

The WTO Subsidy Discipline: Evolution, Structure and Current Challenges

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Seminar Overview

- **Part I — Evolution & Rationale of International Subsidy Discipline**
- **Part II — Key Features of the SCM Agreement**
- **Part III — Industrial Policy Resurgence, Climate Change, and Subsidy Reform Debates**

PART I

Evolution & Rationale of International Subsidy Disciplines

Why Does International Law Regulate Subsidies?

- Subsidies = financial contribution by a government to a particular economic activity or actor — money, a tax break, a cheap loan, goods at below-market price — without receiving full market value in return
- Subsidies can **distort international trade**:
 - They can undermine the market access expectations established through tariff concessions under the WTO framework
 - They can trigger subsidy 'wars'
- Subsidies can serve important **policy objectives**: such as reducing pollution, addressing climate change and environmental degradation, supporting research and development (R&D), fostering the development of disadvantaged regions
- → WTO subsidy discipline does not currently acknowledge these benefits as normative justifications for subsidy use

GATT (1947)

- Subsidies only **partially addressed** by the GATT
- No definition of 'subsidy'
- Art. XVI — **Notification** requirement for subsidies that either increase exports or reduced imports in the subsidizing country + **consultation** mechanism for affected countries if such subsidy caused or threaten to cause serious prejudice
- Art. VI — Countervailing duties (**CVDs**) to offset injury from subsidised imports
- Art. XXIII — Challenge subsidies nullifying negotiated tariff concessions → thereby frustrating legitimate market access expectations

Tokyo Round Subsidies Code (1979)

- First general comprehensive international framework governing the use of subsidies and the application of CVDs
- Dual-track structure:
 - Track I (Arts. 2–6): definition of injury + detailed CVDs procedure
 - Track II (Arts. 8–9): stronger export subsidy prohibition + domestic subsidy disciplines
- Art. 11: acknowledged that domestic subsidies may pursue **legitimate policy objectives** (e.g. regional development, environment, R&D)
- Critical weakness: **plurilateral** — binding only on signatories, not all GATT contracting parties
- The concept of ‘subsidy’, undefined under the GATT, remained not explicitly defined in the Tokyo Round Subsidies Code

The WTO (1995)

- Applies to **all WTO Members**
- First comprehensive, legally binding definition of a subsidy
- Unified Dispute Settlement Mechanism (**DSM**): enables the parties to challenge subsidies that have adverse trade effects in either the domestic market of the subsidizing country or in third-country markets
- Three key treaties governing subsidies:
 - Subsidies and Countervailing Measures (SCM) Agreement
 - Agreement on Agriculture
 - General Agreement on Trade in Services (GATS)
- SCM Agreement prevails over GATT 1994 in case of conflict (General Interpretative Note, Annex 1A)

PART II

Key Features of the SCM Agreement

SCM Agreement — Definition and Scope

- Applies exclusively to **trade in goods** (not services)
- The concept of subsidy:
 - **Financial contribution** by a government or any public body (Art. 1.1(a) SCM): direct transfers (grants, loans, equity), foregone revenue (tax breaks), provision of goods/services
 - **Benefit** conferred (Art. 1.1(b) SCM): advantage compared to what would be available on the market
 - **Specificity** (Art. 2 SCM): targeted at a particular enterprise, industry, or group of enterprises — broadly available measures fall outside scope

The Traffic-Light System

RED — PROHIBITED (Art. 3 SCM Agreement)

- Export subsidies (contingent on export performance)
- Local content subsidies (use of domestic over imported goods)
- Per se trade-distorting
- Must be immediately withdrawn when challenged

YELLOW — ACTIONABLE (Art. 5 SCM Agreement)

- Not prohibited per se
- Challengeable if causing adverse effect:
 - Injury, nullification or serious prejudice (Art. 5 SCM Agreement)
- Remedy: eliminate adverse effects (not necessarily withdraw subsidy)

GREEN — NON-ACTIONABLE (expired — Art. 8 SCM Agreement)

- Permitted under the SCM Agreement
- E.g. Subsidies for regional development; environmental protection; R&D
- ⚠ EXPIRED 1 January 2000 — never renewed

Enforcement: CVDs vs. the Dispute Settlement Mechanism

Countervailing Duties — Unilateral

- Arts. 10–23 SCM Agreement + GATT Art. VI
- Requires: (1) subsidised import, (2) injury to domestic industry, (3) causal link
- CVDs can only be imposed if the prejudice occurs within the market of the importing country
- Neither the unilateral nor the multilateral mechanism permits action based on past harm suffered, nor do they allow for the recovery of previously granted subsidies

Dispute Settlement Mechanism — Multilateral

- Arts. 4 & 7 SCM Agreement take precedence over the general Dispute Settlement Understanding (DSU) provisions
- The multilateral system can cover all subsidies, regardless of where the trade-distorting effects occur
- This mechanism provides a framework for resolving disputes through consultations, mediation, and, if necessary, adjudication
- Remedy: withdraw or eliminate adverse effects
- ⚠ Appellate Body non-functional since Dec. 2019
- Multi-Party Interim Appeal Arbitration Arrangement (MPIA): to preserve the system's 'binding character and two levels of adjudication'

Monitoring

- Art. 25 SCM Agreement requires that any specific subsidy must be notified
- Subsidy information shall include the form of a subsidy, purpose, amount, duration etc.
- Due to the **lack** of any substantial **penalty** for failing to notify subsidies, WTO Members almost never fully comply with this obligation
- The **Subsidies Committee** (Art. 24 SCM Agreement) role is primarily to examine subsidy notifications → its effectiveness is limited due to the lack of notifications
- **Permanent Group of Experts** (Art. 24 SCM Agreement) has an advisory role. It has no visible role in practice due to the unwillingness of Member to share their public spending choices and the fear that any opinion might affect a future dispute before a DS panel

PART III

Industrial Policy Resurgence, Climate Change, and Subsidy Reform Debates

The Global Resurgence of Industrial Policy

- The global return of industrial policy reflects the convergence of major challenges:
 - Climate crisis
 - Geopolitical uncertainty
 - Need for economic resilience
 - Development inequalities
- These pressures are fuelling a new wave of industrial and green policy measures

Climate Change as a Driver

- Climate goals require substantial **public investment**:
 - Triple renewable energy capacity by 2030, double energy efficiency, transition away from fossil fuels
- Two main subsidy **objectives**:
 - Making high-emission legacy industries more sustainable: steel, aluminium, chemicals
 - Fostering markets for low-carbon technologies: solar, wind, batteries, green hydrogen
- **Core tension**: public financing of green industrial policies increasingly places national decarbonisation efforts in direct conflict with WTO subsidy rules

Key Issues

ISSUE 1

Distinction bad/good subsidies

- No distinction based on policy objective
- Classification = level of trade distortion only
- Local content requirements → automatic prohibition
- Green-light category expired in 2000 — never renewed

ISSUE 2

Transparency

- No sanctions for non-notification
- Members notify late, incompletely, or not at all
- Subsidies Committee cannot perform peer-review
- Proposals for rebuttable presumption: not adopted


ISSUE 3

Remedies


- Remedies are exclusively prospective → No recovery of past subsidies
- AB paralysis has significantly weakened the enforceability of remedies
- CVDs cannot address third-market distortions + often misused for protectionist purposes

Reform Options


OPTION 1 SCM Amendment

- Directly amend the SCM Agreement
- Restore/redesign the non-actionable category for green subsidies
- Strengthen transparency & notification
- Improve remedies
-  Currently politically and legally difficult to achieve

OPTION 2 Flexible Interpretation

- Work within existing rules
- E.g.: green subsidies could be considered as non 'specific' → outside SCM scope
- Law-making through adjudication: DSM as adaptation tool
-  AB currently non-functional

OPTION 3 Plurilateral Agreement

- Coalition of willing countries
- No consensus of all Members required
- Plurilateral within the WTO framework or standalone agreement linked to WTO principles
- Currently standalone appears most realistic option to pursue
-  For practical effectiveness, it would need participation by the US, EU, and China

Conclusion

- 75+ years of evolution: GATT → Tokyo Round Subsidies Code → SCM Agreement
- **SCM achievements:** first binding definition of subsidy; applies to all WTO members; DSM going beyond unilateral CVD actions
- **SCM structural weaknesses:** no distinction between bad and good subsidies; lack of transparency; ineffectiveness of remedies in disciplining subsidies
- These weaknesses are now acute: global return of industrial policy + urgency of climate transition
- **Urgency** to address this lack of effectiveness of international subsidy control discipline for both **trade** and **climate**. Main risks:
 - Copycat behavior among countries
 - Increase in the adoption of CVDs
 - Climate objectives these green subsidies aim to achieve could be undermined

Thank you

Questions & Discussion

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