world trade institute

THE IMPORTANCE OF EXCLUDING CRISIS-RESPONSE MEASURES FROM THE SCOPE OF ACTIONABLE AND PROHIBITED SUBSIDIES UNDER THE ASCM

THE CASE OF SUBSIDIES PROVIDED AS A RESPONSE TO THE COVID-19 PANDEMIC AND A CRITIQUE OF EXPERTS' OPINIONS ON REFORM

Nada Al-salmi

WTI working paper no. 1/2026

b
UNIVERSITÄT
BERN

THE IMPORTANCE OF EXCLUDING CRISIS-RESPONSE MEASURES FROM THE SCOPE OF ACTIONABLE AND PROHIBITED SUBSIDIES UNDER THE ASCM: THE CASE OF SUBSIDIES PROVIDED AS A RESPONSE TO THE COVID-19 PANDEMIC AND A CRITIQUE OF EXPERTS' OPINIONS ON REFORM

By

Nada Al-salmi

In Fulfilment of the DAS Requirement

Under the Supervision of: Werner Zdouc

December 2024

Table of Contents:

Abstract:

This paper examines crisis considerations in the Agreement on Subsidies and Countervailing Measures (ASCM) and points to the lack therein by examining the applicability of the provisions of the ASCM to subsidies made to combat the impacts caused by a crisis. It investigates the term 'crisis' from the perspective of international law and examines subsidy programmes designed as crisis-response subsidies during the COVID-19 pandemic from a practical perspective, and their status in anti-subsidy investigations. After examining scholars' opinions on the lack of crisis considerations in the ASCM, and their proposal to revive non-actionable subsidies, this research illuminates the increasing relevance of non-actionable subsidies in the context of crisis.

The paper concludes that reforming non-actionable subsidies is crucial to prevent subjection to the imposition of countervailing duties ("CVDs") or a higher duty of CVDs involving the calculation of crisis-response subsidies. It also notes that revival of non-actionable subsidies must include broadening its scope to incorporate measures designed to combat crises and mitigate their impacts and provide a set of standards to assist in the design of future reforms. It further emphasises that a reform of non-actionable subsidies is crucial to prepare for future crises. Doing so would provide countries with exceptions that they can invoke to combat a crisis, mitigate its impacts and ensure smooth economic recovery.

I. Introduction

Subsidies are one of the main tools that governments use to support domestic industries and grow their economies. However, their use can sometimes harm competition, cause injury or serious prejudice to other countries and lead to market distortions. Thus, WTO members negotiated an agreement to regulate the use of subsidies to prevent such consequences. The Agreement on Subsidies and Countervailing Measures (ASCM) contains provisions that define subsidies, regulate their use, and establish procedures to follow when they result in injury to the industries of members.

Initially, the Agreement helped regulate the field. Over time, with changing circumstances, certain ambiguities in the text and its interpretation emerged and there were some difficulties distinguishing between good and bad subsidies based on their objectives. This drove members to issue reform proposals, many of which remain pending due to lack of agreement. One of the many reforms that has been proposed is to improve the text of the Agreement, in particular a text regarding the incorporation of exceptions of certain types of subsidies into the ASCM.

The need for a reform that incorporates certain types of subsidies has become pressing, especially following the impact of the COVID-19 pandemic on global and domestic trade. The COVID-19 pandemic exposed a gap in the ASCM, particularly in respect of the lack of provisions addressing the role of subsidies during crises or emergencies. It also exposed countries' tendency to invoke the provisions of the ASCM to initiate anti-subsidy investigations and impose countervailing duties in times of crisis, reflecting a growing protectionist attitude towards imports.

Furthermore, the lack of exceptions in relation to crisis-response subsidies leaves many countries vulnerable to anti-subsidy investigations and countervailing measures. The absence of any provision that considers public policy objectives in the ASCM presents a significant issue that needs to be addressed from both a legal and practical standpoint. This paper addresses this gap by considering the issue of lack of crisis considerations in the ASCM through an analysis of its provisions, and by exploring the concept of crisis from an international law perspective. The paper uses the COVID-19 pandemic as a case study to highlight this gap. It examines experts' proposals related to this issue and provides a critique of such proposals. The thesis of this paper is that

excluding crisis-response subsidies from the scope of actionable and prohibited subsidies under the ASCM is crucial to adequately prepare for future crises.

Literature Review

This literature review addresses various issues within the ASCM and encompasses many studies that focus on the need to reform its text, such as Jung (2023). Few studies, however, focus on the reform in light of the impact of the COVID-19 pandemic, among them Borlini (2023) and Ambaw et al. (2020). Research that focuses specifically on the nature of the subsidy programmes provided during the COVID-19 pandemic remains extremely limited. Hoekman and Nelson (2020), Wolfe (2020), and Ding (2024) for instance, who do take the COVID-19 pandemic into account, do not cover the practice of anti-subsidy investigations in the post-COVID-19 context, or whether such investigations include the examination of crisis-response subsidies and relief packages provided therein.

To cover this gap in a holistic manner, this paper explores crisis consideration within the ASCM and highlights the lack thereof by focusing specifically on the status of subsidies and relief packages introduced during the COVID-19 pandemic. The paper argues that reviving non-actionable subsidies and reforming its language to incorporate crisis considerations is crucial to allow countries to combat future crises without being subject to countervailing duties in times of crisis. The paper also seeks to highlight the missing gaps in the reform proposals of scholars, to encourage in-depth research in this area.

Research Methodology

This research uses the doctrinal method to examine the relevant texts of the ASCM, jurisprudence, and legal instruments to identify gaps and ambiguities related to the concept of crisis-response subsidies in the ASCM. The research uses the descriptive approach to analyse subsidies and financial assistance tools provided in response to the COVID-19 pandemic, and the status of these crisis-response schemes in anti-subsidy investigations. In addition, the research adopts a critical analysis approach to review and evaluate expert proposals for reforming the ASCM and reviving non-actionable subsidies. It provides a critique of such proposals, highlighting the gaps in scholarly work and proposing appropriate reform actions.

The paper begins by providing an overview of the ASCM that explores how crises are addressed in legal texts, if at all. It uses the COVID-19 pandemic as a case study to highlight the lack of crisis considerations within the framework. It then evaluates the subsidies provided during the pandemic and reviews their status in anti-subsidy investigations. Next, the paper examines scholarly work in this area and offers a critique of such work. It then proposes reforms that include the need to design a set of standards for crisis-response. The paper concludes by stressing the importance of continued research to support the implementation of such reforms.

II. Overview of Subsidies under the ASCM

The ASCM only applies to goods and it can be broadly described as a tool used to regulate the provision of financial contributions by governments to their industries and the use of unilateral actions, namely the initiation of anti-subsidy investigations and the imposition of countervailing duties on subsidised imports that cause or threaten to cause material injury, or serious prejudice to the interests of exports of a member in other markets. It is also a dispute settlement tool. It introduces three categories of subsidies, classified as yellow, red and green subsidies. The details of these categories are as follows:[1]

- **Actionable subsidies**, categorised as yellow subsidies, are explained in Article 1 of the ASCM as a financial contribution provided by a government or a public body in the territory of a member that involves a direct transfers of funds, potential direct transfers of funds or liabilities, government revenue that is otherwise due but is forgone or not collected, goods or services provided by the government other than general infrastructure, etc. The financial contribution must confer a benefit to the recipient of the subsidy. [2] In addition, according to Article 2, for a subsidy to be deemed actionable, it has to be specific to an enterprise, a group of enterprises or sectors, or a geographical region. Thus, there are three requirements that need to be present to label subsidies provided by governments as actionable, namely, financial contribution, benefit, and specificity.

[1] Trebilcock, M.J. (2015). *Advanced Introduction to International Trade Law.* Cheltenham, UK: Edward Elgar Publishing, page 79.
[2] Article 1 of the ASCM.

- **Prohibited subsidies**, categorised as red subsidies, are defined in Article 3 of the ASCM as taking one of two forms: subsidies that are contingent, in law or in fact, upon export performance, and subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.[3] As specificity is a requirement to use remedies available under the ASCM, prohibited subsidies are deemed to be specific by nature, as stipulated in Article 2.3.[4]

- **Non-actionable subsidies**, referred to as green subsidies, are defined in Article 8 of the ASCM. For a subsidy to be non-actionable it has to either be non-specific, or be in any of the following forms: a financial assistance for research and development, certain types of assistance to disadvantaged regions, and certain subsidies for compliance with environmental regulations.[5] However, subsidies included in Article 8, other than non-specific subsidies, are no longer non-actionable as the status of Article 8.2 expired in 2000 as there was no consensus has been reached on extending its duration.[6]

Differentiating between these types of subsidies is paramount, because the remedy taken by a government essentially depends on the type of subsidy identified. According to the ASCM, remedies can either be through multilateral dispute settlement or countervailing duties known as CVDs. In actionable subsidies, countries' response to subsidies depends on the existence of adverse effects specified in Article 5 of the SCM. Adverse effects can take any of three main forms: "injury to the domestic industry of another Member; nullification or impairment of benefits accruing directly or indirectly to other Members under the GATT 1994; and serious prejudice, including a threat thereof, to the interests of another Member."[7] The existence of adverse effects allows countries to unilaterally impose countervailing measures on subsidised imports into their domestic market upon finding injury or threat thereof, or filing a complaint before the Dispute Settlement Body with the possibility of taking countermeasures if the complaint is upheld.[8] In

[3] Article 3 of the ASCM.
[4] Article 2.3 reads: "Any subsidy falling under the provisions of Article 3 shall be deemed to be specific."
[5] Article 8 of the ASCM.
[6] World Trade Organisation. (n.d.). *Subsidies and Countervailing Measures: Article 8 Jurisprudence*. WTO.
[7] Article 5 of the ASCM.
[8] Trebilcock, M. J. supra, page 79.

prohibited subsidies, along with having the option to invoke any of the aforementioned, countries can seek dispute settlement and request the withdrawal of the prohibited subsidy, regardless of the existence of injury in their domestic industry.

Non-actionable subsidies, on the other hand, do not justify the imposition of countervailing measures or the invocation of the Dispute Settlement Procedures described in Part III of the ASCM once they are conducted in accordance with the provisions of Part IV. Nevertheless, in the case of non-actionable subsidies resulting in serious adverse effects, the affected member could follow procedures that are less escalatory in nature than the ones associated with actionable and prohibited subsidies. Instead of referring the matter to the dispute settlement body (DSB), for example, they could refer the matter to the Committee on Subsidies and Countervailing Measures to seek modification of the subsidy provided.[9]

III. The Definition of Crisis from an International Law Perspective

From a linguistic perspective, the term 'crisis' encompasses various meanings. The Oxford English Dictionary defines the term as: "a state of affairs in which a decisive change for better or worse is imminent" or "a situation or period characterized by intense difficulty, insecurity, or danger," or “a sudden emergency situation.” The Advanced American Dictionary defines it as “a time when a problem, a bad situation or an illness is at its worst point”.[10] Scholars, such as Freeden (2017), believe that the term 'crisis' is centred around a change that could range anywhere between a major change or a minor disturbance.[11] Based on these definitions, a crisis can generally be defined to mean a level of disruption affecting normalcy.

From an international law perspective, the term ‘crisis’ denotes a complex debate among lawyers and experts in international law. There is a common understanding that crisis involves a disruption, but there is a disagreement on when a crisis can be described as a disruption justifying implementing exceptional measures after which everything turns back to its normal status, or a disruption that creates a new permanent change or a ‘new normal’. According to Fabri (2021), “Crisis is, on the legal scale of words, one of those which lead to at least two questions which are

[9] This is explained in detail in Article 9 of the ASCM.
[10] Fabri, H. (2021). *Crisis Narratives and the Tale of our Anxieties. Crisis Narratives in International Law.* Chapter 3, Volume 104. Leiden, Netherlands. Brill.
[11] Freeden, M. (2017) Crisis? How Is That a Crisis?! Berghahn Books. *Contributions to the History of Concepts,* Vol. 12, No. 2 (Winter 2017).

actually linked: the first and most immediate is that of the justification for exceptional measures; the second, which begins with the exception but extends beyond, is that of change."[12]

Other scholars, such as Chimni (2022), explain that, while there are many narratives of crisis from an international law perspective, "the mainstream of international law scholarship uses the term 'crisis' primarily for events or episodes that expose gaps and inadequacies in particular domains of international law."[13] In terms of modern international law, Chimni explains that there are two types of crises: material and epistemic. A material crisis concerns objective real-world development, while an epistemic crisis concerns "the sphere of knowledge production pertaining to the condition of international law". Chimni then gives four main examples of material crises, specifically: episodic, regional, structural, and originary crises. An episodic crisis results from a serious violation of international law or a flawed response to a development; a regional crisis occurs when an area of international law becomes contested; a structural crisis exposes issues in multiple fields of international law, and is often referred to as a generalised crisis; and, finally, an originary crisis relates to conditions that are considered to be the basis for modern international law.[14]

In international agreements, the term 'crisis' is not explicitly defined; however, several terms that have a similar meaning to 'crisis' have been embodied in the language of the agreements. For example, Article 4 of the International Covenant on Civil and Political Rights grants countries the right to derogate from their obligations and take measures under the Convention in times of a public emergency threatening the life of its citizens. Article 4.1 states that:

> *In time of **public emergency which threatens the life of the nation and the existence of which is officially proclaimed**, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve*

[12] Ibid.
[13] Chimni B.S. (2022). *Crisis and International Law: A Third World Approach to International Law Perspective.* Leiden, Netherlands. Brill.
[14] Ibid

> *discrimination solely on the ground of race, colour, sex, language, religion or social origin.*[15]

Article 12.3 of the same Convention grants countries permission to restrict the right to liberty of movement, but this derogation was conditioned upon falling within the justifications stipulated in the Article, which states:

> *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law,* ***are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others****, and are consistent with the other rights recognized in the present Covenant.*[16]

The above are examples of crisis considerations in international agreements. Despite the lack of the explicit use of the term 'crisis', the conditions explained in these articles align with the concept of 'crisis' as argued in this paper.

In WTO Agreements, there are terms or situations that align with the conditions of crisis. For example, Article XX of the GATT 1994 contains general exceptions that allow countries to deviate from their obligations under the GATT and implement measures to – among others – protect human, animal or plant life or health, and others, which can be interpreted as crisis-driven measures. The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) further emphasises this right by allowing countries to impose measures that can restrict trade for the purpose of protecting human, animal or plant life or health and instructs countries to assess risks that may arise from disease outbreaks, which is a clear reference to crisis scenarios.

Similarly, the International Health Regulations (2005) address 'event' situations that could be read to refer to a 'crisis'. Article 1.1 of the Regulations defines an 'event' as the manifestation of disease or an occurrence that creates a potential for disease and introduces the concept of a "public health emergency of international concern" which refers to extraordinary events that pose a public health risk to other States through international disease spread that may require a coordinated global response. [17]

---

[15] *International Covenant on Civil and Political Rights, Article 4.1.*
[16] *International Covenant on Civil and Political Rights, Article 12.3*
[17] Article 1.1 of the International Health Regulations (IHL), 2005.

Based on the above, while there is no agreement on what constitutes a crisis from an international law perspective, it is clear that the term encompasses a broad range of situations that cause disruption and necessitate taking action, whether such action be to respond to the crisis and return to the old normal or to create a new normal.

IV. Crisis and Emergency Consideration under the ASCM

The ASCM refers to a number of events that may or may not be considered as 'crisis' events. It is important to examine whether each of these events can be considered to be a crisis and whether it necessitates a response action.

The first reference can be found in Article 6, where the Agreement discussed displacement or impediment as a manifestation of a serious prejudice. Paragraph 3 of Article 6 specifies that: serious prejudice arises in any case where one or several of the following apply: displacement or impediment of imports of the like product of a Member into the market of the subsidising Member, displacement or impediment of exports of a like product of a Member from a third country market.[18] Article 6.7 specifies circumstances in which the displacement or impediment cannot be invoked. These include:

> *Natural disasters, strikes, transport disruptions, or other force majeure events that substantially affect the production, qualities, quantities, or prices of a product available for export from the complaining Member.*[19]

The Agreement uses the term 'disaster' and 'transport disruptions', which could connote the circumstances that occur during a crisis. The Agreement further uses the term 'force majeure' which implies a wider scope that could incorporate different forms of crisis or emergencies. However, the scope of application of these circumstances is extremely limited as these circumstances only apply to the territory of the complaining member. It even applies restrictively to a situation that affects the export performance in the complaining member. Furthermore, according to some scholars, the invocation of "serious prejudice" under the ASCM is almost impossible and there is

[18] Article 6.3 of the ASCM
[19] Article 6.7 (c) of the ASCM.

little evidence addressing it in disputes.[20] They point out that it is difficult to obtain positive evidence to prove serious prejudice and highlight the fact that there is no reference to it being applied to the subsidising member or at the global level. In other words, this provision is one-sided and only allows the member that is affected by a subsidy to invoke it, and it does not allow subsidizing member who are affected by these circumstances to invoke its application.

Another implicit mention is made in Article 8.2, which outlines non-actionable subsidies. The Article specifies exceptions that allow countries to provide subsidies, but these exceptions are limited to three categories, namely: research and development, disadvantaged regions, and environmental concerns. In the context of a crisis, it becomes possible to invoke one or more of these categories to, for example, provide financial aid for research and the development of medical goods to help combat a health crisis. Unfortunately, these non-actionable subsidies were only temporarily enforced, and they expired in 2000. The lack of any other valid basis to exempt crisis-response subsidies restricts countries from providing financial assistance under these types of subsidies without facing the risk of countervailing measures or disputes brought before the WTO.

Thus, the text of the ASCM lacks any explicit consideration for crisis or any situation that aligns with the concept of crisis other than in the references given above, which are limited in scope and encompass expired provisions. This lack of consideration of crisis situations in the ASCM could be because they were unforeseen when the Agreement was written. This issue was highlighted in a report issued by the International Monetary Fund (IMF) (2022) which states: "Some prominent issues today were not foreseen in the early 1990s: huge environmental externalities (e.g., climate change), the growth of the services trade and the digital economy, the international presence of SOEs, and the potential for national and international health or economic emergencies."[21] Thus, a significant disruption in trade caused by a crisis or an 'emergency', as is stated in the report, was unforeseen at the time of the formation of the Agreement. Hence, no attempt was made to incorporate any language that anticipates such disruption. As will be

[20] Coppens, Dominic. *"How special is the Special and Differential Treatment under the ASCM?A legal and normative analysis of WTO subsidy disciplines on developing countries"* World Trade Review (2013). 12:1, 79-109. Published online by Cambridge University Press.
[21] International Monetary Fund. (2022). *World economic outlook: War sets back the global recovery* (April 2022 edition).

explained in this paper, this lacuna in the Agreement became more important following the impact on trade and economy of the COVID-19 pandemic.

V. The Status of Measures Taken as a Crisis Response: The Case of COVID-19

Subsidies have historically long been used by governments as a crisis-response measure. Hoekman and Nelson (2020) note that "subsidy programmes were an important element of government responses to the Global Financial Crisis".[22] Resorting to subsidies in times of crisis is expected, given their proven efficiency containing the losses that do or may occur because of such events. The question is whether the COVID-19 pandemic amounted to a crisis with impacts similar to past crises.

Some scholars have raised the question of whether the COVID-19 pandemic could be classified as a crisis. Chimni (2022) contends that the COVID-19 pandemic is a contemporary example of a structural crisis, due to its impact on international health law, international economic and trade law, and international human rights law. In its World Development Report (2022), the World Bank Group also described the COVID-19 pandemic as "the largest global economic crisis in more than a century." Furthermore, several academics and researchers described the COVID-19 pandemic as a crisis that disrupted the world (Desta, 2020; Cheng 2020; Schwak, 2021; Yanagida 2023). These scholars' assessment and the impact that it caused indicates that COVID-19 could be considered to be a crisis. This calls for an examination of the measures taken during the pandemic to see whether they would fall under the ASCM and ascertain how they could be viewed in anti-subsidy investigations. Thus, this section investigates the measures taken during the pandemic as crisis-response subsidies.

Before examining the measures taken during the pandemic, it is important to note that for subsidies to be actionable they must be specific. In this regard, the ASCM established a specificity test requirement. Article 1.2 of the Agreement states:

[22] Hoekman, B. and Nelson, D. (2020). Rethinking international subsidy rules. *World Economy*, 43:3104–3132. https://doi.org/10.1111/twec.13022.

> *A subsidy…shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V* ***only if such a subsidy is specific*** *in accordance with the provisions of Article 2.*

The specificity test is a requirement for using the tools available under the Agreement (i.e., imposing countervailing duties or filing a complaint against the subsidising member before the dispute settlement body of the WTO). Article 2.1(b) clarifies when a subsidy is not specific:

> *Where the granting authority, or the legislation pursuant to which the granting authority operates,* ***establishes objective criteria or conditions*** *governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.*

This means that any subsidy built on objective criteria or conditions that are automatically applicable to all shall be deemed to be non-specific. Accordingly, subsidies provided as part of a broad COVID-19 relief package may not be considered specific if they are available to all industries equally or based on objective criteria as specified by Article 2.1(b).

In practice, this can be seen in fiscal assistance and expenditures provided by governments to all industries to protect and cover social security, employment and housing security. It could also be seen in reduced fees and charges on employment and exemptions from social security premiums and tax reduction policies designed for the purpose of protecting jobs under the condition that they apply to all industries and regions in the country.

When the subsidies provided as a crisis response are general and applicable to all, they do not pose an issue because they do not meet the 'specificity' requirement. The issue, however, arises when subsidies target certain industries or a group of industries because they are the most affected by the crisis or because they manufacture goods needed to combat the crisis. Such sector-specific subsidies are likely to be considered actionable or even prohibited under the provisions of the ASCM, depending on the nature of the subsidy, exposing the subsidising member to countervailing measures or a dispute request brought against them before the Dispute Settlement Body.

To understand the significance of this issue, one needs to look at the data on anti-subsidy investigations initiated in 2020. According to WTO data, 2020 — the year of the COVID-19 pandemic — witnessed the highest number of anti-subsidy investigations initiated against other members since the establishment of the organisation.[23] While these investigations may not necessarily be a direct response to subsidies provided during COVID-19 by other members, they reflect the increasing tendency of members to invoke anti-subsidy investigations during crises and, thus, highlight the risk of protectionist measures being imposed during such times due to the lack of a legal basis that prevent countries from doing so. To understand this thoroughly, it is important to explore subsidy programmes provided by countries during the COVID-19 pandemic and examine examples of anti-subsidy investigations to see whether they included COVID-19 subsidy schemes in the investigation or calculation of the CVDs imposed.

1. Subsidies Provided as a Response to the COVID-19 pandemic

When examining some of the financial aid or assistance programmes offered to industries during the COVID-19 pandemic, it becomes clear that some of these programmes could fall within the scope of subsidies under the ASCM. For the purpose of the research, this section will focus on subsidies provided by WTO members during the COVID-19 pandemic applied to certain groups or industries. Subsidies that were generally applicable to all, or that were in force before the pandemic or were expected to be granted irrespective of the pandemic, such as subsidies related to fossil fuels or green energy will not be considered as they are not crisis-response subsidies and fall outside the research scope.[24] Furthermore, subsidies provided for the services sector are also omitted as the ASCM applies only to goods and does not cover services.

In the Asian continent where the pandemic first started, the Ministry of Finance in China carried out several measures to mitigate the losses caused by the COVID-19 pandemic. Among these measures were substantial subsidies for the research, development and manufacturing of vaccines,[25] extending the loss carry-over period for remitting real estate tax and urban land use tax

[23] Trade Remedies Data portal, WTO (Accessed 30-septmber 2024)

[24] It is important to note that the COVID-19 pandemic may have played a role in increasing subsidies provided to green energy or fossil fuels. This is a point of much debate as this sector may have benefited from the pandemic, unlike other industries which were impacted and for which subsidies were needed. For the purposes of this research paper, green and fossil fuel subsidies are considered to fall outside the scope of discussion.

[25] Thrasher et al. (2023). Policy responses to COVID-19: Lessons for the global trade and investment regime, *Globalization and Health*, BMC, pgs 7-9.

for enterprises in industries that were affected by the pandemic, improving VAT rebates on exports, and exempting port construction fees for exported goods. It also included exempting taxpayers in the most affected provinces from paying a certain percentage of value-added tax.[26]

The Government of Japan also implemented a range of financial assistance measures to combat the crisis, among them a financing programme tailored specifically for the health industry through low-interest loans.[27] Other governments created relief packages customised to combat the crisis. The Government of South Korea, for example, announced a Financial Support Package that included "financial support programs for SMEs and key industry relief funds designed to support essential industries, such as shipbuilding, automobiles, and general machinery."[28] The Government of Russia, similarly, provided budget grants and loans to affected industries and subsidies to automakers and others.[29]

In the European continent, fiscal assistance and packages were provided at both the Union level and the member's state level. At the Union level, the EU created, among other programs, 'safety net measures' which "consists of three sets of measures including the European Stability Mechanism (ESM) provides Pandemic Crisis Support up to 2 percent of 2019 GDP for each euro area country (up to €240 billion in total) to finance health-related spending; (2) €25 billion in government guarantees to the European Investment Bank (EIB) up to €200 billion in finance to companies, with a focus on small and medium enterprises (SMEs); and (iii) to create a temporary loan-based instrument (SURE) of up to €100 billion to protect workers and jobs, supported by guarantees from EU Member States."[30] The implementation of these measures can be seen in the provision of fiscal grants and capital injections to industries whose products were most needed during the pandemic, such as approving $53.8 million to Italian companies that manufacture

[26] Ministry of Finance (2021). *The Report on The Implementation of Fiscal Policy of China for 2020* https://www.google.com/search?client=safari&rls=en&q=Ministry+of+Finance+(2021).+The+Report+on+The+Implementation+of+Fiscal+Policy+of+China+for+2020+www&ie=UTF-8&oe=UTF-8

[27] Usami, H. (2020). *COVID-19: Japanese Government Financial Assistance Measures,* White & Case LLP (accessed 12-Oct-2024).

[28] Budget Office (2021). *Recovery for All: Korea's Fiscal Response to COVID-19 Policy Brief Report*, The Ministry of Commerce and Finance, The Republic of Korea. https://english.moef.go.kr

[29] Policy tracker (2021). *International Monetary Funds*. (This policy tracker summarizes the key economic responses governments are taking to limit the human and economic impact of the COVID-19 pandemic. The tracker includes 197 economies. Last updated on July 2, 2021.)

[30] Ding, Ru. (2024). *Time to Reform the Non-Actionable Subsidy Rules in the WTO: The COVID-19 Subsidies and Beyond*. Oxford: Hart Publishing, 2021. Studies in International Trade and Investment Law. Studies in International Trade and Investment Law. Bloomsbury Collections. (pp. 62).

ventilators, masks, safety suits, goggles, gowns, and shoes used as personal protective equipment.[31] At the members level, the EU "introduced a 'State Aid Temporary Framework'" which suspended certain state aid rules to allow member states to respond with targeted support of pandemic countermeasures."[32] State aid included "direct grants, repayable advances, or tax advantages, guarantees on loans, aid in the form of subsidized, short-term export credit insurance interest rates for loans, aid in the form of deferral of tax and/or of social security contributions, and state injection of equity to firms."[33] In practice, "the national level liquidity measures, including schemes approved by the European Commission under temporary flexible EU State Aid rules, has amounted to about €3 trillion". [34] This means that many of the members of the European Union have used this temporary framework to provide subsidies to their domestic industries.

In the American continent, the U.S. enacted a Coronavirus Aid, Relief and Economy Security Act (CARES Act), which amounts to $ US 2.3 trillion. This Act intended to provide emergency assistance to individuals, families and businesses.[35] The assistance offered under this program included "loan forgiveness, direct grants, waiver of a prepayment penalty to small and medium enterprises, delay in paying tax, loans and loan guarantees.[36] The Department of Commerce's National Institute of Standards and Technology (NIST) also awarded nearly $54 million in grants for 13 high-impact projects for research, development, and testbeds for pandemic response.[37] Another programme involved awarding $600 Million to Bolster US Manufacturing of COVID-19 Tests.[38]

As seen above, some programmes were contingent on export performance such as 'improving VAT rebates on exports' and 'exempting port construction fees for exported goods', which could

[31] Ambaw D. et al. (2020). *Lessons from the pandemic for future WTO subsidy rules*, Centre for Economic Policy Research, London, United Kingdom.
[32] Thrasher et al. (2023), Ibid.
[33] Ding, supra pp 64.
[34] Ibid. pp 64.
[35] Ibid. 67
[36] Ibid
[37] U.S. Department of Commerce. (2022, February 4). *Commerce Department awards $54 million in American Rescue Act grants*. https://www.commerce.gov/news/press-releases/2022/02/commerce-department-awards-54-million-american-rescue-act
[38] U.S. Department of Health and Human Services. (2023, September 20). *Biden-Harris administration awards $600 million to bolster U.S. manufacturing of COVID-19 tests and announces re-opening of COVIDTests.gov*. HHS.gov. https://www.hhs.gov/about/news/2023/09/20/biden-harris-administration-awards-600-million-bolster-us-manufacturing-covid-19-tests-announces-re-opening-covidtestsgov.html

be classified as prohibited subsidies as stated in Annex I of the ASCM.[39] Other subsidies were only available to certain enterprises or regions. Furthermore, many of these subsidies could be justified as being provided to contain the damages or losses to the industries receiving the subsidies, or for manufacturing goods that were most needed to combat the crisis. Either way, such programmes could be categorised as being specific and to most likely contain criteria that confer a benefit to the recipient given that they were provided to contain a crisis and mitigate its impacts, thus falling within the provisions of the ASCM.

Based on the above, subsidy programmes or relief packages can easily be identified as falling within the scope of the ASCM. Thus, investigating authorities conducting anti-subsidy investigations could deem them actionable or even prohibited, leading to the imposition of CVDs upon finding material injury. It could even lead to an increased CVDs because these subsidy programmes or relief packages are expected to be calculated alongside other actionable subsidy programs leading to a higher rate. Complaining members could also invoke 'adverse effects' under the ASCM. While the 'adverse effects' condition does not apply to subsidising members who prove that no injury, nullification, impairment or serious prejudice was caused to another member[40] the complaining members may file a dispute request if they deem the subsidies to be prohibited as being contingent upon export performance or on the use of domestic over imported goods. The risk here is that the subsidising member could be obligated to withdraw the subsidy, regardless of finding injury or threat thereof because injury under this type of subsidy is presumed. According to Ding (2024), "Any WTO Member can challenge such subsidies directly without proving adverse effects or specificity, which are presumed." This again shows the problematic lack of any crisis consideration of crisis-response subsidies in the ASCM.

The following section examines some anti-subsidy investigations conducted during and post the COVID-19 pandemic from a practical point of view with the aim of establishing whether the investigating authorities took responding to the crisis into consideration in their investigation.

[39] Annex I provides an Illustrative List of Export Subsidies that includes: The provision by governments of direct subsidies to a firm or an industry contingent upon export performance, the full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

[40] Article 6.2 provides: Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.

2- The Status of Subsidies Made as A Response to the COVID-19 Pandemic in Anti-Subsidy Investigations

First, it is paramount to note that it is difficult to identify an anti-subsidy investigation that focuses solely on subsidies provided during COVID-19 as typically a group of subsidies are investigated together. As understood from the WTO jurisprudence, investigating authorities can follow a cumulation approach, defined by the Appellate Body as consisting of:

> *analysing the effects of a single subsidy, or an aggregated group of subsidies, in order to determine whether it constitutes a genuine and substantial cause of adverse effects. Having reached that conclusion, a panel may then assess whether other subsidies — either individually or in aggregated groups— have a genuine causal connection to the same effects, and complement and supplement the effects of the first subsidy (or group of subsidies) that was found, alone, to be a genuine and substantial cause of the alleged market phenomena. The other subsidies have to be a "genuine" cause, but they need not, in themselves, amount to a "substantial" cause in order for their effects to be combined with those of the first subsidy or group of subsidies that, alone, has been found to be a genuine and substantial cause of the adverse effects.*[41]

The above means that investigating authorities can investigate a group of subsidy programmes, including those provided as a response to the crisis, to analyse their combined effects. Each subsidy in the group must genuinely contribute to the harm, even if this is not substantial when the subsidy is considered on its own. Such an analysis, therefore, could involve examining aggregated group of subsidies to establish the claim of injury, which could ultimately impact the countervailing duties (CVD) imposed by increasing the amount of duties. For the purpose of this paper, and to avoid unnecessary verbosity, this section focuses on a limited number of anti-subsidy investigations from the investigating authorities in Canada, Australia, and India.

In the final determination in an anti-subsidy investigation concerning the subsidising of container chassis originating in or exported from China, conducted by the Canadian investigating authority (CBSA), the authority recommended the imposition of countervailing duties (CVD) on Chinese exports despite the exporters' claim that some of the subsidy programmes considered in

[41] Appellate Body Report, US – Large Civil Aircraft (2nd complaint), paras. 1287 and 1292.

the CVD calculation were related to measures responding to the COVID-19 pandemic. According to the final findings report issued by the CBSA, among the subsidy programmes investigated were the following: online training created to improve the skills of employees and stabilise employment during the pandemic, electricity grants for resumption of work and production, grants for purchasing prevention supplies, grants for the establishment of prevention and isolation facilities to assist companies in recovering from the pandemic, and grants for transportation for key enterprises to resume work and production. It also included reimbursement of unemployment insurance due to the pandemic and exemptions for land usage tax and property tax to help enterprises recover from the pandemic.

The CBSA responded that it did not receive a response from the Government of China to the subsidy questionnaire and that it considers these programmes specific.[42] Despite the lack of a government response to confirm the nature of the subsidy programmes, this investigation shows that there is no exception that can exempt crisis-response subsidies from being examined in anti-subsidy investigation, or from the calculation of CVDs. With or without a government clarification, such crisis-response subsidies will remain actionable, regardless of their objective, as there is no exemption in the ASCM that prevents considering them so. However, if there were an exemption for crisis-response subsidies in the investigation, the final CVD that would be imposed would have been lower given that the amount of these subsidies would be excluded from the calculation.

In a similar anti-subsidy investigation concerning imports of steel corner beads and angles into Australia, the investigating authority examined subsidy programmes that included land use tax deductions, government subsidies for job stability, and research and development assistance grants during the COVID-19 pandemic.[43] In this investigation, the investigating authority did not examine the objective of the subsidy programmes, nor did it link them to the COVID-19 pandemic or determine whether or not they were a crisis-response subsidy. In fact, it identified these programmes as countervailable and stated that: "Due to the nature of the grant it is considered that

[42] Canada Border Services Agency. (2021, June 30). *Final determination: Certain concrete reinforcing bar,* pp 31-36, 46-56.
[43] Australian Department of Industry, Science, and Resources. (2024, August 1). *Consideration report: Anti-dumping case 650*.

a financial contribution would be made in connection to the production, manufacture or export of all goods of the recipient enterprise (including goods exported to Australia)."[44]

Although no link was made in the investigation report between the subsidy programmes mentioned above and their timing, it could be argued that some were crisis-response driven given that they were announced publicly by the government as subsidies that were being implemented to combat the crisis. Some of the subsidies were similar to the ones investigated by other investigating authorities, including the Canadian authorities. This demonstrates that there is a lacuna in the ASCM regarding crisis-response subsidies.

Another example of crisis-response subsidies being included in anti-subsidy investigations can be found in the final report on anti-subsidy investigation concerning imports of "saturated fatty alcohol" from Indonesia, Malaysia, and Thailand into India issued by the Indian Investigating Authority (DGTR) in 2023 in which the DGTR stated that it had examined several subsidy programmes from Malaysia and Indonesia. These subsidy programmes explicitly included COVID-19 relief packages. In this investigation, the DGTR classified these COVID-19 programmes as subsidies, which confirms that such programmes were deemed actionable by the investigating authority. However, the DGTR did not include these subsidies in the final CVD calculated, stating that it had relied on the highest subsidy margins for the cooperating parties based on the facts available.[45] In other words, these programmes were excluded from the final calculation of the CVDs imposed because there were other subsidies with high margins and not because these programmes were crisis-response subsidies.

Based on the above and in light of the absence of an exception that allows countries to provide crisis-response subsidies that prevents investigating authorities from including them in the calculation of the CVDs, the consideration of subsidy programmes provided in times of crisis for the purpose of combating it will remain permissible in anti-subsidy investigations and will possibly lead to an imposition of CVDs or increased CVDs.

[44] Consideration Report: *Anti-dumping case 650*, Ibid.
[45] Directorate General of Trade Remedies (DGTR), (7 Feb 2023), *Final Findings Notification in Anti-subsidy investigation concerning imports of "saturated Fatty Alcohol" from Indonesia, Malaysia and Thailand*. No.6/18/2021-DGTR (https://www.dgtr.gov.in/sites/default/files/english%20signed.pdf)

VI. Examining Scholars' Opinion regarding Reviving and Reforming Non-actionable Subsidies in the Context of the COVID-19 Crisis: A Critical Analysis

Upon witnessing the impacts of the COVID-19 pandemic, countries and experts in international law called for reforms to be made to WTO rules. Some scholars proposed different approaches, among them Wolfe (2020)[46] who suggests the creation of a single crisis coordination committee under the General Council of the WTO to "cover all trade measures implemented in response to the crisis, including measures designed to re-start economies".[47] He further elaborates that its task would be to "ensure coordinated assessment of new measures and a consistent approach to crisis related specific trade concerns".[48]

While the creation of such a committee could push WTO Agreements to incorporate crisis consideration, or at least assist relevant bodies of the WTO in the interpretation of existing rules, a reform of the specific text of the ASCM is still strongly needed irrespective of whether the committee is created. This is because, even if such a committee were to be established, its mandate would remain limited to assessment and assistance and would not cover the interpretation of rules or decision-making regarding the implementation of WTO Agreements. Thus, a reform of the provisions of the ASCM and reinterpretation of non-actionable subsidies remains necessary.

Many scholars have emphasised the need to revive non-actionable subsidies. Reviving non-actionable subsidies would be insufficient; their content must also be reformed to incorporate the change of circumstances to reflect the changing circumstances of the present and to anticipate future developments. A holistic reform would involve two interconnected aspects that must be addressed sequentially: a distinction must be made between good and bad subsidies, and a public policy objective consideration similar to that stipulated in Article XX of the GATT must be incorporated in the text. Each of these aspects will be discussed and critically analysed in detail below.

[46] He proposed different procedures and initiatives to be taken at the WTO level. For the purposes of this research, the focus is on the proposal relevant to the topic of the paper. For more information read: Wolfe, R. (2020). *Exposing governments swimming naked in the COVID-19 crisis with trade policy transparency* (and why WTO reform matters more than ever). London: Centre for Economic Policy Research.
[47] Ibid.
[48] Ibid.

Before delving into these aspects, it is necessary to examine Article 8.2 to understand why experts are advocating for its revival. As stated earlier, Article 8.2 describes three categories of subsidies that are deemed non-actionable, which are:

> *(a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms;*
>
> *(b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development*
>
> *(c) assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms.* [49]

These categories are not exempted unconditionally but there are further detailed provisions governing their use. However, the provisions of Article 8.2 expired in 2000 due to a lack of consensus among members to extend its duration. Therefore, any subsidy programme falling within these categories is categorised as being either actionable or prohibited. Research and development (R&D) is one of the three categories explicitly mentioned in Article 8.2. This article governs financial assistance for R&D activities by allowing governments to cover up to 75% of the costs for industrial research or 50% of the costs for pre-competitive development activities.[50] Subsidies under this category were not subject to countervailing measures as they were deemed beneficial or neutral for international trade. During the COVID-19 pandemic, this category was frequently invoked by countries, including the United States, members of the European Union, and China to implement fiscal programmes for R&D. Some of these programmes were specifically targeting medical research and vaccine manufacturing.[51]

In this regard, Ambaw et al. (2020) states: "Many countries are subsidizing research on, and development of, COVID-19 vaccines, and many more countries will probably justify the various COVID-19 subsidy schemes they have introduced as necessary for protecting human life or health, or to avoid devastating effects on the economy." The author states that the use of this

[49] Article 8 of the ASCM.
[50] Article 8.2 of the ASCM.
[51] Yanagida, supra.

tool could actually aid negotiations for reviving the non-actionable subsidies given that many countries have used it. He further elaborates: "With everyone now a sinner, it could be easier to negotiate subsidies disciplines, especially if WTO members could agree on the types of subsidies which are necessary to combat the pandemic and aid the recovery."[52]

Two important notes can be drawn from Ambaw et al. (2020). First, there is a need to have a functioning R&D provision that can assist the government response to crises as, in the case of COVID-19, assistance was provided to support manufacturing of medical goods and vaccines. Second, this common practice of supporting R&D – despite the expiry of Article 8.2 enabling the provision of this kind of subsidy – indicates that there is hope for members to reach consensus given that circumstances have changed since they were last asked to negotiate the extension of the provisions of Article 8.2, which makes reviving Article 8.2 extremely feasible.

In his discussion on the need to revive R&D, Ding (2024) points that the scope of the currently expired provisions is narrow when applying it to the context of COVID-19. In fact, the fiscal assistance provided by some countries to R&D during the pandemic exceeded the percentage cap specified in Article 8.2. This means that even if the provisions are revived, countries are still limited to a certain percentage. Thus, Ding proposes to widen the scope by keeping this category unlimited in times of crises as this time justifies the urgent intervention of providing fiscal assistance.[53]

1. The Need for a Distinction between Good and Bad Subsidies

Reviving non-actionable subsidies alone is not sufficient. While there are some categories that can be used in times of crisis, such as R&D, there is still a need to widen the scope of actionable subsidies to incorporate subsidies provided in time of crisis. As explained above, some scholars pointed the issue of the narrow scope of non-actionable subsidies in the context of the pandemic, others have pointed out the importance of incorporating a flexibility into the non-actionable subsidies category.

[52] Ambaw, et al. (2020). Lessons From The Pandemic For Future WTO Subsidy Rules. Centre for Economic Policy Research, London, United Kingdom. (page 203-209).
[53] Ding, supra. (pp73).

In his discussion on lessons learnt from the COVID-19 pandemic and in the context of subsidies, Borlini (2023) highlighted the need for a well-balanced system of subsidy control that differentiates between good and bad subsidies. He states: “One key lesson learnt is that both fiscal and monetary policy measures in response to the crisis were needed to shield the real economy and financial sector from the pandemic fallout.”[54] This means that the subsidies given during the pandemic were necessary to avoid complications of the crisis; this signals a need to incorporate a level of flexibility that puts subsidies responding to a crisis in the 'good' category as non-actionable subsidies.

Ambaw et al. (2020) stressed the importance of drawing a line between 'good' and 'bad' subsidies in the context of COVID-19. They state that: “WTO members should discuss the reintroduction of such flexibilities into the ASCM as part of a broader discussion on ‘good’ subsidies, such as those promoting uptake of carbon-reduction technologies and development of vaccines for pandemics.”[55] The reintroduction proposed here is two-pronged. Subsidies could be considered to be good subsidies based on their timing and whether they are being implemented in response to a crisis. Namely, the subsidies must be necessary to combat a pandemic and aid in recovery. Ding (2024) also adopts a similar approach by calling for introducing a flexibility under non-actionable subsidies that considers measures taken during crisis. He proposes that subsidies made for the purpose of combating crisis should fall under a new category called ‘non-actionable subsidies for disaster relief’.[56] The introduction of this category aims to distinguish crisis subsidies from other subsidies and therefore puts crisis-response measures in the category of good subsidies.

Drawing the line between 'good' and 'bad' subsidies requires examining the objective of the subsidy programmes. Incorporating a policy objective consideration is crucial in determining whether a subsidy is good or bad and, in times of crisis, the 'good' category should apply to subsidies which have the objective of combating a crisis and mitigating its impacts, whether applied to the industries that have been most affected or deployed to assist in manufacturing most needed goods.

[54] Borlini, L. (2023). The COVID-19 Exogenous Shock And The Crafting Of New Multilateral Trade Rules On Subsidies And State Enterprises In The Post-Pandemic World. German Law Journal, 24, (https://doi.org/10.1017) p72-101.
[55] Ambaw et. Al. Supra p210.
[56] Ding, supra, p76.

It is worth noting that the ASCM explicitly refers to the term 'policy objective' in Article 25 which discusses the information needed to be included in the notification of subsidies. Specifically, Article 25.3 states that:

> *The content of notifications should be sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programs. In this connection, and without prejudice to the contents and form of the questionnaire on subsidies, Members shall ensure that their notifications contain the following information:* ***… (iii) policy objective and/or purpose of a subsid***y.[57]

The use of the term 'policy objective' in Article 25.3 indicates that its purpose is to "enable other members to evaluate the trade effects and to understand the operation of notified subsidy programs". There was no explanation in the Agreement, nor in any regulations, on how members can evaluate a policy objective as part of the trade effects. It is, therefore, unclear how members can examine the policy objective. This implies that an evaluation of trade effects considering therein the policy objective is at the discretion of the members as there is no provisions regulate it within the ASCM. What happens after evaluation is up to the members examining it, meaning that there are no categories or provisions or case law that can help identify different levels of policy objectives in a way that exempts certain policy objectives from being examined or, at least, indicate whether a policy is justifiable. Thus, the reference to the policy objective in the ASCM under the notification obligation does not provide a sufficient basis for exception and, thus, exceptions need to be explicitly mentioned in the context of remedies or times of crisis. The following section examines the need for a policy objective in the context of crisis as discussed in scholarly work.

2. The Need to Examine the Policy Objective: Reading the Exceptions of Article XX in the Context of Subsidies Provided as a Crisis Response

As discussed earlier in the paper, the ASCM lacks consideration of actions taken in times of crisis, while a crisis consideration is explicitly referenced in other Agreements, including the GATT, albeit with a specific definition given of what constitutes a crisis. In particular, Article XX of the GATT allows deviation from all GATT obligations in specific circumstances stipulated in

[57] Article 25: Notifications, the ASCM.

the provisions of the Article, among them measures taken to protect human health and life. Article XX reads:

> *Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,* ***nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: … 2 (b) necessary to protect human, animal or plant life or health****..*

The question here is whether the provisions of this Article apply to other WTO Agreements. Van den Bossche and Zdouc (2021) state that "Article XX of the GATT 1994 can only justify inconsistencies with obligations under the GATT 1994, and not with obligations under other WTO agreements, except when provisions of these other agreements explicitly (i.e. Article 3 of the TRIMS Agreement or Article 24(7) of the Agreement on Trade Facilitation) or implicitly (e.g. paragraph 5.1 of China's Accession Protocol) incorporate Article XX and thus make it available to justify inconsistencies with all or some of the obligations under these agreements".[58]

Before diving into whether the exceptions of Article XX apply to ASCM, it is necessary to analyse the language of the Article and its interpretation in the case law to understand the nature of the exceptions and whether they are relevant to measures taken during crisis. The Article uses the term "protect", which is interpreted by the Appellate body in EC – Seal Products as to: "defend or guard against injury or danger; shield from attack or assault; support, assist ...; keep safe, take care of".[59] The Appellate Body further confirmed a panel ruling that the use of the phrase "to protect" implies an existence of a risk by stating: "In EC – Asbestos, in addressing the term 'to protect' in Article XX(b), the panel noted that 'the notion of 'protection' ... implies the existence of a health risk'. We note that Article XX(b) focuses on the protection of 'human, animal or plant life or health'. It may be that the protection of human, animal, or plant life or health implies a particular focus on the protection from or against certain dangers or risks.[60]

[58] Van den Bossche, P. & Zdouc, W. (2021). *The law and policy of the World Trade Organisation: Text, cases, and materials* (5th ed.). Cambridge University Press.
[59] Appellate Body Reports, *EC – Seal Products*, paras. 5.197-5.198.
[60] Appellate Body Reports, *EC – Seal Products*, Ibid.

This means that the term 'to protect' connotes an existence of a risk to human life or health that justifies taking measures necessary to respond to it. The exception, therefore, is likely to apply in the context of the COVID-19 pandemic, given that the pandemic posed a risk to both human life and health, especially when considering the case law interpretation of the Article XX (b). In particular, as interpreted in the WTO jurisprudence, the word 'protect' means "defend or guard against injury or danger; shield from attack or assault; support, assist"[61] The reference to the terms 'support', and 'assist' implies the provision of support or assistance in the forms of measures taken to preserve human life or health. However, it is not clear whether assistance could be interpreted to include financial assistance. This raises the question of whether this exception applies to subsidies in general and subsidies provided for the purpose of responding to a crisis.

Questioning whether the exceptions of Article XX apply specifically to the provisions of the ASCM is not new. Nu Ri Jung (2023) writes in this regard that the question of applicability of Article XX to the ASCM is a controversial one and "existing literatures fail to provide a clear answer on the applicability of the GATT Exceptions to the ASCM". Nu Ri Jung (2023) further notes that there are different opinions about the applicability of Article XX to the provisions of the ASCM. To summarise them, the first opinion argues that Article XX does not apply, simply because the language in Article XX explicitly uses the term 'this Agreement' which indicates that it only applies to the GATT. Yet, it could apply to other Agreements that refer to the exceptions explicitly such as the Agreement on the Application of Sanitary and Phytosanitary Measures ('SPS Agreement') and the Agreement on Trade-Related Investment Measures ('TRIMs Agreement'). The ASCM, however, does not make such a reference and, therefore, exceptions under the XX cannot apply to the ASCM.[62] This opinion confirms Van den Bossche and Zdouc's (2021) conclusions. The other opinion, however, argues that Article XX has an expansive nature and highlights its value in the ASCM as it contains subsidies under Articles VI (countervailing duties) and XVI (subsidies in general) of the GATT.[63] This opinion is also adopted by Jung (2023) who notes that "the General Interpretative Note to Annex 1A states that only "[i]n the event of conflict between a provision of the [GATT] and a provision of [the ASCM], the provision of the [ASCM]

[61] Ibid.
[62] Jung, N.R. (2023). Are There 'Exceptions' to the ASCM? Applicability of the GATT Exceptions Vis- à-Vis the International Rules on Subsidies. *Journal of World Trade,* 57(3). pp. 457–472.
[63] Ibid.

shall prevail". This means that only in the case of 'opposing rules/provisions' between the two Agreements, the provisions of the ASCM override those of the GATT. Jung further believes that there is no conflict when applying the exceptions of the GATT into the ASCM; what seems to be a conflict is a matter of interpretation and, therefore, the provisions of the GATT apply to the ASCM in respect of actionable subsidies. However, there are some provisions that constitute an opposition to each other in both Agreements, namely, the provisions related to prohibited subsidies. In this case, the provisions of the ASCM overrides.[64] This means that the exceptions of the GATT when found in conflict cannot apply to the ASCM because of the General Interpretative Note to Annex 1A.

In his analysis, Jung (2023) did not discuss the applicability of the exceptions of the GATT to subsidies provided in times of crisis, nor did he address the status of COVID-19 measures in his discussion. As seen from the discussion provided earlier in the paper, some subsidies that were provided for the purpose of combating the crisis and mitigating its impact can be deemed to be actionable. Also, as seen in some anti-subsidy investigations, relief packages and COVID-19 assistance were not deemed to fall under the exceptions of the GATT and were not exempted from investigation. This puts Jung's analysis on a theoretical level when it is read in parallel with the actual practice of countries in anti-subsidy investigations. In other words, subsidies provided as a crisis response can be seen to be in conflict with the ASCM and, therefore, the exceptions of the GATT will not exempt them from being subject to the provisions of ASCM.

The WTO jurisprudence appears to leave the question of applicability unresolved. In this regard, Ding (2024) writes: "The 2006 World Trade Report of the WTO Secretariat, in its legal analysis, suggests: '[w]hile Article XX in principle would apply to subsidies, the more specific rules of the SCM Agreement in any case are explicitly geared to remedying trade distortions from subsidization'. Also, '[t]he lack of textual support for such a reading, however, makes it unlikely that the Appellate Body would accept an Article XX defense to a claim under the SCM Agreement". [65] Accordingly, the applicability of Article XX to the ASCM is unlikely. Based on the discussion above, it becomes evident that there is no definitive answer as to whether the provisions of Article XX apply to the ASCM.

[64] Ibid.
[65] Ding, Ru. (2024). Supra, pp 61.

While Article XX (b) does not apply to crisis-response subsidies, which otherwise would have solved the issue of the lack of exceptions in the ASCM, the nature of exceptions and the consideration given for public policy objectives can be incorporated into the reform of the ASCM to cover the lack of crisis considerations. In this regard, scholars such as Borlini (2023) highlight the importance of introducing the policy objective into the ASCM when assessing whether the actions of a state reflect a legitimate public policy goal. He writes: "Theoretically, a sensible way to allow this sort of assessment would be the introduction in the ASCM of a general exceptions provision, akin to GATT Article XX, which relates to a range of legitimate public policy goals, including human, animal, and plant life and health, and the conservation of natural resources." The lack of a policy objective consideration in the ASCM, in his opinion, limits the country's flexibility to provide subsidies that target a public policy objective.

Hoekman and Nelson (2020) emphasise the fact that the provisions of Article 8.2 are too narrow to consider the policy objectives of subsidies provided for purposes other than economic ones. They state that the article "did not encompass an explicit recognition that some subsidies are much less of a concern than others, and the need for governments to address market failures." They further state that "disciplines need to consider (be conditioned on) what governments are aiming to do, implying asking what the underlying problem or objective is, and differentiating economic from non-economic goals."[66]

Borlini (2023) emphasises the same point, stating that the: "provision did not include an explicit and general recognition that certain subsidies are less concern than others, and ignores the fact that addressing market failures – including problems global in nature such as the climate change crisis – is one of the tasks that governments must do".[67] Although Borlini here refers to the climate change crisis not the COVID-19 pandemic the message remains the same as the impact of climate change on the world in the future will be equal to or surpass the impact made by the COVID-19 pandemic. This again highlights the importance of incorporating the policy objective and differentiating between economic and non-economic goals to allow for the provision of assistance as a way of crisis-response.

[66] Hoekman, B., & Nelson, D. (2020). Rethinking International Subsidy Rules. *World Economy*, 43, 3104–3132.
[67] Borlini (2023), Ibid.

That being said, the possibility of misusing the policy objective tool to achieve an economic gain or pursue other goals that are not crisis-oriented cannot be ignored. Some scholars highlighted the difficulty of determining 'good' subsidy from a 'bad' subsidy based on the country's policy objective. Lester (2011) specifically argues that: "Determining the aims of a subsidy policy, however, requires making an inference to the motives of states. Even ex post and with full access to the internal deliberations of governments, it is difficult to discern intentions."[68] While this can be true, the mere presence of a crisis, pandemic, or any emergency that disrupts world trade should be a facilitating factor in reading the motive of the states. As seen in the COVID-19 pandemic, interventions were necessary to protect human life and health which were followed by an economic cost that justified further intervention to stabilise the economy and mitigate the impacts of the pandemic.

In other words, while reading motives in the ordinary course of trade can be difficult, motives become somewhat clearer during times of crisis especially when a crisis has a significant impact on a country economic, social or political structure. The country's response at such times should be considered in parallel with the impacts of the crisis to assess whether the measures taken by the state are aimed to fulfil a policy objective, such as protection of human life and health, rather than achieve economic gain. This can be understood from Lester's (2011) response to the difficulty of knowing a country's intentions: "In the absence of this sort of knowledge, the question is about aligning incentives". In other words, to check whether the measures taken by a state stem from fulfilling a policy objective, one needs to look at the degree of alignment and proportionality between the policy objective and the crisis in question.

It is important to note here that the language of Article XX (b) focuses on the act of 'protection' and does not include compensatory measures to the parties affected by the measures taken by the Government to achieve this protection. This point was not thoroughly investigated by scholars when discussing the need to incorporate exceptions into the ASCM similar to the one stipulated in Article XX (b). If the same language of the exception in Article XX (b) is included, countries would only be able to benefit in the case of providing subsidies to industries manufacturing goods needed to protect life or health. Such a clause would not benefit the industries suffering from the

[68] Lester, S. (2011). The Role Of The International Trade Regime In Global Governance. *UCLA Journal of International Law and Foreign Affairs*, 16(2), 209–277. http://www.jstor.org/stable/45302247

measures governments may take under the exceptions of Article XX. Thus, the language of the exception should be framed in a way that also covers subsidies provided for the purpose of mitigating the losses incurred by industries affected by government measures to protect human life or health.

During the pandemic, the decision to impose curfews by a large number of countries around the world, while easily justified under the exceptions of Article XX, had an impact on the economy of the countries and this impact was particularly significant for some industries, to the extent that it necessitated providing them with fiscal assistance. As Wolfe (2020) states: "Trade fell off a cliff when governments told people to stay home. It may also be harmed by good faith measures intended to support families without jobs and firms without customers."[69] Therefore, the provisions of Article XX have to be altered when incorporated in the ASCM to also include the provision of subsidies to the most affected industries in times of crisis that bear losses because of measures implemented by government to protect human life or health.

It is nonetheless vital that subsidies align with the circumstances of the crisis. For example, subsidies provided to the most affected industries or for the manufacturing of urgently needed goods differ from those provided to expand a thriving industry or promote a country's competitive advantage. Under the first circumstance, countries should be allowed to invoke the exception to subsidise goods that are urgently needed to protect human life or health. In the case of the COVID-19 pandemic, this was seen in the provision of subsidies for medical equipment, masks, sanitizers, etc. Countries should also be able to provide subsidies to the industries that have been badly affected by measures taken by government to respond to the crisis to protect human life or health, such as shutdowns or any type of restriction. Such invocation should shield these subsidies from being subject to the provisions of the ASCM. Thus, subsidies provided for the purpose of responding to a crisis should be carefully designed to achieve the objective of the exception. The design of crisis-response subsidies will be discussed in detail in the following section.

IX. Standards to be Considered Upon Designing Crisis-Response Subsidies in the Projected Reform

[69] Wolfe, R. (2020). *Exposing governments swimming naked in the COVID-19 crisis with trade policy transparency* (and why WTO reform matters more than ever). London: Centre for Economic Policy Research.

The literature in this area comprises some common recommendations for designing crisis-response subsidies. Taken collectively, these recommendations can provide a comprehensive framework for the design of the crisis-response subsidy that scholars are advocating. The framework should include: a public policy objective, a necessary government intervention on a non-arbitrary or discriminatory basis, the determination of the duration of the measure with a phase-out plan, proportionality, a consideration of the needs of developing countries and, finally, the notification of the subsidies.

A report issued by the IMF, OECD, World Bank, and WTO explicitly touches upon some of these recommendation when discussing subsidies provided during the COVID-19 pandemic: "Support that is necessary (for example, either because of market failures or as a response to a severe crisis) needs to be well targeted, time-limited (preferably with an announced phase-out plan), proportional, transparent, and non-discriminatory. This can help prevent damaging effects on trading partners while preserving the ability of competitive forces to spur innovation and productivity improvements."[70]

In other words, the design of the crisis-response subsidy should be approached with caution taking into consideration different factors to ensure such a measure serves its purpose of responding to a crisis and mitigating its impacts. This section presents a discussion of the most important standards to be considered when designing a crisis-response subsidy.

1) The Public Policy Objective and the Necessity Requirement

The discussion on the public policy objective was carried out in detail earlier in the paper under Section VI, which concluded that the public policy objective, in the research context, proposes that a measure shall only focus on protecting the country from a crisis, whether this protection entails providing subsidies to the most needed goods, or the most affected industries suffering from government measures taken to fulfil the purpose of protection.

The policy objective should be built on an urgent need for a government intervention to justify the measures taken. The urgent need proposed here means that measures to be taken must be necessary to combat the crisis. It is worth mentioning that linking the public policy objective with

[70] Subsidies, trade, and international cooperation / prepared by staff of IMF, OECD, World Bank, WTO Washington, DC: International Monetary Fund, 2022. | 2022/001.

the "necessity" requirement was evidenced in the WTO jurisprudence. To interpret Article XX (b), the Panel in *EC – Tariff Preferences*, and also the Panels on *US – Gasoline* and *EC – Asbestos* followed an approach consisting of three-tier test to determine whether the measures carried out for the purpose of protecting human life or health fulfilled the public policy objective requirement: the first step is to look into the policy objective claimed; the second step is to examine whether the measure is "necessary" to fulfil the objective claimed; and, the final step is to examine whether the measure is applied in line with the introductory clause of Article XX.[71] The latter step concerns applying the measure in a non-arbitrary or discriminatory way among countries and that the measure is not a disguised restriction on international trade. Further interpretation of the implementation of this standard can be found in WTO jurisprudence, which had gone through intensive legal argument to interpret Article XX, given that it was repeatedly invoked in a number of disputes before the WTO dispute settlement body.[72]

For the purpose of the research, and considering that the discussion concerns the time of crisis, the "necessity" requirement should be understood to imply that the measures taken must be in response to an occurrence of a circumstance or an emergency that significantly disrupts the world and leaves, or is expected to leave, an impact on different fronts including trade, economy, society, and safety of a country's citizens. Such an occurrence can escalate into a crisis that justifies government intervention. This means that significant attention should be given to the timing factor as it should play a role in determining whether countries can invoke crisis exceptions and carry out measures that they deem necessary to fulfil the public policy objective.

That being said, the language of the public policy objective proposed should emphasise that such a measure is necessary to achieve its objective, as was already stipulated in Article XX and interpreted in the WTO jurisprudence, so it can justify the government intervention. The framing of this language would prevent the misuse of subsidies outside the context of crisis because the measures – which consist of subsidies – must be necessary for governments to take. In other words, the mere existence of the objective is not sufficient for carrying out a measure, but it has to be necessary.

[71] The Panel Report, *US – Gasoline*, para. 6.20. The Panel Report, EC tariff preferences, paras. 7.198-7.199. The Panel Report, *EC – Asbestos*, para. 8.184.
[72] Ibid.

By applying the three-tier test to the COVID-19 pandemic, some government decisions to provide financial assistance to industries to manufacture masks, medical equipment and the like to cover the shortage of medical supplies, or avoid the lack thereof, can be read as fulfilling the public policy objective. The assistance, in this example, could be argued by governments to have been carried out for the purpose of protecting human life or health, there was a specific need that necessitated a government intervention and this intervention was not applied on an arbitrary or discriminatory basis as it had no economic gains and did not target exports or imports of other countries. Accordingly, the three-tier test should be adopted and applied to crisis circumstances, provided that the public policy objective is to protect human life and health, the measure to be taken is necessary to achieve the protection and is not to be applied in an arbitrary or discriminatory way to other members or serve as a disguised barrier to trade.

2) Duration of the Measure

As understood from the discussion above, the occurrence of a crisis or an emergency that significantly disrupts the world and leaves, or is expected to leave, an impact on the country's different fronts must be a prerequisite for invoking an exception to deviate from the provisions of the ASCM. However, the mere existence of a crisis and the necessity to implement a measure should not be left unrestricted. The subsidies proposed to be provided must be carefully designed to achieve their purpose. Therefore, such subsidies, given that they are created in times of crisis, should be restricted to the time frame in which the crisis occurs. The duration of the crisis-response subsidy should be structured into two stages that can be considered consecutively: alleviating injury to the domestic industry without causing serious injury to other members and implementing a phase-out plan to prevent a relapse and ensure a smooth withdrawal of subsidies. Each of these stages will be discussed below.

2.1 The injury standard

Article 15 of the ASCM addresses the procedures for the determination of injury when conducting anti-subsidy investigations into allegedly subsidised imports. Article 15 states:

> *A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the subsidized imports and the effects of the subsidised imports on prices in the domestic market for the like products, and (b) the consequent impact of these imports on the domestic*

producers of such products. The term “injury” was interpreted in the footnote of the Agreement as it follows: *Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean* ***material injury*** *to a domestic industry,* ***threat of material injury*** *to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.*

The injury standard, as understood from the Article and the footnote, concerns material injury or threat thereof or a material retardation. Accordingly, a country conducting an anti-subsidy investigation can impose CVDs upon finding ‘material injury' or threat thereof. While material injury can be a sufficient standard in normal anti-subsidy investigations, this must be reconsidered in times of crisis. Given the magnitude of a crisis and its impacts on a country’s trade, this standard should be raised. In normal circumstances, in the absence of a crisis or any emergency that affects trade whether regionally or globally, the implementation of this standard will achieve its purpose of alleviating injury occurring to the domestic industry of the investigating country. However, in times of crisis, injury occurs in both the subsidising member and the investigating member. Implementing anti-subsidy and countervailing measures in times of crisis may create a back-and-forth subsidy battle between countries because each one will be expected to support its industries during a crisis, which calls in question the need for a balance of rights in both countries.

The degree of injury must be thoroughly investigated and weighted against the circumstances of applying or imposing CVDs. Currently, the Agreement focuses solely on the injury caused by subsidised imports and does not address any other forms of injury, including injury caused because of a crisis, which could outweigh the injury caused to the domestic industry of the investigating authority. In other words, while subsidies may cause material injury to the industry of the investigating authority, it prevents serious injury or losses that could have been caused to the subsidising country, whether this injury concerns the domestic industry itself, or injury caused to the country at a larger level. In other words, a crisis may cause severe disruptions to an industry, but the subsidies provided to address this disruption may still be challenged under the ASCM. As things stand, if a country that is confronted by a crisis that poses a risk to the life or health of its citizens provides subsidies to respond to it – whether to industries manufacturing most needed goods, e.g. vaccines to prevent serious losses, or to industries suffering from decisions to protect life and health – it is still subject to imposition of CVDs under the ASCM.

Although some research has highlighted the issue of the lack of policy objective consideration in the ASCM that was especially evident during the COVID-19 pandemic, there has been no in-depth research conducted to examine the need to weigh injury caused to the industry of the subsidising member and injury caused to the industry of the investigating member. It is, thus, important to address this issue and propose an approach to solve this issue given that circumstances change in times of crisis. To balance out the right of using the tool of imposing CVDs in times of crisis, it is important to set an injury standard that applies only in times of crisis.

Raising the standard will not deprive the investigating country from the right to conduct anti-subsidy investigation; it will regulate its use during the crisis as the injury to be assessed will have to reach a certain level for the CVDs to be imposed. Raising the standard of injury is not a novel idea in the WTO Agreements. It was explicitly incorporated in the Safeguard Agreement. The Safeguard Agreement specifies that injury must be serious in order to invoke this tool. Article 2.1 states:

> *A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as* ***to cause or threaten to cause serious injury*** *to the domestic industry that produces like or directly competitive products.*

Article 4.1 of the Safeguard Agreement explains what 'serious' means in the context of this Agreement:

> *For the purposes of this Agreement: (a)* ***"serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry****; (b) "threat of serious injury" shall be understood to mean* ***serious injury that is clearly imminent****, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility.*

The WTO jurisprudence has also highlighted the difference between 'material injury' and 'serious injury'. In the Appellate Body Report, US – Lamb, the Appellate Body states: "We are fortified in our view that the standard of 'serious injury' in the Agreement on Safeguards is a very

high one when we contrast this standard with the standard of 'material injury' envisaged under the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures (the 'ASCM') and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'." The Appellate body explained that the standard of injury under the Safeguard Agreement is higher than the standard of injury under the ASCM for reasons that are built on the significant increase in imports. The safeguard tool used to respond to this significant increase was labelled an 'emergency action' that allowed temporary deviation from the provisions of the GATT and Safeguard Agreements. The significant increase in imports could be argued to reach the level of a crisis, or even less than a crisis, depending on its magnitude, especially when the circumstances under the Safeguard Agreement align with those of a crisis, such as in the case of unforeseen and unexpected developments.

Therefore, bringing the argument made under the Safeguard Agreement into the context of crisis within the ASCM renders it reasonable to argue for raising the standard of injury to 'serious' instead of 'material' in times of crisis. Implementing this standard into the design for crisis-response subsidies enables countries to provide these subsidies without being subject to CVDs, except if such subsidies cause serious injury which enables the investigating country to impose CVDs. Needless to say, the subsidising country must be cautious when designing a crisis-response subsidy so as not to cause serious injury to other countries and it must focus on eliminating the serious injury affecting its industry or avoiding significant losses that occur, or expected to occur, because of the crisis. It important to note here that occurrence of serious injury or losses, or threat thereof, must be evidenced to invoke the exception of providing crisis-response subsidy. If there is no serious injury occurring, or expected to occur, and the subsidizing country invokes crisis-response subsidies, the standard of injury loses its status under the concept of crisis and returns to the main standard, which allows investigating countries to impose CVDs upon finding material injury. By adopting this approach, the rights of the investigating member and the subsidising member can be balanced.

Another point of interest that needs to be considered is that crises and emergencies that leave significant impact are expected to last for a long period of time. Scholars such as Freeden (2017), while speaking generally about crisis, noted that a crisis "can indicate tremendous or uncontrollable speed in its onset, and then be of slow durability, indeed unshift ability, in its

oppressive presence. A rapid onset is rarely matched by a quick exit".[73] This means that a one-time subsidy or short-term assistance may not be sufficient to bring an industry or economy back to normalcy after a significant crisis. Economic recovery often take years. Although it has been almost five years since COVID-19 emerged, for instance, countries are still recovering from its impact.

In practice, the notion of longer recovery period appears to be present in the minds of many governments when designing crisis-subsidy measures. Some countries have extended their crisis-subsidy schemes. Germany, for example, extended an economic aid programme that was designed as a response to the COVID-19 pandemic to the end of June 2022.[74] Some countries set a deadline for expiration of such measures. The EU set a 2022 deadline for "State Aid Temporary Framework"[75] and India set a deadline of 2024-25 for a production-linked incentive scheme for 25-30 firms that manufacture anaesthetics and cardio-respiratory medical devices.[76] These examples demonstrate that crisis-subsidy measures can be applied during a crisis but, more importantly, they can be still implemented post-crisis to ensure a stable recovery.

It is, therefore, expected from governments to incorporate a recovery period in the design of a crisis-response subsidy to ensure that such a measure serves its purpose and prevents a relapse that causes serious losses. The issue, however, is whether subsidies provided during the crisis and extended afterward as part of the recovery period in which the 'serious' injury is no longer occurring can fall within the proposed exception. It can be argued here that crisis-response subsidies in the recovery period should also be exempted from being subject to the imposition of CVDs as long as they do not cause injury within the meaning of the ASCM. The serious injury standard should apply only to the crisis response subsidies during the crisis, while subsidies implemented in the recovery period that are expected to last after the crisis should be dealt with under the general provisions of the ASCM given that the status of the crisis is fading away.

---

[73] Freeden, M. (2017). Crisis? How Is That A Crisis?! Contributions To The History Of Concepts, 12(2), Winter, 2017. Berghahn Books. Page 27.
[74] Federal Government of Germany. (n.d.). *German federal government informs about the corona crisis*. Deutschland.de. (Retrieved November 27, 2024).
[75] Cleary Gottlieb Steen & Hamilton LLP. (2022). *State aid: EU response to the energy crisis through state aid measures*. (Retrieved November 27, 2024)
[76] Ambaw D, et al. (2020), Supra.

Thus, the standard of serious injury should not apply to crisis-response subsidies in the recovery period as a way of balancing the rights between countries. Upon the existence of material injury, these crisis response subsidies can be treated as actionable or prohibited as long as they are in the recovery period and cause injury to the industry of the investigating member. Determining when the crisis officially ends and the recovery period begins invokes a very complicated legal question that should be investigated in future research.

2.2 Temporariness and a Phase-out Plan

Subsidies made for the purpose of responding to a crisis must be designed as a temporary solution and not as a permanent one. Such subsidies must only be valid for the duration of the crisis and must contain a phase-out plan for exiting the programme to ensure that such measures do not turn into a protectionist measure that causes trade distortions, or serious injury to the interests of other members. As explained in the above section, some countries, upon designing programmes and support to their industries, have considered a deadline within which the measures would expire. However, some countries could provide subsidies on one-off basis and without specifying the longevity of the measure.

The need for a phase-out plan was highlighted by Hoekman and Nelson (2020), who state that:

> *"The COVID- 19 pandemic and associated widespread and far-reaching recourse to a variety of subsidy programs provide another example of both an instance where the use of subsides is called for and where there is an obvious need for countries to cooperate so as to manage potential negative spillovers, including by ensuring that interventions are temporary and are removed once the crisis has been addressed".*[77]

The temporariness requirement and exit plan must therefore be an integral part of the design of crisis-response subsidies. Having an expiry date ensures that such measures will not remain forever, and it can also help investigating countries exclude short-term measures from anti-subsidy investigations. Accordingly, subsidies must be provided within a designated timeframe in which the crisis takes place. In cases of measures that outlast the crisis, the provisions of the ASCM regarding actionable or prohibited subsidies should apply because no crisis consideration exists

[77] Hoekman B & Nelson D. (2020) Supra. Pp3128.

and the standard of injury to be implemented would be as stipulated in the ASCM. This, of course, needs further research on how investigating authorities and subsiding countries can deal with phase out plans and avoid converting crisis-response subsidies into protectionist measures.

3) Proportionality and Preventing Spillover

The fact that subsidies, even if provided as a crisis response, can still affect trade, cannot be disregarded. In fact, Hoekman and Nelson (2020) express this concern by stating that "subsidy policies are the natural, and appropriate, instruments for the pursuit of a wide variety of policy goals, but like any policy of economic significance, they will generally have spillovers effects on trade."[78] To measure the proportionality of a measure and to prevent any spillover effects that leads to trade distortions, an in-depth assessment of the effects of the measure is required.

Hoekman and Nelson (2020) touch upon this subject when speaking about the policy objective by noting that not only the immediate effects should be assessed, but also the full general equilibrium effects on the policy and its objective. They suggest creating an effects-based competition policy approach, "to allow for the flexibility needed to assess the magnitude of subsidies and their effects in different contexts and market structures." [79] However, assessing the effects of a policy requires inputs from different fields, mainly from an economic point of view. While this topic needs further analysis, it is sufficient to say that measuring the effects of a subsidy is necessary to determine its proportionality and to prevent any potential spillover.

Furthermore, and as explained earlier in the paper, the objective of the public policy must align with the circumstances of the crisis so that it achieves its purpose but does not exceed it. In this sense, Hoekman and Nelson (2020) note that emergency support or subsidies "needed in a severe crisis should be carefully designed to avoid supporting insolvent firms or harming competitors. How emergency support is designed affects how easily it can be unwound, as circumstances permit, to prevent long-term distortions." In other words, countries must, when deciding the design of a subsidy, consider its potential effects to ensure that it does not lead to long-term distortions and ensure that such subsidies are proportional and serve the purpose of combating a crisis.

4) Developing Countries' Needs

[78] Hoekman B & Nelson D. (2020) Ibid. 3104
[79] Ibid.

The ASCM addresses developing countries' needs. This can be observed in some provisions in the Agreement, such as Article 27, which addresses Special and Differential Treatment of Developing Country Members. In particular, "Article 27.2 grants an exemption from the prohibition on export subsidies for least-developed-country Members and developing-country Members with a gross national product (GNP) below US$1,000 per capita."[80] Furthermore, "Article 27.13 provides that certain subsidies that would normally be actionable are not actionable if granted by developing-country Members in the context of privatization programs (e.g. direct forgiveness of debt and subsidies to cover social costs)."[81] In addition, Article 27.10 sets certain de minimis thresholds below which such imports are not countervailable, namely where: (1) the overall level of subsidies to the relevant product is not more than 2 per cent ad valorem; or (2) the volume of the subsidised imports is less than 4 per cent of the total imports of the like product of the importing Member, unless the collective share of imports from such Members exceeds 9 per cent of the total imports of like products.[82] Accordingly, the special and differential treatment generally include, among other things, permission to use prohibited subsidies under certain conditions, longer periods for implementing the provisions of the ASCM, possible extension of export subsidies, and a higher threshold with a raised de minimis standard that exempts them from being subject to CVDs if the percentage of subsidies per unit, or the volume of exports falls below the specified percentage outlined in the Agreement.

However, these provisions, while beneficial to developing countries, do not assist them in times of crisis. More importantly, some of these provisions have expired, and others apply to a small number of countries explicitly excluded by the Agreement or are subject to approval from the designated WTO Committee to continue providing certain subsidies. The need for expanding the special and differential treatment became more important during the COVID-19 pandemic. According to Frankel (2020), developing countries were hit hardest during the pandemic and the losses their economies incurred because of the pandemic exceeded those incurred by developed countries.[83]

[80] Van den Bossche, P. & Prevost, D. (2021). *Essentials of WTO law* (2nd ed.). London: Cambridge University Press.
[81] Ibid.
[82] Ibid.
[83] Frankel, J. *"The Impact of the Pandemic on Developing Countries"* August 3, 2020

As discussed previously in the paper and specifically in the anti-subsidy investigations, some of the countries that were subject to the investigations and in which COVID-19 measures were examined were developing countries. In light of the lack of exceptions for developing countries, the current provisions expose them to the risk of being subject to the imposition of CVDs or raising the CVDs imposed as crisis-response subsidies were included the calculation of other non-crisis subsidies. Hence, there is a need to reconsider granting special and differential treatment to developing countries in times of crisis especially when crises – as shown in the pandemic – are expected to leave a bigger impact on their economy than that of developed countries.

It is important to note that the provisions in the ASCM related to special and differential treatment were drafted in circumstances in which there were no crises or emergencies comparable to the COVID-19 pandemic and yet due consideration was given to such countries. The impacts of the COVID-19 pandemic on developing countries necessitates the reconsideration of such differential treatment which may include permitting longer phase-out plans and raising the de minimis standard for subsidies in times of crisis. This standard should be read with all the other standards when it is applied to developing countries. Further investigation is needed to verify whether incorporating this standard would benefit developing countries while avoiding trade distortions or significant impacts on the interests of other countries.

5) Transparency

The impact of reviving non-actionable subsidies and reforming its language to incorporate crisis-measures would be significant, not only because it covers a gap in the Agreement that considers changes in circumstances, but also because it addresses other obligations that are currently at issue, namely, the notification issue. The ASCM contains a set of notification obligations, among them, notification of subsidies.[84] Accordingly, members are obligated to notify all specific subsidies granted or maintained within their territories. The issue, however, is that not all subsidy programmes are notified to the WTO.

In fact, many countries have repeatedly expressed their concern about the lack of transparency at the SCM Committee semi-annual meetings.[85] The lack of transparency can be driven by

[84] Notifications obligations can be found under Articles 25 (1,11,12), 27.13, 32.6, and others under the ASCM.
[85] World Trade Organisation. (2024, April 23). *Transparency concerns remain at center during discussions at SCM Committee meeting*. https://www.wto.org/english/news_e/news24_e/scm_23apr24_e.htm

different reasons. WTO Members may be reluctant to notify their subsidy programmes to the WTO because of the lack of exceptions in the ASCM that incorporates crisis considerations similar to those stipulated in Article XX. Members may fear that notifying subsidies provided during a crisis could lead to the imposition of countervailing measures against their exports.

As a result, they may choose to withhold information about these subsidies, leading to issues of transparency and non-compliance with the notification obligations under the Agreement. Thus, reviving the provisions of Article 8.2 and widening its scope could encourage members to notify their subsidies to the WTO. This can help lessen the issue of lack of transparency. Incorporating such flexibility would encourage countries to come forward with information about their subsidies. Based on the above, these standards would lay down the ground for a future reframe of the ASCM to fill the lacuna of not having a functioning exception to invoke in times of crises.

X. Conclusion

This research explored the issue of the lack of exceptions in the ASCM that allow countries to provide subsidies during times of crises, without the risk of being subject to anti-subsidy investigations or an imposition of countervailing measures. The research highlighted the impacts of the COVID-19 pandemic on trade, and exposed the limitations of the current trade rules in responding to global emergencies. It examined examples of countries' fiscal responses to the COVID-19 pandemic and the status of subsidies provided as a crisis response in anti-subsidy investigations. The research critically reviewed scholarly opinions pertaining to reviving non-actionable subsidies and highlighted the importance of incorporating crisis-response subsidies into the ASCM, as these were crucial during and after the COVID-19 pandemic, in preparation for future crises.

The research proposes a framework be built comprising standards governing the design of crisis-response subsidies, which may include: identifying a public policy objective, fulfilling the necessity requirement for government intervention on a non-arbitrary or discriminatory basis, determining the duration of measures while setting a phase-out plan, ensuring proportionality, considering the needs of developing countries, and finally, ensuring such measures are notified to the WTO.

In conclusion, the collective efforts of WTO members cannot be neglected, as it is vital to encourage negotiations for reform, and the significant impact of the COVID-19 pandemic on their trade can be a facilitating factor in advancing such negotiations. Undoubtedly, reform is crucial to enable a quick response to any future crisis. Future studies should focus on conducting in-depth research to evaluate the feasibility of such reforms from multiple perspectives, especially given the likelihood of calls for reform in the near future. In the meantime, it is hoped that this research inspires the design of an implementation mechanism to assist in the future reform of the ASCM.

References:

1. Ambaw, et al. (2020). *Lessons From The Pandemic For Future WTO Subsidy Rules*. Centre for Economic Policy Research, London, United Kingdom.
2. Appellate Body Report, US – Lamb. Para. 129.
3. Article XX of the GATT 1994.
4. Australian Department of Industry, Science, and Resources. (2024, August 1). Consideration report: Anti-dumping case 650. Retrieved from https://www.industry.gov.au/sites/default/files/adc/public-record/2024-08/650_-_2__report_-_consideration_report__con_650.pdf](https://www.industry.gov.au/sites/default/files/adcpublic-record/2024-08/650_-_2_-_report_-_consideration_report_-_con_650.pdf
5. Borlini, L. (2023). *The COVID-19 Exogenous Shock And The Crafting Of New Multilateral Trade Rules On Subsidies And State Enterprises In The Post-Pandemic World*. German Law Journal, 24, 72–101. (https://doi.org/10.1017) Page 72-101.
6. Budget Office. (2021). *Recovery For All: Korea's Fiscal Response To COVID-19 Policy Brief Report*. Ministry of Commerce and Finance, Republic of Korea.
7. Calvin Cheng. (2020, March 26). *COVID-19 In Malaysia: Economic Impacts & Fiscal Responses*. Institute of Strategic and International Studies.
8. Canada Border Services Agency. (2021, June 30). Final Determination: Certain Concrete Reinforcing Bar (2021). Retrieved from (https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/cc2021/cc2021-fd-eng.pdf)
9. CARREÑO et al. (2020). *The Implications Of The COVID-19 Pandemic On Trade. The European Journal Of Risk Regulation*, 1–9.
10. Chimni, B. S. (2022). *Crisis And International Law: A Third World Approaches To International Law Perspective*. Brill.
11. Cleary Gottlieb Steen & Hamilton LLP. (2022). *State Aid: EU Response To The Energy Crisis Through State Aid Measures*. Retrieved November 27, 2024.
12. Coppens, D. (2013). *How Special Is The Special And Differential Treatment Under The ASCM? A Legal And Normative Analysis Of WTO Subsidy Disciplines On Developing Countries.* World Trade Review, 12(1), 79–109.

13. Directorate General of Trade Remedies (DGTR). (2023, February 7). Final Findings Notification In Anti-Subsidy Investigation Concerning Imports Of "Saturated Fatty Alcohol" From Indonesia, Malaysia, and Thailand. Retrieved from (https://www.dgtr.gov.in/sites/default/files/english%20signed.pdf)
14. Ding, Ru. (2024). Time to Reform the Non-Actionable Subsidy Rules in the WTO: The COVID-19 Subsidies and Beyond. Oxford: Hart Publishing, 2021. Studies in International Trade and Investment Law. Studies in International Trade and Investment Law. Bloomsbury Collections.
15. Elms, D. (2021). *Trade Disrupted: Global Tensions, US-China Trade War, And COVID-19 Impact*. ISEAS - Yusof Ishak Institute.
16. European Stability Mechanism (ESM). (n.d.). *Pandemic Crisis Support*. Retrieved from (https://www.esm.europa.eu/content/europe-response-corona-crisis)
17. Fabri (H). (2021). *Crisis Narratives and the Tale of Our Anxieties. Crisis Narratives in International Law.* Chapter 3, Volume 104. Brill. (https://doi.org/10.1163/9789004472365_005)
18. Federal Government of Germany. (n.d.). German federal government informs about the corona crisis. https://www.bundesregierung.de/resource/blob/974430/1753912/8e7d1b394d9508c2856f7b7b0a253352/2020-05-18-massnahmen-englisch-data.pdf?download=1
19. Frankel, J. (2020, August 3). *The Impact Of The Pandemic On Developing Countries*. Belfer Center for Science and International Affairs Research institute in Cambridge, Massachusetts.
20. Freeden, M. (2017). *Crisis? How Is That A Crisis?! Contributions To The History Of Concepts*, 12(2), Winter, 2017. Berghahn Books.
21. Hoekman, B., & Nelson, D. (2020). *Rethinking International Subsidy Rules*. World Economy, 43, 3104–3132. (https://doi.org/10.1111/twec.13022)
22. International Monetary Fund. (2022). World Economic Outlook: War Sets Back The Global Recovery (April 2022 edition). Retrieved from https://www.elibrary.imf.org/view/journals/064/2022/001/article-A001-en.xml?ArticleTabs=abstract

23. Juliette Schwak. (2021). *Korea's Exemplary Response To The COVID-19 Pandemic.* Institute for National Strategic Security, National Defense University, 9(4).
24. Jung, N. R. (2023). *Are There 'Exceptions' To The ASCM? Applicability Of The GATT Exceptions Vis-À-Vis The International Rules On Subsidies*. Journal of World Trade*, 57*(3), 457–472.
25. Kelsey, S. (2020, March 26). *What's Inside The Senate's $2 Trillion Coronavirus Aid Package*. NPR. Retrieved from (https://www.npr.org/2020/03/26/821457551/whats-inside-thesenate-s-2-trillion-coronavirus-aid-package)
26. Office of the High Commissioner for Human Rights (OHCHR). (n.d.). *International Covenant on Civil and Political Rights*. Retrieved November 30, 2024, from https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
27. Lester, S. (2011). *The Role Of The International Trade Regime In Global Governance. UCLA Journal Of International Law And Foreign Affairs*, 16(2), 209–277. Retrieved from (http://www.jstor.org/stable/45302247)
28. Melaku Geboye Desta. (2020). *Covid-19 And Export Restrictions: The Limits Of International Trade Law And Lessons For The Afcfta*. Addis Ababa: ECA. Retrieved from (https://hdl.handle.net/10855/43765)
29. Policy tracker. (2021). International Monetary Fund.
30. The European Commission. (2020, April 23). *EU leaders approve €540 billion package of safety nets and task Commission with developing proposal for Recovery Fund*. European Commission Press Release. Retrieved from https://ec.europa.eu/newsroom/ecfin/items/675083#:~:text=Following%20the%20meeting%20of%20the,operational%20by%201%20June%202020
31. The Panel Report, US – Gasoline, para. 6.20.
32. The Panel Report, EC tariff preferences, paras. 7.198-7.199.
33. The Panel Report, *EC – Asbestos*, para. 8.184.
34. The Agreement on Subsidy and Countervailing Measures.
35. The Agreement on Safeguard
36. Trade Remedies Data portal, WTO (Accessed on 28-09-2024).

37. The Report on The Implementation of Fiscal Policy of China for 2020, Ministry of Finance, 2021. Available at (http://www.mof.gov.cn/en/news/mn/202103/t20210308_3666924.htm)
38. The U.S. Department of Commerce. (2022, February 4). Commerce Department Awards $54 Million In American Rescue Act Grants. https://www.commerce.gov/news/press-releases/2022/02/commerce-department-awards-54-million-american-rescue-act
39. Thrasher, R., et al. (2023). *Policy Responses To COVID-19: Lessons For The Global Trade And Investment Regime*. Globalization and Health, 7–9.
40. Van den Bossche, P., & Prevost, D. (2021). *Essentials of WTO law* (2nd ed.). Cambridge University Press.
41. World Bank. (2022). *Policy Priorities For The Recover*y (World Development Report 2022). Retrieved from (https://thedocs.worldbank.org/en/doc/42c28f3e303497073639f105c62d48d3-0050062022/original/WDR-2022-Policy-Priorities.pdf)
42. World Trade Organisation. (2024, April 23). Transparency Concerns Remain At Center During Discussions At SCM Committee Meeting. WTO.
43. World Trade Organisation. (n.d.). Subsidies And Countervailing Measures: Article 8 jurisprudence. Retrieved from (https://www.wto.org/english/res_e/publications_e/ai17_e/subsidies_art8_jur.pdf)
44. Wolfe, R. (2020). *Exposing Governments Swimming Naked In The COVID-19 Crisis With Trade Policy Transparency* (and why WTO reform matters more than ever). Centre for Economic Policy Research. London, United Kingdom.
45. Yale School of Management. (2020). *COVID-19 Financial Response Tracker Visualization (CFRTV)*. Retrieved from (https://som.yale.edu/centers/programme-on-financial-stability/COVID-19-tracker)
46. U.S. Department of Health and Human Services. (2023, September 20). *Biden-Harris administration awards $600 million to bolster U.S. manufacturing of COVID-19 tests and announces re-opening of COVIDTests.gov*. HHS.gov. https://www.hhs.gov/about/news/2023/09/20/biden-harris-administration-awards-600-million-bolster-us-manufacturing-covid-19-tests-announces-re-opening-covidtestsgov.html

47. Usami, H. (2020). *COVID-19: Japanese Government Financial Assistance Measures*. White & Case LLP. Retrieved October 12, 2024.
48. Van den Bossche, P., & Zdouc, W. (2021). *The law and policy of the World Trade Organisation: Text, cases, and materials*(5th ed.). Cambridge University Press.