WTO Subsidy Rules in an Era of Industrial Policy: Implications for the Multilateral Trading System

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1. Introduction

Subsidy disciplines occupy a central place in the architecture of the multilateral trading system. Since its adoption at the end of the Uruguay Round, the WTO Agreement on Subsidies and Countervailing Measures ('WTO ASCM' or 'the Agreement') has represented one of the most significant advances of the multilateral trading order, introducing for the first time a general definition of subsidy,[2] a specificity test, a taxonomy of prohibited and actionable measures, and a dedicated institutional architecture – the Committee on Subsidies and Countervailing Measures – to oversee its operation.

Yet more than a quarter of a century since its entry into force, the ASCM is increasingly showing its age. Two gaps stand out. First, transparency: the system rests on an incentive structure that does not reward, and barely penalises the absence of, notification. Second, substantive discipline: the legal

[1] This chapter draws on and develops the presentations given at the University of Bologna on 5 May 2026. The authors used Claude (Anthropic) to generate a first draft of the paper on the basis of (i) the research outline and the PowerPoint presentation prepared for the seminar, and (ii) the authors' previous work on the topic. The AI tool was not used to generate new or original ideas. The authors have reviewed and edited the content of the initial draft as needed and take ultimate responsibility for the content of the published work.

[2] Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14 (WTO ASCM), Article 1, providing the first formal, general definition of 'subsidy' in the multilateral trading system.

standards developed through WTO jurisprudence have proven both too demanding to capture some of the most policy-relevant forms of subsidisation, and too narrow to reach new instruments of industrial policy, notably those associated with China's state-directed economic model.

Against this background, the multilateral rule-book has proven remarkably resistant to updating. This chapter examines both gaps in turn (Sections 2 and 3), before turning to the institutional question of where reform might realistically occur (Sections 4–6): whether at the multilateral level, through plurilateral initiatives, or – as increasingly appears necessary – through the diffusion of subsidy disciplines via preferential trade agreements ('PTAs') and national legislation, a process that some have started to describe as the emergence of a new 'common law' of subsidies and state-owned enterprises ('SOEs').

2. The Transparency Deficit

Transparency has been a foundational, if imperfectly realised, ambition of the GATT/WTO system since 1947. Already Article XVI of the GATT imposed a basic notification duty on any contracting party granting a subsidy that increased exports or reduced imports, coupled with a duty to enter, upon request, into consultations where serious prejudice was caused to another party.[3] The WTO ASCM built on this foundation without fundamentally altering its logic: it introduced the first formal definition of subsidy, confined the notification duty to specific subsidies, and specified in some detail the content notifications should contain – form, financial value, objective, duration, and statistical data permitting an assessment of trade effects.

The persistent problem, however, is one of incentives. As has been influentially argued, the largest subsidisers are frequently the least transparent, and the WTO system, reliant as it is on self-reporting, does not penalise the breach of the notification duty in any meaningful way.[4] This is not, at bottom, a problem of technical capacity: it is a problem of institutional design that offers no reward for compliance and imposes no cost for its absence. Article 25.7 ASCM specifies that notification 'does not prejudge' a measure's legal status, precisely with a view to reducing the fear of self-incrimination that has haunted the system since the 1960s;[5] but this assurance has done little to alter the underlying calculus of governments, especially once the WTO's comparatively muscular dispute settlement mechanism entered into force. Paradoxically, the very success of WTO adjudication appears to have made notification more, not less, risky in the eyes of Members.

The consequence is a system in which notifications, where they exist at all, are frequently incomplete, delayed, or vague, and in which the Committee on Subsidies and Countervailing Measures – the body meant to deliberate on this information – is correspondingly starved of the raw material for meaningful peer review. Reform proposals exist: better use of the Permanent Group of

[3] General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 187 (GATT 1947), Article XVI:1 (Section B of Article XVI was added by the 1955 Review Session). See also GATT 1947, Article X on the general obligation of publication of trade-related laws and regulations.

[4] Terry Collins-Williams and Robert Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows' (2010) 9 World Trade Review 551.

[5] Article 25.7 WTO ASCM. See GATT Panel, 'Operation of the Provisions of Article XVI' (L/1442 and Add.1–2, adopted 21 November 1961) BISD 10S/201, 206, para 19, identifying fear of self-incrimination as an obstacle to notification as early as 1961.

Experts, the cross-notification mechanism foreseen – but barely used – under Article 25.10 ASCM,[6] or a decoupling of the transparency function from the shadow of dispute settlement. None of these, however, addresses the more fundamental institutional question developed in Section 4 below: whether a system built on self-reporting by more than 160 Members, several of whom have every incentive not to report, can be fixed through incremental reform alone.

3. The Difficulty of Disciplining Subsidies

Even where information is available, WTO subsidy disciplines are not well equipped to police the practices that most concern governments today. Two distinct difficulties can be identified.

3.1 The 'public body' problem and the high threshold of the law

The first difficulty concerns the legal standards developed through more than two decades of WTO litigation, particularly at the hands of the Appellate Body.[7] The interpretation of 'public body' under Article 1.1(a)(1) ASCM is emblematic.[8] The Appellate Body's test – requiring that an entity 'possess, exercise or [be] vested with governmental authority' to qualify as a public body – has been widely criticised as both under-inclusive, in that it may exclude entities that are functionally instruments of State industrial policy, and difficult to apply, in that it demands an intensive, fact-specific inquiry into corporate governance for which WTO panels are ill-suited.

3.2 Cross-border financial contributions and new forms of subsidisation

The second, and arguably more consequential, difficulty is that the ASCM's architecture presupposes that a financial contribution is made by the government of the Member in whose territory the recipient is located. This assumption sits uneasily with contemporary patterns of State-directed finance, particularly the cross-border deployment of Chinese capital through instruments such as the Belt and Road Initiative, State-owned banks, and State-owned enterprises operating abroad.[9] Whether, and how, the ASCM's definition of subsidy can be construed to capture financial contributions that cross a border before reaching their ultimate beneficiary remains genuinely unsettled.

The cross-border subsidy is not, in fact, a new problem. The question arose during the negotiation of the 1979 GATT Subsidies Code, resurfaced in the United States countervailing duty cases of the

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[6] Article 25.10 WTO ASCM (cross-notification by Members other than the subsidising Member), a mechanism that has been rarely and only selectively used in practice.

[7] See Pramila Crivelli and Luca Rubini, '"Flying High in a Plane": Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft (WT/DS316/AB/RW)' (2020) 19 World Trade Review 316, discussing the demanding legal standards that have emerged from WTO subsidy jurisprudence.

[8] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China))* (adopted 25 March 2011) WT/DS379/AB/R, para 317. See generally Michael Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?' (2012) 46 Journal of World Trade 979, on the 'public body' interpretation adopted by the Appellate Body.

[9] See Victor Crochet and Vineet Hegde, 'China's "Going Global" Policy: Transnational Subsidies under the WTO SCM Agreement' (2020) 23 Journal of International Economic Law 841.

early 1980s, and has since recurred in a stable set of configurations sharing a single source: the assumption, built into the definition of a subsidy, that support can be attributed to territorially bounded State action.[10] What the recent disputes expose, in other words, is a drafting choice rather than a novelty in the conduct of any particular Member.

In the absence of a negotiated response, the matter has so far been left to the ingenuity of investigating authorities. The European Union's own trade remedy practice has pushed the boundaries of the existing text – for instance, in imposing countervailing duties on Egyptian exports benefiting from Chinese-funded support, relying on the International Law Commission's Articles on State Responsibility to attribute the Chinese financial contribution to the Egyptian government.[11] Such interpretation, however understandable as a stop-gap, risks conflating secondary rules of attribution with the primary rules that define what a subsidy is.[12] The United States has taken the opposite route, repealing in 2024 the regulation barring the countervailing of transnational subsidies and thus removing the territorial limit altogether.[13] Neither approach substitutes for a negotiated rule, and both leave the underlying assumption in place.

The question has now been addressed, for the first time, in WTO dispute settlement. In DS616 the Panel examined the EU's countervailing duties on stainless steel from Indonesia, where the Commission had treated financial contributions of Chinese origin as subsidies of the Government of Indonesia, attributing them on an 'inducement' theory, invoking Article 11 of the ILC Articles on State Responsibility. The Panel rejected the inducement route, holding that Article 1.1(a)(1) ASCM sets out a closed definition that does not permit government-to-government inducement to bring a measure within its scope, while expressly reserving the question whether conduct 'acknowledged and

[10] On the origins of the territorial assumption in the Tokyo Round negotiations, see RR Rivers and JD Greenwald, 'The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences' (1979) 11 Law and Policy in International Business 1447; Gary N Horlick, 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures' (2013) 8 Global Trade and Customs Journal 278, 297.

[11] See, eg, Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt [2020] OJ L189/1; Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt [2020] OJ L201/10, in which the European Commission relied on the International Law Commission's Articles on State Responsibility to impute a Chinese financial contribution to the Egyptian government.

[12] For the underlying methodological objection – that this approach conflates draft secondary rules on attribution of State responsibility with the primary rules defining a subsidy – see Joost Pauwelyn, 'Treaty Interpretation or Activism? Comment on the AB Report on United States – ADs and CVDs on Certain Products from China' (2013) 12 World Trade Review 235, making an analogous point regarding the Appellate Body's reasoning in *US – Anti-Dumping and Countervailing Duties (China)* (n 8).

[13] US Department of Commerce, 'Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws' (2024) 89 Fed Reg 20766, repealing 19 CFR § 351.527 with effect from 24 April 2024; Tariff Act of 1930 § 701, 19 USC § 1671. On the EU's attribution practice, see Case T-480/20 *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:T:2023:90 and Case T-540/20 *Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:T:2023:91, upheld in Joined Cases C-269/23 P and C-272/23 P *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission* ECLI:EU:C:2024:984, without endorsing the reliance on the ILC Articles; Luca Rubini, 'Are Transnational Subsidies Regulated by EU and WTO Law? The General Court Has Spoken (Cases T-480/20 and T-540/20)' (RSC Policy Paper 2023/09, European University Institute 2023); Victor Crochet and Marcus Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law' (2021) 20 World Trade Review 343.

adopted' by another government might ever be attributed.[14] Significantly, however, it did not decide the prior question of whether transnational subsidies as such may be countervailed under the ASCM, an issue the parties had not put to it. Within the context of a non-operational Appellate Body, the report has been appealed into the void.[15] The definitional question thus remains, for all practical purposes, where the drafters left it.

The cumulative effect of these two difficulties – a demanding 'public body' standard and an uncertain reach over cross-border financial contributions – is that the ASCM has struggled to capture precisely the forms of subsidisation most salient in the current wave of industrial policy competition. Faced with this gap, several major trading powers have turned to unilateral remedies and to creative readings of existing disciplines, rather than waiting for multilateral reform that shows little sign of materialising. The EU's Foreign Subsidies Regulation is perhaps the clearest example of this trend: a unilateral instrument, modelled in substance on EU State aid control, designed to fill a gap that the WTO rule-book – in the assessment of the Commission itself – does not adequately address.[16] Another notable example can be found in the US with the repeal of the old 'transnational subsidy rule', thus allowing the investigation and countervail of transnational subsidies.[17]

Whatever its merits, the emergence of such instruments illustrates a broader dynamic: where multilateral consensus cannot be reached, the major trading powers do not simply wait – they act, whether through the negotiated diffusion of their own standards (Section 6 below) or through unilateral coercion.

4. From Multilateralism to Plurilateralism: Where Should Reform Happen?

Given the transparency and substantive gaps identified above, and the WTO's now well-documented inability to update its own rule-book – the fate of the Doha Round being the starkest illustration – a threshold institutional question arises: is the multilateral level still the right place to pursue reform?

There are strong reasons to think that it remains, in principle, the first-best option. Subsidy disciplines are inherently difficult to conceive on a narrow geographical basis: a discipline binding only a subset of trading partners, while leaving the largest subsidisers outside its scope, risks simply displacing distortive practices rather than curbing them. More fundamentally, how can you really regulate a subsidy and its effects for some markets only? Yet the realpolitik of the WTO's consensus-based decision-making, combined with the evident lack of appetite among the largest Members to bind themselves further, counsels a more pragmatic route: plurilateralism.

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[14] Panel Report, *European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia* (circulated 2 October 2025, not adopted) WT/DS616/R, paras 7.55–7.103. See Luca Rubini, 'WTO Panel Report, European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia, WT/DS616/R, Circulated on 2 October 2025' (2026) 53(1) Legal Issues of Economic Integration 95.

[15] The European Union notified its appeal on 21 November 2025, notwithstanding the non-operational Appellate Body, and Indonesia filed a cross-appeal on 27 November 2025.

[16] Commission, 'White Paper on Levelling the Playing Field as regards Foreign Subsidies' COM (2020) 253 final; Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

[17] See Luca Rubini, '"We are all just prisoners here, of our own device": regulating transnational subsidies between domestic and international law' (2026) 21 (7 & 8) Global Trade and Customs Journal 270-277.

The WTO structure itself accommodates plurilateral agreements: Article X:9 of the Marrakesh Agreement allows one to be added to Annex 4 by consensus, and Article II:3 confirms that it creates no obligations for Members that have not accepted it. The criteria commonly advanced in the debate – that such an agreement be open to accession, not harm the interests of other Members, and be capable of integration into the multilateral system – are policy conditions rather than textual ones. But, still, they remain highly desirable. There is precedent for the idea: in 1979 a subset of contracting parties concluded under the GATT an advanced code on subsidies, the Tokyo Round Subsidies Code, whose countervailing duty provisions were substantially carried over into the ASCM, although its central innovation, the general definition of subsidy, had no counterpart in the Code.[18] Reaching the consensus required to bring a new agreement within the WTO's legal framework seems out of reach at present, even though this is a less ambitious step than amending the ASCM itself. It is, however, important that academic and policy circles start highlighting it as the most desirable, and necessary, second-best option.

That may change if a broader reform of the WTO gets under way. For now, the more realistic path is an agreement that stands on its own, keeps an institutional link with the WTO without becoming part of its treaty architecture, and is built so that it can be brought inside once participation widens.

To be meaningful, however, a plurilateral discipline on subsidies cannot simply recruit whichever Members are willing; it must, at the very least, include what might be called the 'core' of the system – the United States and the European Union, but also China and India, together with other significant trading nations such as Brazil and Canada and the UK. A plurilateral initiative excluding any of these players would risk being either toothless (if it excluded the major subsidisers) or unpalatable (if it required disciplines the excluded powers would never accept in a multilateral setting). This is a politically demanding threshold, and it is one reason why, to date, plurilateral initiatives on subsidies, such as the Trilateral Initiative gathering the EU, Japan and the United States since 2017, have produced draft texts but little concrete progress.[19]

A second dimension of the composition question concerns the developing world. With the partial exceptions of India and Brazil, most developing Members are largely absent from the subsidy conversation at the WTO, and understandably so: the fiscal capacity to subsidise at scale is itself unequally distributed, and a discipline on subsidies is, from the perspective of a Member that cannot

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[18] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (adopted 12 April 1979, entered into force 1 January 1980) BISD 26S/56 (Tokyo Round Subsidies Code). See John J Barcelo III, 'Subsidies, Countervailing Duties and Antidumping After the Tokyo Round' (1980) 13 Cornell International Law Journal 257; Gary N Horlick and Peggy A Clarke, 'The 1994 WTO Subsidies Agreement' (1994) 17(4) World Competition 41. On the conditions for a plurilateral agreement, see Takemasa Sekine, 'Possibility of Developing and Expanding the Regulation of Subsidies through Free Trade Agreements (FTAs): Analysis Focusing on a Trend in FTAs Concluded by the EU' (2020) 16(5) Public Policy Review 1. The argument in this and the following paragraph is developed at greater length in Elettra Bargellini, 'The TCA's Subsidy Regime: A Model for Strengthening WTO Rules on Subsidies?' in Elisa Baroncini (ed), The WTO as a Major Actor of Sustainable Development and Its Reform Process – The EU Approach (Bologna University Press, forthcoming 2026).

[19] The 'Trilateral Initiative' gathering the EU, Japan and the United States since late 2017; the only draft text circulated to date essentially introduces new categories of prohibited subsidies: see Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union (Washington DC, 14 January 2020) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union> accessed 28 August 2026.

afford them, a discipline on other people's conduct. Where the Chinese State favours a domestic firm it appears to do so through some form of subsidy far more often than do economies with more constrained public finances, which rely correspondingly more on other instruments.[20]

Such Members do not for that reason abstain from intervening: they reach for other instruments. Indonesia's response to the question of how to capture value from its nickel endowment was not to subsidise domestic processing but to prohibit the export of unprocessed ore – a measure found by the panel in *Indonesia – Raw Materials* to be inconsistent with Article XI:1 GATT 1994, though the report was appealed into the void and never adopted,[21] and arguably no less distortive than the subsidy it replaced. Export restrictions on critical raw materials, local content requirements and procurement preferences all perform, for governments that cannot write cheques, functions closely analogous to subsidisation. A plurilateral disciplining subsidies among the fiscally capable, while leaving these substitutes untouched, would risk displacing distortion towards instruments that are harder to observe rather than reducing it.

5. The CPTPP as a Building Block?

If a freestanding plurilateral negotiation on subsidies is unlikely to succeed in the short term, an alternative is to build on existing agreements that already discipline a subset of subsidy-related conduct among a critical mass of the relevant players. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership ('CPTPP') is an obvious candidate. Its membership already includes major trading economies, its rules are in several respects more detailed than the WTO's, and, crucially, it is currently the subject of exploratory talks with the European Union and of a pending accession request by China, developments that could, in principle, extend its disciplines toward the 'core' group identified above.[22]

The difficulty is that the CPTPP's subsidy-related disciplines are heavily focused on State-owned enterprises and the designated monopolies through which SOEs often operate, rather than on subsidies as a general category. This is a significant limitation: many of the most contentious contemporary subsidy practices – clean energy tax credits, semiconductor incentives, R&D support – are not necessarily channelled through SOEs, and a discipline confined to the SOE context would leave much of the current industrial policy landscape untouched. If the CPTPP is to serve as a genuine building block for a modern subsidy discipline, its rules would need meaningful updating and generalisation beyond the SOE paradigm.

6. Intellectual Transplants and the Emergence of a 'Common Law' of Subsidies

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[20] Simon J Evenett and Johannes Fritz, 'Subsidies and Market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States' (28th Global Trade Alert Report, 2021) <www.globaltradealert.org/reports/gta-28-report> accessed 28 August 2026; Simon J Evenett and others, 'The Return of Industrial Policy in Data' (2024) 47 The World Economy 2762.

[21] Panel Report, *Indonesia – Measures Relating to Raw Materials* (circulated 30 November 2022, not adopted) WT/DS592/R. Indonesia notified its appeal on 8 December 2022.

[22] Petros C Mavroidis and André Sapir, *China and the WTO: Why Multilateralism Still Matters* (Princeton University Press 2021).

Where, then, might the raw material for such an update come from? A promising avenue lies not in any single instrument but in a body of recent practice scattered across several PTAs and national legislative reforms,[23] each of which has, largely independently, grappled with similar problems and converged on broadly comparable solutions. The EU's own generation of PTAs concluded since the mid-2010s – with partners as varied as Japan, Singapore, Mexico and Vietnam – increasingly extend subsidy disciplines beyond goods to services and introduce structured justifications for 'good' subsidies (that at times reproduce, nearly verbatim, the language of EU State aid law).[24]

The EU's Foreign Subsidies Regulation, for its part, extends a State-aid-inspired methodology to subsidies granted by third countries to companies operating in the EU internal market – a unilateral instrument, to be sure, but one whose substantive standards could plausibly inform a future negotiated discipline.[25] The United Kingdom's Subsidy Control Act 2022, adopted after Brexit precisely to replace the EU State aid regime domestically, adds a further data point, demonstrating that even outside the EU a broadly comparable regulatory philosophy – principles-based control, ex ante categorisation of subsidies by risk, and a public transparency register – has proven attractive as a model.[26]

Among these instruments, the subsidy regime of the EU–UK Trade and Cooperation Agreement ('TCA') deserves particular attention.[27] Under Article 363 TCA a subsidy is financial assistance arising from the resources of a Party which confers an economic advantage on one or more economic actors, which is specific in that it benefits certain economic actors over others in relation to the production of certain goods or services, and which has, or could have, an effect on trade or investment between the Parties. The definition covers services and investment as well as goods, closing the gap that renders the ASCM unable to reach a large part of contemporary State support.[28]

On policy objectives, Article 366 TCA does not attempt an exhaustive list of permitted purposes; it sets out instead a sequence of principles against which any subsidy must be assessed: that it pursue a specific public policy objective remedying an identified market failure or addressing an equity rationale; that it be proportionate and limited to what is necessary; that it bring about a change in the beneficiary's economic behaviour that would not otherwise occur, without compensating costs the beneficiary would have incurred in any event; that it be the least trade-distortive instrument reasonably available; and that its positive contribution outweigh its negative effects on trade and

[23] Luca Rubini, 'State Aid and International Trade Law' in Leigh Hancher and Juan-Jorge Piernas López (eds), *Research Handbook on European State Aid Law* (2nd edn, Elgar 2021).

[24] See, eg, the EU's agreements with Japan (signed 2018), Singapore (signed 2018) and Vietnam (signed 2019), and the agreement in principle with Mexico (2018), which extend coverage to services and introduce justifications for 'good' subsidies at times reproducing the language of EU State aid law.

[25] The US adopted similar legislation within the context of merger control.

[26] See, eg, the Subsidy Control Act 2022 (UK), adopted following the UK's departure from the EU State aid regime, establishing a principles-based domestic system of subsidy control with its own transparency database (the Subsidy Control Database).

[27] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 30 December 2020, entered into force 1 May 2021) [2021] OJ L149/10 (TCA), Title XI, ch 3.

[28] Article 363 TCA. See Andrea Biondi, 'The New Chapter on Subsidies Regulation in the EU–UK TCA: Some First Impressions' (2021) 20 European State Aid Law Quarterly 173, 177; Totis Kotsonis, 'The Squaring of the Circle: Subsidy Control under the UK–EU Trade and Cooperation Agreement' (2021) 20 European State Aid Law Quarterly 15.

investment.[29] Article 367 then prohibits outright certain categories – unlimited guarantees, rescue and restructuring aid unaccompanied by a credible plan, export subsidies, local content subsidies.[30] The architecture is that of Article 107(3) TFEU as elaborated in the Commission's compatibility practice, transposed into a treaty between sovereigns, and it is preferable to that of Article 8 ASCM, because it does not enumerate the permitted objectives in advance but subjects every subsidy to the same structured justification.[31]

For enforcement the TCA offers various tools, the most interesting of which are the remedial and rebalancing mechanisms. The remedial measures under Article 374 address an identifiable subsidy causing a significant negative effect on trade or investment between the Parties.[32] The rebalancing measures under Article 411, by contrast, cannot be applied against an individual subsidy, but they allow a Party to respond to significant divergences in subsidy control between the Parties giving rise to material impacts on trade or investment. The procedure is expedited: consultations are limited to fourteen days, after which the measures may be adopted unless the other Party requests an arbitration tribunal, which must in turn rule within thirty days of its establishment.[33] The speed of that design bears directly on the weaknesses of the ASCM's remedial architecture. Indeed, transposed to the multilateral level, a comparable acceleration would go some way towards the more immediate compensation or retaliation that a prohibited subsidy may warrant, without waiting for the full dispute settlement process to run its course – a process so slow that, by the time harm is demonstrated, it is often too late to address it.[34]

The domestic implementation of the TCA in the United Kingdom supplies a further lesson. The Subsidy Control Act 2022 establishes a public subsidy database, and where the statutory duty to publish applies, the one-month period for challenging a subsidy before the Competition Appeal Tribunal runs from the date of entry in that database, so that a failure to publish leaves the subsidy indefinitely open to challenge. The ASCM contains no comparable incentive.[35]

Taken together, these recent instruments – EU PTAs, the Foreign Subsidies Regulation, the EU–UK TCA, the UK Subsidy Control Act, and potentially a reformed CPTPP – do not obviously amount to a single, coherent code. But their cumulative weight, and the fact that they increasingly involve trading partners well beyond the EU's immediate neighbourhood, raises a genuine question,

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[29] Article 366(1)(a)–(f) TCA.
[30] Article 367 TCA.
[31] Article 107(3) TFEU. Bargellini, 'The TCA's Subsidy Regime' (n 18).
[32] Article 374 TCA. See Andrea Biondi, 'Subsidies Control and Enforcement' in Federico Fabbrini (ed), *The Law and Politics of Brexit, Volume V: The Trade and Cooperation Agreement* (OUP 2024) 218.
[33] Articles 411(1)–(3) TCA. See David Collins, 'Standing the Test of Time: The Level Playing Field and Rebalancing Mechanism in the UK–EU Trade and Cooperation Agreement (TCA)' (2021) 12 Journal of International Dispute Settlement 617, 635; Catherine Barnard, 'Level Playing Field Provision in the TCA: An Introductory Guide' (Paper for the Senedd Legislation, Justice and Constitution Committee, LJC6-13-22 Paper 27, 2022) <https://business.senedd.wales/documents/s124507/LJC6-13-22%20-%20Paper%2027%20-%20Paper%20by%20Professor%20Catherine%20Barnard%20University%20of%20Cambridge%20Level%20Playi.pdf > accessed 16 August 2026.
[34] Bargellini, 'The TCA's Subsidy Regime' (n 18).
[35] Subsidy Control Act 2022, ss 32–33 (subsidy database) and s 71 (time limits for review applications); Competition Appeal Tribunal Rules 2015, SI 2015/1648, r 98A. See Elettra Bargellini, 'How the SCA 2022 Shapes the Effectiveness of the TCA: Lessons from EU State Aid and WTO' (2025) 59 Journal of World Trade 213, 232; George Peretz, 'United Kingdom: To Have One Subsidy Control Regime Is a Misfortune: To Have Two Looks Like Carelessness' (2021) 20 European State Aid Law Quarterly 455.

tentatively explored elsewhere: whether what is emerging is best understood as the incremental development of a new 'common law' of subsidies and SOEs – a body of converging practice that could, in time, supply the building blocks for a more ambitious plurilateral, or even eventually multilateral, discipline.[36]

7. Concluding Remarks

The WTO ASCM was a genuine advance for the multilateral trading system, but a quarter-century of practice has exposed two structural weaknesses: an incentive structure that fails to secure meaningful transparency, and substantive disciplines that are simultaneously too demanding, in their legal standards, and too narrow, in their territorial and definitional reach, to capture the industrial policy practices that most concern governments today.

Multilateral reform, though preferable in principle, faces a WTO membership unable to update its own rule-book. The more realistic path is likely to run through plurilateral initiatives among a 'core' of major trading powers, built where possible on existing platforms such as the CPTPP, and fed by the accumulating practice of PTAs and domestic legislation that increasingly converge, without any central coordination, on a recognisably similar set of principles and approaches. Whether this converging practice will crystallise, in time, into a genuine common law of subsidies, or will instead remain a patchwork vulnerable to fragmentation and unilateral coercion, is likely to be one of the central questions for the multilateral trading system over the coming decade.

[36] Importantly, some of the key principles and approaches of these disciplines are in line with the structural elements of the WTO ASCM disciplines, with reform discussions within the WTO, and also with other initiatives like the Trilateral. The hypothesis of an emerging 'common law' of subsidies and State-owned enterprises is being explored by Luca Rubini. See Luca Rubini, "Transcending territoriality: Expanding EU State aid control through consensus and coercion" in Leigh Hancher, Juan-Jorge Piernas-Lopez, and Luca Rubini (eds.)*The future of EU State aid law – Consolidation and Expansion* (2023, Madrid: EU Law Live Press) 119-134.