The WTO as Major Driver of Sustainable Development and its Reform Process

Progetto UNIBO-MAECI
L'Organizzazione mondiale del commercio quale protagonista dello sviluppo sostenibile nel rilancio del sistema multilaterale

edited by
Elisa Baroncini
with the collaboration of
Alessandra Quarta, Giulia Bortino and Niccolò Lanzoni

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Identifying Key Gaps in the Current WTO Subsidies Transparency Regime[1]

Luca Rubini

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Keywords: National administrations – Notification – Trading system – Transparency – WTO law.

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1. Introduction

Transparency in subsidies is foundational to the multilateral trading system, yet the current World Trade Organization (WTO) regime falls short in several respects.

This brief chapter identifies key gaps in the WTO's subsidy transparency mechanisms, explores why transparency is crucial, assesses current challenges, and proposes pathways for reform grounded in best practices from other WTO disciplines.

The chapter will also consider what, beyond the WTO, could be reliable information sources for state subsidies. In so doing, it will explore the objectives, incentives and challenges of all these other information sources. The final step of the analysis will sketch the course of conduct that could be adopted to improve the current situation.

2. The GATT/WTO subsidy transparency mechanism

Transparency is a long-standing tenet of the GATT/WTO framework. Already in 1947 Article X of the GATT provided for a general obligation of publication of "Laws, regulations, judicial decisions and administrative rulings of general application … promptly in such a manner as to enable governments and traders to become acquainted with them." This broad transparency obligation extended to "trade agreements" between different governments. Crucially, publicity was a condition of enforceability of the domestic policy.

More specifically, with respect to subsidies, the very first obligation of the world trading system was one of transparency. Thus, Article XVI of the GATT (which became XVI:I only after the 1955 review) included as discipline a basic obligation of transparency, coupled with an obligation to enter into consultations should a subsidy cause serious prejudice to another contracting party. In particular,

> If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to

[1] This brief chapter is based on the presentation given by the author for an informal discussion on transparency in industrial subsidies organized by the EU, Japan and Kenya in Geneva at the WTO premises in early February 2025.

> increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

Going beyond the textual element, transparency in subsidies encompassed three dimensions which replicate the common input-process-output policy cycle. First, the system focuses on gathering *information* about subsidies. As GATT Article XVI:I provides, the main tool to gather information relies on governments' notifications. Since the beginning, the GATT could not actively seek information, and prompt notification, on subsidy programmes. The only source of information was governmental, and this has essentially been the case ever since.

The information on subsidies is then subject to a process of *deliberation.* In other words, the information is functional and necessary to enable peer review, i.e. to allow other governments to get to know about others' subsidies and if appropriate to question them, in particular should they cause, or be liable to cause, serious prejudice. This questioning is supposed to take place in the specific Committee on subsidies. It can be immediately noted that the effectiveness of this Committee in discussing subsidies has varied through time (with a peak just after the Tokyo Round of negotiations and during the Uruguay Round, and a dismal performance in the WTO era) but, overall, the broad assessment is negative. There is quite simply not enough deliberation on subsidies in the house.

The textual reading of the original GATT transparency obligation, which has simply been detailed through – but certainly not superseded by – the WTO Agreement on Subsidies and Countervailing Measures (WTO ASCM), includes one interesting nuance. Not only the provision sets out a clear notification obligation to the Contracting Parties (the reader should know that the use of capital initials, or better capital letters for the full name, indicates an obligation towards the GATT constituency as a whole, to the institution), but it also notes that, following a complaint of serious prejudice, the obligation to discuss the possibility of limiting the subsidization is owed *alternatively* to the parties concerned (which is obvious) *or* (and this is the very interesting part) to the Contracting Parties as a whole. This seems to highlight the "community dimension" of the GATT and suggest, once again, that subsidies may generate obligations towards the whole constituency. This, for now, preliminary observation will be picked up again later on, when discussing about possible solutions to the current transparency problems.

Finally, deliberation generated through information should lead to an output in terms of *use* of the knowledge generated – both for the benefit of WTO Members and the business community, international stakeholders and civil society at large.

As noted, the WTO ASCM builds on the basic obligations of GATT Article XVI:I, and the experience generated through the GATT practice, to develop the WTO mechanism, which does not add significant innovations in the key elements of the system.

The very first innovation is not directly related to transparency and notifications. It is a matter of substantive law and in particular it relates to the very first innovation of the WTO system, i.e. the introduction of the very first formal definition of subsidy in Article 1 ASCM. Despite its uncertainties, and the inherent difficulties with the definition exercise, this is a fundamental starting point for governments in understanding what they have to notify.

The WTO also makes it clear that only specific subsidies should be notified. Once again, as seasoned trade lawyers know, to determine whether a subsidy is specific or not may not always be easy. But the constitutional value of this specification cannot be passed unnoticed. By determining that only subsidies that are also specific are subject to notification, the intention is to significantly limit the number of policies that should be notified.

The WTO ASCM gives specific indications of the key information notifications should include (and in particular the form of the subsidy, its financial value, objective, duration and "statistical data permitting an assessment of" its trade effects). In so doing, it builds on previous practice (the questionnaire used today is essentially the one set up in 1961).[2] In addition, there is a specific array of measures that should be notified, certainly subsidies but also countervailing duties actions. Notifications should be done regularly, and this regularity changes according to category of country.

Most significantly, while underlining the centrality of the Committee on Subsidies, where representatives of governments sit, the WTO ASCM includes two key institutional innovations, which are certainly based on the GATT experience, especially after the Tokyo Round of Negotiations, and in particular on the Expert Group on the Calculation of Subsidies. The ASCM provides for the creation of a 5-Member Permanent Group of Experts, which should give various types of assistance to it, also in the context of dispute settlement. In particular, this group may assist Panels "with regard to whether the measure in question is a prohibited subsidy" (see Article 4.5) and may provide the Committee and Members with "an advisory opinion on the existence and nature of any subsidy" (see Article 24.3 and 24.4).

Very much on the basis of the awareness that more complex institutional structures, and expertise, are needed when one talks of transparency and governance of subsidies, the ASCM gives the Committee the power to create any appropriate subsidiary bodies. There is no indication of the scope and purpose of these subsidiary bodies but one can easily guess that, while not wanting to tie their hands, negotiators were conscious of how subsidies and their assessment may be intractable and leaving it all to the work of the Committee -which, it bears repeating, is not normally constituted of experts but diplomats coming from the capitals- was not enough. It may be useful to repeat a point just made, i.e. that this provision may well have been made on the basis of the experience of the GATT with the very interesting and useful work done by Group of Experts on the Calculation of the Amount of a Subsidy which was set up by the Committee on subsidies in May 1980.

One final, and difficult to apply, express provision is that notifications are "without prejudice." Article 25.7 ASCM reads:

Members recognize that notification of a measure does not prejudge either its legal status under GATT 1994 and this Agreement, the effects under this Agreement, or the nature of the measure itself.

In other words, governments should notify their subsidy measures and programmes in confidence, without any fear that any information they submit to the peer-control of other governments may be used for a formal challenge in dispute settlement. This is the idea.

But it is easily said, and put down in legal language, than easily done. It is a fact that, in addition to the technical difficulties and capacity-constraints, the biggest obstacle to transparency in subsidies in the WTO rests in the fear of self-incrimination.[3] This fear is particularly vivid because of the strong

[2] As contained in BISD 9S/193-194.

[3] The language itself of Article 25 WTO ASCM may create concerns in this direction. Soon after saying that the notification is without prejudice, in paras. 25.7, para. 25.9 makes it clear that responses to other Members' questions should be quick and comprehensive and "in particular, they shall provide sufficient details to enable the other Member to assess *their compliance with the terms of this Agreement*." (emphasis added).

dispute settlement system introduced by the WTO, which, interestingly, was not fully anticipated by subsidy disciplines negotiators.[4] Paradoxically, or perhaps not, this legalistic innovation *did* reduce transparency – so one argument goes.

As noted, despite widespread recognition of its importance, transparency in subsidies remains weak. To appreciate both the importance and predicaments of transparency in subsidies, suffice mentioning the extremely pivotal Subsidy Transparency Initiative, an official inter-institutional programme aimed at improving transparency in subsidies which was launched in 2022 by the Secretariats of the IMF, OECD, World Bank, and WTO. With hindsight, this very promising initiative has not generated much change yet, essentially not going beyond the initial report manifesto of April 2022.

But why does transparency in subsidies matter?

3. *Why Transparency Matters*

The very first step of the analysis must be an evaluation of the value of transparency in subsidies in the context of the world trading system. Why does transparency in subsidies matter?[5]

3.1 Transparency, fair competition in the market and better policy-making

Subsidies may be a major irritant in trade relations and cause distortions in the market. Their transparency can thus ease the functioning of markets and the competitive process. Subsidy transparency builds mutual trust and reduces trade tensions. The knowledge of foreign subsidies programmes may enhance policy understanding. Especially if this understanding leads to an evaluation of subsidies and their effects vis-à-vis their policy objectives, combined with an assessment of their costs, it can also lead to an improvement of policies and to the development of best practices. A public good without any doubt.

3.2 Transparency, the cost of information and developing countries

Transparency in subsidies is especially critical for developing countries and least developed countries (LDCs), which often face significant informational and administrative barriers, normally much higher than developed economies.[6] From an informational perspective, which, as seen, is key for properly competing in international markets, the lack of transparency is a cost. But also the generation of transparency is a cost. These costs can be particularly high and, in relative terms, they are very high for developing economies which have to invest their scarce resources.

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[4] See the contributions of Jan Woznowski, a key GATT Secretariat figure in the Uruguay Round Negotiations, and Gerard Depayre, lead of the EEC negotiating team in the Uruguay Round subsidy negotiations, in Luca Rubini and Jennifer Hawkins (Eds), *What shapes the law? Reflections on the history, law, politics and economics of international and European subsidy disciplines* (2016, European University Institute, Global Governance Programme). See also their interviews conducted by the author. The transcripts are available at https://lucaslaws.com/oral-history-project/.

[5] See the seminal article of Terry Collins-Williams and Robert Wolfe, "Transparency as a trade policy tool: the WTO's cloudy windows" (2010), World Trade Review, 551–581.

[6] See in particular, Chad Bown and Bernard Hoekman, *Developing countries and enforcement of trade agreements: why dispute settlement is not enough* (2007), World Bank Policy Research Working Paper 4450; Robert Wolfe, "Transparency matters for LDCs too: the relevance of current debates on WTO reform" in LDCs and the Multilateral Trading System, WTO/EIF (2023) 10–15.

3.3 Transparency, developed economies and the 'domestic problem'

But – it bears highlighting – the lack of transparency in subsidies is a problem that plagues developed countries too. And, perhaps counterintuitively, the lack of transparency in subsidies cuts both ways. Not only does it obviously concern the subsidies granted by other countries, but it also regards one's own subsidies! It is a fact that subsidies can be granted by all levels of government, which may make, in particularly large and constitutionally complex countries, it difficult to know at the federal level what lower levels of government do.

An effective supranational system of subsidies governance, especially if centred on transparency, can thus also come to the aid of central governments, solving a domestic political problem.

3.4 Transparency, and the legitimacy and trust in the trading system

Effective transparency, especially if it concerns troublesome measures like subsidies, contributes not only to fairness but also to the legitimacy and functionality of the trading system.

While transparency has been described as "perhaps the best tool for disciplining subsidies",[7] its potential remains largely unrealized. Unlike the successful models seen in the WTO's Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) Agreements[8], the subsidies regime suffers from systemic issues across all transparency levels.

In the following two sections I will concentrate on two types of challenges that subsidy transparency faces in the WTO.

4. Notification Challenges

It is notorious that the problems of subsidy transparency begin with the notification process.

First, there are significant (and perennial) conceptual and practical difficulties in defining and measuring subsidies. There is no need here to devote much energy in addressing this point. Already in the early GATT years, there was an understanding that providing for a precise legal definition was almost impossible because any attempt would have resulted in over -or under- inclusion. Obviously, these issues that pertain to the substance of the law directly affect the procedural obligation of notification of "subsidies." Various actions can ameliorate the situation here, for example, the clarifications coming from the rich case-law of Panels and the Appellate Body. Even the important role of literature should not be discounted so easily, although scholarship does operate at a subterranean level and is rarely mentioned in decisions. In other words, it is there and there is ample anecdotal evidence that both secretariat and Panellists and Members of the Appellate Body have resorted to the clarifications in the literature. This engagement, however, very rarely makes its appearance in decisions through explicit references. What should be lamented though is the virtual lack of deliberation and clarification in the Committee and in the other bodies referred to in the WTO ASCM.

Secondly, there is administrative fragmentation across government levels. This is an issue which specifically characterises subsidies. Unlike other measures such as tariffs or quotas, or indeed regulation, which are constitutional competence of given bodies and institutions within the jurisdiction of WTO Members, the same does not hold true for subsidies. The definition of subsidy is broad enough to encompass financial contributions coming from "the government or any public body" as well as government-mandate actions through "private bodies." The mechanisms of transfer

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[7] Collins-Williams and Wolfe, cit.

[8] See Marianna Karttunen, *Transparency in the WTO SPS and TBT Agreements* (2020) Cambridge University Press.

of economic resources that can legally constitute subsidies, and are therefore subject to the notification obligation, are thus extremely varied and may find their origin in different governmental entities and actions. We have noted already the rather counter-intuitive reality that sometimes central government is not even aware of subsidies granted by the lower levels, and this happens across the board, also for important developed economies.

Thirdly, in some cases, poor transparency may be conducive to capacity constraints. As a corollary to the previous comment, it may be clear that this difficulty for the central government (which is usually responsible for notifications) to track down and identify subsidies and subsidy programmes may be particularly acute for those Members that face significant capacity constraints. The WTO Secretariat plays an important role in addressing these issues, but its intervention is only partial.

Fourthly, as noted in the previous section, there is reluctance to self-report due to legal or reputational concerns, mostly represented by fear of self-incrimination. The practical experience of 30 years of WTO Committee work has shown how the incentive structure underlying the notification system is defective. As advanced, the dismal record in notifications may be one of the unintended consequences of the emergence of a strong dispute settlement.

Already in 1961, a GATT Report on "Operation of the Provisions of Article XVI" singled out the fear of self-incrimination as a key obstacle to the effectiveness of the system: [t]he role of Article XVI in providing the CONTRACTING PARTIES with accurate information about the nature and extent of subsidies in individual countries has been partly frustrated by the failure of some contracting parties to notify the subsidies they maintain. To the extent that this is based on the reluctance of contracting parties to expose themselves to charges of non-conformity with the Agreement, it reflects a misinterpretation of Article XVI. Moreover, a contracting party can be required to consult concerning a subsidy, whether or not it has been notified. There seems, therefore, no advantage to a contracting party in refraining from notifying its subsidies; on the contrary, notifications may dispel undue suspicions concerning those subsidies not previously notified.[9]

As experience has abundantly shown, the final observations of the Panel did not really influence the future conduct of governments, incentivizing them to notify.

Fifthly and finally, there are substantially no consequences for non-compliance. To be sure, non-compliance with an obligation is a breach of WTO law. But there are *de facto* no legal consequences for this breach. If claims are raised, they normally focus on the breach of other substantive obligations, related to the grant or maintenance of prohibited or actionable subsidies, or to the lack of compliance with CVD substantive or procedural provisions. No Member will simply complain about the lack of notification. It is difficult to legally conceive this lack of compliance as an issue of "nullification or impairment of benefits."

Most significantly, perhaps, at least at a hypothetical level, the WTO Secretariat itself has its hands completely tied and cannot identify or even assess any subsidy *ex officio*. This lack of power does not only come from the silence of the law but, most radically, from the deeply entrenched (but never legally uttered) mantra that the WTO is Member-driven. Enforcement is in the hands of governments, not the Organisation.

As a consequence of all the factors addressed below, the practical result is that government notifications, if present, are often incomplete or vague.

While the diagnosis may be easy, what is certainly not easy is the prognosis. What cure can remedy this problem? It is difficult to definitely say, but probably a mix of actions may be what should be considered. On the one hand, one can think of relying on different sources of information. The

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[9] L/1442 & Add.1-2, adopted on 21 November 1961, 10S/201, 206, para. 19.

government-only-notification route should be only one of the sources of information. Other sources one can hypothetically think of relate to business (i.e. the ones that actually operate in markets), other governments (i.e. so-called "cross-notifications", albeit this tool, already provided for in Article 25.10 of the WTO ASCM, has largely being unutilized and made effective only in show-off cases) and/or other international organisations, public or private. As is known, there are various institutions that have been carrying out interesting empirical research and analysis of subsidies in the last decades. Suffice it to mention the private initiative of the Global Trade Alert (GTA) of Professor Simon Evenett or the "Magic" database of the OECD, which even identifies subsidisation at the firm level. There are several issues, however. First, there is not necessarily a complete overlap in definitions, i.e. not all subsidy transparency initiatives share the same scope, and even less adopt the specific legal definition of subsidy of the WTO ASCM. Secondly, each and every organisation and transparency mechanism has its own objectives which significantly shape the whole process, and, once again, these objectives are not necessarily the same underlying the WTO system. Thirdly, very much like in the current WTO systems there are disincentives that bar notifications, the same applies with other hypothetical sources of information. For example, the private sector may be reluctant to come out for fear of retaliation. Finally, whenever the relevant source of information does not use data directly provided by the relevant government, there is obviously an issue of verification.

While, therefore, there are many stakeholders and institutions dealing with transparency, what may be difficult is to "interface" them all into a comprehensive "transparency eco-system" which would end up in a true public good for both government and business communities. This would need aligning objectives, definitions, and incentives, which is clearly not an easy venture.

On the other hand, aside from considering other sources of information, one important factor to work on in the specific WTO mechanism could be to decouple the transparency mechanism from dispute settlement. This, too, is not an easy task, and a great deal of institutional and legal imagination may be required. One could think, for example, of introducing some type of protection from dispute settlement for those subsidies that have been notified (or, vice-versa, some type of pejorative substantive/procedural regulatory treatment for those that have not been notified; the use of presumptions may come to aid here).

In sum, while one may be aware of the broad type of solutions to deploy, how to make these broad observations operational, i.e. what specific types of mechanisms and actions to take, what specific legal provisions to include, is a conundrum.

5. *Deliberation and participation deficits*

It is now obvious that any problem at the level of notifications – which, it bears repeating, are the only source of subsidy information for the WTO Committee – inevitably translate in a sub-optimal activity of the same Committee which is notoriously characterised by very low levels of participation and deliberation.

Beyond notification issues, participation in subsidy-related deliberation is hindered by various other factors. The poor organization of the information, the limited resources and coordination, especially in developing countries, the absence of structured analysis of "subsidy trade concerns" (as compared for example to what happens for the SPS and TBT Committees), and, finally, the limited understanding and appreciation of the broader purpose of transparency.

6. *Reform strategies*

Hypothetically, two types of strategies may be considered.

First, action may be introduced to improve practice. First, inspiration can be drawn from the best practice of the SPS / TBT Committees. Secondly, the Secretariat may be involved to give more support and technical assistance to any Member needing it. Thirdly, a more leverage of digital tools (e.g., e-Agenda, hybrid meetings, annotated agendas). Finally, since these are already options envisaged by the Uruguay Round negotiations and explicitly provided for in the ASCM, make use of the Permanent Group of Experts and set up any appropriate subsidiary bodies (per ASCM Articles 24.2 and 24.3). This has happened only twice, in 1995, when the Committee created an Informal Group of Experts to deal with a specific issue[10] and a Working Party on Subsidy Notifications.[11] More recently, interestingly (and promisingly!), Brazil suggested the creation of a Working Group on Implementation,[12] and a group of Members[13] suggested the creation of an "informal technical discussion group."

The adoption of any of these actions by the Committee would require an immediate appreciation and self-awareness by the Committee itself of its central role in sustaining transparency and deliberation in subsidies. In other words, the Committee should realise that it is not simply a place for the activity of governments and, as practice has shown, essentially of certain Members only. But it is a collective body of the WTO, surely populated by government officials, but still a collective body that has a specific collective interest in subsidy transparency and specific prerogatives, besides and in addition to those of governments. This constitutional interpretation finds some support in our reading of the very first transparency obligation of the world trading system which is Article XVI:I of the GATT, which the ASCM develops in the WTO era. This is what you find in other Committees, such as the SPS and TBT Committees. This sense of community is, however, largely lacking in the Subsidy Committee. Even in those – rare – cases where the language of the law seems to offer some power of initiative to the Committee (not the Secretariat), this seems to have been unused. See, for example, Article 24.5 which reads:

In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate

While all the best practice actions sketched above do not require any formal law reform and may be triggered at once, the issue is once again with the lack of specific incentives to do so (or, building on the interpretation just developed, the lack of sense of community).

If the transparency problem is to be solved, it may therefore be necessary to change gear and consider law reform. In descriptive and broad terms, this would mean considering revising the legal framework to institutionalize improved transparency obligations and mechanisms. As noted, beyond very general statements and suggestions, what has proved difficult so far (and, even assuming an appetite for investing political capital in reform, which is probably not present) is to identify specific reform actions. The ultimate goal should be the rejuvenation of the Subsidies Committee as a centre

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[10] The terms of reference were: "To examine matters which are not specified in Annex IV to the Agreement [calculation of the total ad valorem subsidization] or which need further clarification for the purposes of paragraph 1(a) of Article 6, and to report to the Committee such recommendations as the Group considers could assist the Committee in the development of an understanding among Members, as necessary, regarding such matters." G/SCM/5. For reports of the IGE, see documents G/SCM/W/415/Rev.2; G/SCM/M/16, item H; G/SCM/W/415/Rev.2/Suppl.1; and G/SCM/M/24 item E.

[11] G/SCM/M/1, item P. The text of the decision can be found in G/SCM/1. The Chair's report on the discussions in the Working Party at the October 2003 meeting can be found in G/SCM/M/48, paras. 210-220.

[12] See G/SCM/W/567-G/SG/W/236, G/SCM/W/568-G/SG/W/237, G/SCM/W/567-G/SG/W/236 and G/SCM/W/568-G/SG/W/237.

[13] Canada, the Republic of Korea, Japan, New Zealand, Norway, the United Kingdom, and the United States. See RD/SCM/63/Rev.2, for the relevant discussion in the Committee. See also G/SCM/M/125, paras. 150-185. Also see G/SCM/M/127, paras. 242-246.

for deliberation and chambers of conciliation. Ultimately, the biggest conundrum is to align governments' incentives with the institutional ones.

7. Conclusions

Transparency in subsidies remains an unmet promise. Drawing on cross-committee best practices and committing to both procedural and legal reforms can revitalize the WTO's subsidy regime and contribute to a more equitable and effective multilateral trading system. For now, much of the work still focuses on analysing the problems and sketching the possible solutions, thinking out-of-the-box. This chapter is a first attempt in doing so.