



CENTRE FOR TRADE AND INVESTMENT LAW, NEW DELHI

Virtual Panel Discussion on *THE FUTURE OF SUBSIDY REGULATION AT THE WTO*

during the
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Discussion Note

There is a call for “renewed engagement” to “ensure that the WTO is fully ready to meet the challenges of a changing global economy”.¹ The demand for WTO reforms emphasise the need to keep the WTO system “fit for purpose”.² There are strong views that the current WTO disciplines on subsidies are weak and ineffective.³ Against this backdrop, the United States (US), the European Union (EU) and Japan issued a Joint Statement of the Trilateral Meeting (Trilateral Statement) on January 14, 2020 to propose ways to “strengthen existing WTO rules on industrial subsidies”.⁴ Another recent development is the White Paper on foreign subsidies published by the EU on 17 June 2020.⁵ Again, the G-20 Trade and Investment Ministers, in their Riyadh communique, also affirmed the need to “strengthen international rules on industrial subsidies”.

JOINT STATEMENT OF THE TRILATERAL MEETING OF THE US, EU AND JAPAN

The Trilateral Statement raises important questions regarding the future of subsidy regulations at the WTO and makes a strong push to introduce the existence of market-oriented conditions as an integral element while participating as part of an open, ruled based multilateral trading system.

There is an argument that the Trilateral Statement is merely a political declaration of intent outlining the vision of the US, EU and Japan for the expansion of subsidy disciplines at the WTO. The Trilateral Statement seeks to change the structure of the SCM Agreement by collapsing the distinction between prohibited and actionable subsidies, and by introducing presumptions and reversing the burden of proof. It does so in two ways: first, by expanding the

¹ DDG Wolff urges G20 trade ministers to step up engagement on WTO reform (WTO News, 22 September 2020) <https://www.wto.org/english/news_e/news20_e/igo_22sep20_e.htm> (accessed 25 September 2020).

² Ibid.

³ Robert E. Lighthizer, *How to Set World Trade Straight* (The Wall Street Journal, 27 August 2020) <<https://www.wsj.com/articles/how-to-set-world-trade-straight-11597966341>> (accessed 25 September 2020)

⁴ *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, 14 January 2020.

⁵ European Commission, *White Paper on Levelling the Playing Field as regards Foreign Subsidies*, COM (2020) 253 Final, Brussels, 17 June 2020.



list of Prohibited Subsidies under Article 3.1 of the SCM Agreement; and second, by amending the definition of ‘public body’⁶ under Article 1.1.

The Trilateral Statement suggests that the current list of prohibited subsidies provided for in Article 3.1 of the SCM Agreement is ‘insufficient to tackle market and trade-distorting subsidization’ which exist in certain countries. It, therefore, proposes the addition of four new types of *prohibited subsidies* – (i) unlimited guarantees; (ii) subsidies to an ailing enterprise in the absence of a credible restructuring plan; (iii) direct forgiveness of debt; and (iv) subsidies to enterprises unable to obtain financing from independent commercial sources. The proposal, in its current form, should not be treated as a proposal to amend the SCM Agreement *as such*, but rather as a suggestion on how subsidy disciplines should evolve in the future. Accordingly, there is a need for the WTO Members to get clarity on the intent and contours of the disciplines before a well-considered view on the Trilateral Statement is formulated. This is especially relevant for the four types of new subsidies that are proposed to be prohibited.

The Trilateral Statement enlists subsidies which are overly broad in their description, for instance, (i) “excessively large subsidies”; (ii) “subsidies that prop up uncompetitive firms and prevent their exit from the market”; (iii) “subsidies creating massive manufacturing capacity, without private commercial participation”; and (iv) “subsidies that lower input prices domestically in comparison to prices of the same goods when destined for export”. It is important to examine how these broad categories of subsidies can be identified in the first place, and later, how they can be properly addressed under subsidies disciplines of the WTO.

While this is only a proposal for future disciplines under the SCM Agreement, it is appropriate to ask the question whether the SCM disciplines which are subject to mandatory dispute settlement, are ideally suited to deal with the aforesaid categories of subsidies. In this context, it may be useful to look at various initiatives pursued in forums including the OECD and certain preferential trade agreements. In this connection, it is also pertinent to ask whether these proposals are predominantly targeted at certain types of economic developments models and whether the new disciplines can have unintended consequences for developing and least-developed Members.

In addition to the above, issues related to “benefit” and “specificity” are key issues related to the SCM Agreement. Article 2 of the SCM Agreement deals with the subsidies specific to an enterprise or industry or group of enterprises or industries (“certain enterprises”). Article 2 does

⁶ To be regulated by the SCM Agreement, a measure must fall within the definition of subsidy within Article 1. Two essential elements of a subsidy are: a financial contribution by the government or a public body or income or price support and a benefit thereby conferred. The Appellate Body in *US – Anti-Dumping & Countervailing Duties (China)* has held that the term ‘public body’ covers entities that possess, exercise or are vested with governmental authority.⁶ Similarly, in the *US – Carbon Steel (India)*, the Appellate Body ruled that the control of government cannot be the sole determinative factor to treat an enterprise as a public body.⁶ Amongst other debatable proposals, the Trilateral Statement acknowledges the ineffectiveness of Appellate Body’s interpretation of the term ‘public body’ in catching numerous subsidies provided through the state-owned enterprises. The broader definition of public body is likely to bring within its purview several entities that are owned by the government or perform some function under the direction of the government.⁶ An important question which arises out of this proposal is that what are the implication of a fixed definition as against a case to case strategy adopted by the Appellate Body.



not provide a clear definition of the terms ‘enterprise or industry or group of enterprises or industries’ or what constitutes certain enterprises. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body noted that it ‘involves “a certain amount of indeterminacy at the edges”’,⁷ which subjects it to wider interpretations. The use of de facto specificity is also a bone of contention.

Regarding the transparency in the notification of subsidies, the Trilateral Statement builds on the EU Modernization proposal that suggested moderate consequences of presuming a measure to be a subsidy on non-notification. However, the Trilateral Statement proposes to consider non-notified subsidies as prohibited to incentivize proper notification by parties. Under the EU Modernization Proposal, a non-notified subsidy would have been presumed to be a subsidy.⁸ Linking the prohibition of subsidy with a procedural requirement may have its own complications.

The Trilateral Statement provides an opportunity to reflect on the renewed focus on the reforming the SCM Agreement. It is also important to assess whether these proposals can lead to constructive efforts in reforming the SCM Agreement and the extent to which such proposals can elicit broad-based support from the WTO Membership.

THE EU’s WHITE PAPER ON FOREIGN SUBSIDIES

On June 17 June 2020, the EU published a White Paper on Levelling the Playing Field as regards Foreign Subsidies (White Paper) which addresses the subsidies which may have been provided by a non-EU WTO Member State, directly or indirectly, to the EU-based entity. These types of subsidies are being called transnational subsidies or cross-border subsidies or simply, foreign subsidies. Through the White Paper, the EU has suggested that the SCM Agreement does not cover transnational subsidies and due to lack of clarity and regulation on such subsidies, the domestic industries of the European Single Market face detrimental and far-reaching consequences. The White Paper suggests that transnational subsidies have created a distortion to the competition in the EU Market primarily because these remain outside the scope of the EU State aid control regime.⁹ At present, the EU White Paper is open for public comments and consultations before the proposals can become an EU legislation.

The White Paper discussed three *Modules* of subsidies viz. distortive transnational subsidies, distortions caused by the acquisition of EU entities by companies receiving transnational subsidies and the manner in which transnational subsidies distort the EU public procurement process/market. An important element of the White Paper is the acquisition of EU firms by non-EU entities. The White Paper proposes that companies intending to acquire an EU firm or participate in the EU procurement process would need to disclose foreign funding it might have received in the past three years.¹⁰ There is, however, a presumption that acquisitions of less than *de minimis* threshold of €200,000 does not create any negative effect. At the same time, the White

⁷ *Ibid*, para. 373.

⁸ European Commission, *Note for the Attention of the Trade Policy Committee: WTO’s Proposals on WTO Modernisation*, WK 8329/2018 INIT, 5 July 2018.

⁹ *Supra* note 4, p. 5.

¹⁰ *Supra* note 4, p. 15.



Paper introduces the concept of the ‘EU interest test’ which involves an assessment of the positive effect in contrast to the distortive effects of the subsidies.

In this regard, the Panel discussion aims to analyse the implications of the White Paper especially in relation to reforming the global subsidy disciplines.

THE INTERNATIONAL WORKING GROUP ON EXPORT CREDITS

The third category of focus will be on export credits. Export credits schemes include insurance, finance arrangements, guarantee, etc which are offered by the public or private financial institutions. Export credits have become a vital source of finance in sectors such as airlines, shipping and telecommunication. Long-term export credit schemes are currently governed under the Organisation for Economic Co-operation and Development Arrangement on Officially Supported Export Credits, 1979 (the Arrangement) which provides for terms and conditions to be complied with by the member’s Export Credit Agencies (ECAs). While the Arrangement is considered as ‘soft law’¹¹, the implicit reference by incorporation in the SCM Agreement provides a safe harbour from WTO’s general prohibition of export subsidies.

Article 3 of the SCM Agreement stipulates a prohibition on granting or maintaining subsidies contingent in law or in fact on export performance, as either sole or one of the several conditions. Under proviso to Item (k), Annex I of the SCM Agreement, export credit schemes constitute an export subsidy under the SCM Agreement except where they comply with the Arrangement. Considering that the majority of members of the Arrangement are from developed countries, the Arrangement has suffered from its limited membership. The new active members such as China, India, Italy and Brazil¹² continue to remain outside the purview of the Arrangement. The limited flexibilities under the Arrangement have been overused for the introduction of more competitive programmes resulting in the shrinking of the scope of Arrangement in terms of volume and geographical coverage and also in the context of services and sustainable development. The US, EU and Japan have declared that these countries intend to cooperate on the development of a new set of guidelines for government-supported export credits.¹³

Given the increasing importance of export credit for developing countries, especially in the context of the proviso to Item (k), Brazil raised the issue that the Arrangement was negotiated outside the WTO system which did not take into account the concerns of the whole WTO membership, and hence, created an uneven level playing field among the WTO Members. This led to the creation of the International Working Group (IWG) on export credits in 2012. It is understood that the new IWG framework will be a ‘successor’ to the Arrangement for the purpose of the proviso to Item (k).

¹¹ Kamala Dawar, *Official Export Credit Support: Competition and Compliance Issues* 54(3) *Journal of World Trade* pp. 373-396 (2020).

¹² Report of the US Congress on Global Export Credit Competitiveness, p. 23, June, 2018.

¹³ *Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union*, 25 September 2018.



An important concern of the developing countries is the inclusion of short-term credits. The OECD Arrangement in its present form only covers Medium to long term financing given for a period of two years or more. Most of the trade financing including export credits is in the nature of short-term credits, insurances or guarantees.¹⁴ Major developing countries rely on the short-term credits to help exporters maintain liquidity. One important question that arises for consideration is – considering the growing importance of short-term credits, should the IWG framework extend the safe haven provisions also to short-term credits in addition to medium-to-long term credits?

N.B. Please note the afore-mentioned issues are only illustrative and the discussions can also focus on issues which are not properly enlisted in this note.

¹⁴ World Trade Organization, *The Challenged of trade financing*, <https://www.wto.org/english/thewto_e/coher_e/challenges_e.htm#:~:text=Trade%20finance%20is%20at%20the,of%20a%20short%2Dterm%20nature> (accessed 25 September 2020).