monitoring the notification and reporting back to Members. (TN/RL/W/260) (EU)</p> <p>- Members reporting the CVD actions in semi-annual reports would provide a 'supplementary' notification giving details of subsidies that are</p>	<p>need for such evaluation would depend on the nature of rules and standards which might be agreed for use by developing and least-developed Members. (TN/RL/W/70) (Venezuela and Cuba)</p> <p>-whether or not to introduce penalties for members failing to comply with notification obligations</p> <p>-whether or not to introduce specific transparency rules for public bodies and SOEs</p>
<i>Article 25- Notifications</i>	<p>-a too complex notification system as proposed by the EU is difficult to be enforced. (TN/RL/W/57) (Egypt)</p>	

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>subject to definitive CVD measures, if such subsidies have not been notified by the subsidizing Member. (TN/RL/W/263) (EU)</p> <p>-notified subsidies would benefit from a rebuttable presumption of non-actionability or an increase in the standards for action under the Part II or III of the ASCM. (TN/RL/W/260) (EU)</p> <p>-provide disincentives for notification failures, including: (i) generating a review procedure through an expedited WTO dispute settlement procedure or by referring the matter to an empowered Permanent Group of Experts (TN/RL/W/30) (EC); (ii) presuming those subsidies that are partially or never notified as actionable. (TN/RL/W/260) (EU)</p>	
<i>Article 27 – Special and Differential Treatment of Developing Country Members</i>	<p>-inject flexibility in S&DT provisions. (TN/RL/W/57) (Egypt); (TN/RL/W/68) (India)</p>	<p>-the legitimacy of self-designation of developing country status and the access to relevant S&DT</p>

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	-consider S&DT for developing countries provided that this would be for a strictly temporary period and would be drawn up only following an agreement on rules for non-exempted countries. (TN/RL/W/30) (EC)	
	-it is unnecessary to expand the S&DT to allow greater undisciplined subsidization on the part of developing countries. (TN/RL/W/33) (US)	
	-add a footnote to Article 27.2(b) that 'In the case of developing country Members included in Annex VII, the eight-year period shall commence from the year in which they graduate out of Annex VII'. (TN/RL/GEN/177) (India)	
Article 27.2-the exemption of Article 3.1(a)	-amend Article 27.2 so that the prohibition in Article 3.1(a) does not apply to export subsidies granted by developing countries where they account for less than 5% of the f.o.b. value of the product. (TN/RL/W/4) (India)	

	<i>Doha Proposals</i>	<i>Current Concerns</i>
Article 27.3-the exemption of Article 3.1(b)	-the prohibition of Article 3.1(b) on import substitution subsidies shall not apply to developing Members. (TN/RL/W/4) (India)	
Article 27.4-further explanation of Article 27.2(b)	-add a footnote to Article 27.4 that 'This will also include developing country Members who may graduate out of Annex VII'. (TN/RL/GEN/177) (India)	
Article 27.5-termination of export subsidies	- address the eventuality that a developing Member has reached export competitiveness in a particular product once and then lost it again during the ensuing eight year phase out period, or a developing Member lost expert competitiveness in a particular product after the end of the eight year phase out period. (TN/RL/GEN/136) (Egypt, India, Kenya, and Pakistan)	
Article 27.6-export competitiveness	-add a footnote to Article 27.6 to specify 'to determine export competitiveness of a particular product, the share of that product	

	<i>Doha Proposals</i>	<i>Current Concerns</i>
	<p>in world trade shall be calculated on a multi-year moving average basis for two consecutive years'. (TN/RL/GEN/136) (Egypt, India, Kenya, and Pakistan)</p> <p>-CVD on imports from developing countries should be restricted only to that amount by which the subsidy exceeds the <i>de minimis</i> level, and</p>	
Article 27.10- termination of CVD investigation	<p>CVD should not be imposed on imports from developing countries where the total volume of imports is negligible and such negligible level should be 7 % of total imports. (TN/RL/W/4) (India)</p>	
Article 27.11- specification for certain developing country Members	<p>-amend Article 27.11 to raise the <i>de minimis</i> level of subsidization above 3%, below which CVD shall not be imposed on imports from developing countries. (TN/RL/W/4) (India)</p>	

