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ABSTRACT

Some subsidies (such as for fossil fuels and fisheries) adversely affect global public goods (such as a stable climate and the maintenance of global fish stocks); others affect global price levels (domestic support for certain agriculture commodities), or have negative consequences for a trading partner. WTO members have negotiated an agreement on subsidies, but there are severe limits to that agreement's ability to exercise discipline, and the prospects of its amendment remain limited. This article examines whether states can improve discipline through the use of informal mechanisms and, if so, under what conditions. Informal discipline on subsidies depends on the existence of fora to discuss definitions, generate information about their incidence, discuss whether a particular measure fits the definition, and consider whether a remedy exists. This article takes international organizations seriously as fora for generating "law," not simply as bodies exercising power or coercion, and it explores a particular view of law. If codification is not the only indicator of law, if one accepts that law also emerges in social interaction, then we must attend to the less formal places where the law of subsidies emerges, and affects state actions. The analysis of where disciplines might be found is based on a three-level set of comparisons: (i) Within the WTO, involving horizontal compared to sectoral disciplines, with a focus on committee and other peer-review processes, rather than the traditional focus on the dispute settlement system; (ii) the WTO compared to, and in complement with, other international organizations addressing particular sectors; and (iii) international organizations compared to, and in complement with, non-governmental organizations. The article provides four case studies involving subsidies: (i) export credits, (ii) shipbuilding, (iii) fisheries, and (iv) fossil fuels. It assesses variations in number of actors, the conceptualization of the problem, definitions, obligation, data, and organizations across these case studies and the impact of such differences on the development of subsidy disciplines.

I. INTRODUCTION

Subsidies create transnational externalities, either through advantages provided to certain traders or through adversely affecting global public goods. Disciplining such government support through formally binding rules, however, is notoriously difficult, given the role of subsidies in public

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policy. Can informal rules serve as a complement and alternative? We believe that a focus on formal codified law is insufficient for understanding how law develops and has effects on social understandings and practices. We assess whether the prospects and limits of informal legal rules to create international discipline on the use of government subsidies in areas where formal or “hard” law is not working well, or does not exist at all.

The first challenge for disciplining subsidies is defining them. Any government expenditure is a subsidy; even revenue forgone in the form of tax breaks is a subsidy. Nobody would imagine that all such expenditure, and foregoing of revenue, should be subject to international obligations. States have worked for decades to agree on a definition of “subsidy” for trade purposes since subsidies can be a significant source of international conflict. Some subsidies (such as for fossil fuels and fishing) adversely affect global public goods (such as a stable climate and the maintenance of global fish stocks); others affect global price levels (domestic support for certain agriculture commodities), or have negative consequences for another country’s trading interests. Such definitional questions depend on the development of consensual understanding.

Subsidies have been subject to evolving disciplines in the trading system since the original General Agreement on Tariffs and Trade (GATT) in 1947, but we face the paradox that the current and much more sophisticated version of those disciplines in the Agreement on Subsidies and Countervailing Measures (ASCM) might be both too constraining, and too loose. On the one hand, the rules of the World Trade Organization (WTO) as interpreted by the Appellate Body might interfere with legitimate policy measures, such as supporting the development of renewable energy.² On the other hand, most subsidies are not subject to sanction in the dispute settlement system, including fossil fuel subsidies, perhaps the most pernicious of all; and, despite years of negotiations, Members have not agreed on disciplines for fisheries subsidies. Our motivation for the article lies in an assumption that the Doha Round negotiating group on Rules is not likely to reach consensus on an amendment of the ASCM any time soon, and that adjudication before WTO panels and the Appellate Body faces severe limits in advancing discipline in this area. The motivation, therefore is the question: if states cannot get to further hard law in the area of subsidies in the near future, can they improve discipline through the use of informal mechanisms and, if so, under what conditions? That is, do less formal mechanisms at the WTO or elsewhere help provide effective discipline? And if so, where do they, or where might they, work?

We take international organizations seriously as fora for managing the trading system; we think about what they do as generating “law” in terms of practice, not simply as an exercise of power or coercion; and we explore a particular view of law. Legal positivists distinguish between hard and soft law with a binary binding/non-binding dichotomy.³ Hard law is then defined as enforceable rules with precise codification and a tough enforcement system. The “legalization” of the WTO compared to the GATT is therefore said to represent a transition from a ‘soft law’ to a ‘hard law’ system.⁴ Hard law is used to refer to “enforceable” rules while soft law, or “non-binding” law, means indicative standards. Analysts use the term “soft law” to recognize as “law” things that can be legal in their effects yet involve neither state legislation nor an international

² Henok Birhanu Asmelash, 'Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged', 18(2) *Journal of International Economic Law* 261 (2015), at 274-778.

³ Gregory C. Shaffer and Mark A. Pollack, 'Hard Vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance', 94 *Minnesota Law Review* 706 (2010), at 712-17.

⁴ Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', 54(3) *International Organization* 421 (2000), at 436, 441.

treaty. Some scholars rather use the term “informal” with respect to law to capture three distinct but often combined features: the involvement of (i) non-traditional actors (not just states, but also regulators, public agencies, central banks, expert groups, cities, business and NGOs), (ii) non-traditional processes (not treaty-making in formal international organizations [IOs] like the WTO but in networks, arrangements or groups), and (3) non-traditional outputs (not treaties, but standards, guidelines, principles or arrangements).⁵

Constructivist and new governance theorists go further, arguing that while commitments may vary in their degree of formal codification and their justiciability, neither explicitness nor courts are necessarily indicators of “law” if actors recognize a provision as legal and act accordingly.⁶ The Organisation for Economic Co-operation and Development (OECD), for example, has no formal dispute settlement system, yet signatories act “as if” certain obligations are binding, such as, for example, the Arrangement on Officially Supported Export Credits discussed in Part II.1. If codification is not the only indicator of law, if one accepts that law emerges in social interaction and practice,⁷ then we ought to attend to all the places where the law of subsidies emerges and disciplines state actions.

Global governance can be viewed as operating through different mechanisms, such as coercion, reciprocity, learning, and socialization. Informal law, although often viewed as working through the latter two mechanisms, can work through all four. It can lead to social sanctions (such as consumer boycotts), or affect financing (such as from the International Monetary Fund [IMF] or World Bank), and thus work through coercion. It can work through reciprocity such as in WTO and OECD peer-review systems based on reciprocal commitments involving reporting, monitoring, and evaluation. It can lead to policy learning through information sharing and deliberation. And it can lead to social emulation and model mongering affecting practice.

Law is most likely to play an effective role where its subjects reach a consensus on diagnosing the problem that law is designed to address. Informal discipline on subsidies depends on the existence of fora to discuss and clarify definitions, generate information about their incidence, discuss whether a particular measure fits the definition, and consider whether a remedy exists. In the trading system, the WTO provides a forum, but it is not alone, since so do the Group of Twenty (G-20), the OECD, the IMF, and informal networks organized by non-governmental organizations (NGOs) and other stakeholders. The success of the processes will depend on generating trustworthy data, identifying the relevant actors, and providing a forum for bringing them together. The monitoring of whatever rules emerge requires ongoing deliberation to ensure convergence of normative understandings as applied to particular contexts, and concordance between international norms and national and local practice. Only then will normative settlement

⁵ Joost Pauwelyn, 'Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How They May Outcompete WTO Treaties', 17(4) *Journal of International Economic Law* 739 (2014), at 742. See also Gregory Shaffer and Mark A. Pollack, 'The Interaction of Formal and Informal Lawmaking', in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (2012) 241-270 (addressing guidelines, standards, declarations, and informal monitoring and peer-review processes).

⁶ Cf. Lon L. Fuller, *The Morality of Law*, 2nd ed. (1969); Roderick A. Macdonald, 'Here, There...and Everywhere: Theorizing the Legal Pluralism of Jacques Vanderlinden', *Mélanges Jacques Vanderlinden* (2005); Robert Wolfe, 'See You in Geneva? Legal (Mis)Representations of the Trading System', 11(3) *European Journal of International Relations* 339 (2005); Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union* (Oxford: Oxford University Press, 2010).

⁷ Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010) xviii, 411; Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law*, Vol. 129 (2014) 101ff.

of the meaning of the rules emerge.⁸ When the legal order aligns with the understanding of the problem, and such normative settlement occurs across levels of social organization, one can refer to the creation of a transnational legal order in which norms and practices at the transnational, national, and local levels concord.⁹

Information, and discussion of that information, in some sort of body provide an opportunity to learn from the experience of other countries and to consider whether government support serves a legitimate policy objective, or whether it is an attempt to manipulate the terms of trade at the expense of firms in other countries. The notion that transparency matters is based on the idea that sunshine can discipline the actions of states.¹⁰ The canonical idea, going back to Louis Brandeis, that sunshine is the best disinfectant, assumes that agents whose actions are exposed will hew more closely to shared understandings of the common good.¹¹ If not, then other agents provided with information can exercise appropriate discipline. Sunshine in itself enables but does not cause change. In this view of agency, sunlight can contribute more to social order than coercion. Sunlight plays this role in the trading system by reducing information asymmetries. That is, individual governments may know what they are doing (though not what all parts or level of government are doing!), but firms, citizens, and trading partners do not know. Information understood in this way is a public good, and one that is likely to be underprovided. Even if the subsidy is legitimate, the public has a right to know, and other governments both need to be assured that the measure is legitimate, and they can learn from the policy experience of others.

Organizations have comparative advantages, and issue areas vary in their characteristics, so that some organizations are relatively better suited for some issue areas than others. Actors' choice among international organizations to discipline particular subsidies can reflect variation in their characterization of what makes a subsidy an international issue (such as whether it affects trading partners or undermines global public goods), and the number of parties affected by the particular subsidy (such as all countries or only a subset of countries in which a particular economic sector is established, such as shipbuilding or commercial jet aircraft). This article begins by addressing subsidies viewed primarily as trade concerns, and shows that parties do not have to do everything at the WTO. It then addresses subsidies viewed primarily as public goods concerns, such as fisheries and fossil fuel subsidies.

We assess variation in subsidy disciplines in two ways, the first involving alternative fora within the WTO and other international organizations to address them; and the second involving four dimensions of variation within each of these institutional settings: definition of the subsidy; consensus over obligation; trustworthiness of data; and organizational characteristics.

First, we consider variation:

1. Within the WTO, involving the choice between cross-cutting (horizontal) compared to sectoral disciplines, with a focus on committee and other peer-review processes, rather than the traditional legal focus on the dispute settlement system; and
2. The WTO compared to, and in complement with, other international organizations addressing particular sectors, notably the OECD, including variation within the OECD.

⁸ See Terence Halliday and Gregory Shaffer, 'Transnational Legal Orders', in Terence Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (2015) 3-75, at 38-41 (on the issue of normative settlement).

⁹ Ibid.

¹⁰ See Petros C. Mavroidis and Robert Wolfe, 'From Sunshine to a Common Agent: The Evolving Understanding of Transparency in the WTO', 21(2) *Brown Journal of World Affairs* 174 (2015).

¹¹ Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: F.A. Stokes, 1914), Chapter V.

Second, we consider variation across our four case studies, on four dimensions:

1. Definition of subsidies, which can be a proxy for the degree of consensual understanding in a sector.
2. Obligations, which are necessarily subsequent to a definition of subsidy within a sector.
3. Data, which vary by source, quality, and the amount of transparency provided to other governments and the public.
4. Organizational characteristics, which vary in terms of opportunities for learning, surveillance, and dispute settlement.

Our expectation is that definitional clarity (dimension 1) allows for stronger discipline (dimension 2) because everyone understands the obligations. More trustworthy data (dimension 3) means more sunshine, which allows trading partners and stakeholders to apply pressure for reform. And such pressure is more readily applied in organizations with a strong institutional structure (dimension 4) that provides for sustained interaction to clarify definitions and obligations, and to ensure monitoring, facilitate learning and determine remedies. We also expect disciplines focused on a smaller number of affected actors to be easier to reach than those involving large numbers, such as the beneficiaries of fossil fuel subsidies.

Part II discusses the contribution and limits of transparency and surveillance to the horizontal discipline of subsidies in the WTO. Part III presents four sectoral case studies involving organizations other than the WTO: the OECD export credit arrangement; OECD shipbuilding initiatives; various initiatives on fisheries subsidies; and various ones on fossil fuel subsidies. The article concludes by asking: What works? Are informal disciplines possible?

II. Horizontal Subsidies Discipline in the WTO

The dispute settlement system is thought to be the jewel in the WTO crown, the means of enforcing the rules. But here is the puzzle — while subsidies have been the subject of 103 complaints in the WTO, constituting 21 percent of all disputes, and 25 percent of the cases resulting in a Panel or Appellate Body decision, the number of cases filed is minute relative to the volume of state aids and world trade. Disputes are the small tip of a large pyramid of conflict management mechanisms in the WTO.¹² A focus on disputes as enforcement of hard law obscures the other, perhaps more important though less formal, aspects of the WTO contribution to subsidies discipline.

In the WTO, transparency and monitoring provisions are primarily focused on helping to ensure that existing commitments are met. They can, in theory, however, also lead to new knowledge that can lead to changes in the rules, their interpretation, and practices, including by giving rise to new understandings among policymakers. Three actions are especially important for the operation of transparency in the WTO regarding subsidies—how the other Members of the WTO are notified of the new policy action; how a notification is discussed in Geneva; and whether

¹² Robert Wolfe, 'Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life', World Trade Organization (WTO) (2013), at 24, available at https://www.wto.org/english/res_e/reser_e/ersd201303_e.pdf (visited 10 September 2015); see Henrik Horn, Petros C. Mavroidis, and Erik N. Wijkstrom, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees', 47(4) *Journal of World Trade* 729 (2013) (discussing informal trade conflict resolution in WTO committees).

the results of the Geneva process are published in a way that allows citizens to hold their government accountable for its use of public money.

In the WTO Glossary, a “notification” is defined as “a transparency obligation requiring member governments to report trade measures to the relevant WTO body if the measures might have an effect on other Members.”¹³ In previous work, Collins-Williams and Wolfe showed how the record of industrial subsidies notification under the ASCM was poor.¹⁴ It still is. As shown in Table 1, more than half of the Members are still not notifying their subsidies. Some Members have not submitted a notification for many years, and Members question the comprehensiveness of the notifications that have been submitted. While some notifications run to hundreds of pages, others are very brief.

Table 1: Status of Subsidies Notifications¹⁵

	2007	2009	2011	2013
Members that notified subsidies	46%	46%	45%	37%
Members that made a “nil” notification	8%	14%	14%	11%
Sub-total notifying Members	54%	60%	59%	48%
Members that did not make any notification	46%	40%	41%	52%

In the face of continued weak notification, the chair of the Committee on Subsidies and Countervailing Measures (SCM Committee) began reading out the names of Members who were late.¹⁶ When that did not improve the rate of notification, he invited all of the Members who were late to explain the delay to the committee.¹⁷ Among the most important players invited to offer such explanations at the April 2012 meeting were China, the European Union (EU) (on behalf of Austria and Greece), India, Indonesia, Nigeria, South Africa, and Thailand.¹⁸ The excuses offered included technical and capacity constraints, and coordination difficulties.¹⁹ In April 2013, the SCM chair listed the 71 Members that had not made 2011 notifications, including four of the top 30 merchandise exporters — China, Indonesia, Thailand, and the United Arab Emirates.²⁰

Why do Members not notify subsidies? Four reasons can be advanced. The first is bureaucratic incapacity, which may be the case for many developing countries whose trade ministries are understaffed and lack resources. Second, Members might worry about providing adverse information for a potential legal dispute, perhaps about a measure they suspect might be illegal. By notifying, they provide information that a trading partner might not have and they admit

¹³ WTO, ‘Glossary’, http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (visited 10 September 2015).

¹⁴ See Terry Collins-Williams and Robert Wolfe, ‘Transparency as a Trade Policy Tool: The WTO’s Cloudy Windows’, 9(4) World Trade Review 551 (2010), at 564-65.

¹⁵ WTO, ‘Overview of Developments in the International Trading Environment: Annual Report by the Director-General’, Trade Policy Review Body, WT/TPR/OV/16, 31 January 2014, Table 21.

¹⁶ WTO, ‘Minutes of the Regular Meeting Held on 26-27 October 2011’, Committee on Subsidies and Countervailing Measures, G/SCM/M/79, 2 February 2012, para. 143-44.

¹⁷ Ibid. para. 147

¹⁸ Ibid. para. 145.

¹⁹ Ibid. para. 146, 157, 159, 161.

²⁰ WTO, ‘Notification Requirements Under the Agreement on Subsidies and Countervailing Measures’, Committee on Subsidies and Countervailing Measures, G/SCM/W/546/Rev.4, 16 April 2013, at 14; WTO, ‘Minutes of the Regular Meeting Held on 22 April 2013’, Committee on Subsidies and Countervailing Measures, G/SCM/M/85, 5 August 2013, para. 26.

that the measures might be actionable. Third, Members' trade authorities find it easier to notify actions taken by themselves (like the number of new dumping investigations commenced by the commerce department) than data on subsidies offered by other ministries, or other levels of government. The fourth reason, and perhaps most important, is ambiguity about what to notify. The ASCM has no preamble stating the objects and purposes of the agreement that could provide contextual guidance for interpretation. Some observe that the ASCM's very vagueness allowed it to be concluded in the first place, so that, in part, it constitutes the recording of a dis-agreement.

The definition of a subsidy determines what must be notified. The first part of the definition, in Article 1.1 of the ASCM, requires a financial contribution or price or income support provided by the government. The second part, in Article 1.2, requires that a benefit be conferred to the recipient, which entails an exercise of comparison between a situation where a recipient receives the financial contribution and one where it does not. The ASCM classified subsidies as prohibited, actionable, or non-actionable.²¹ Two categories of subsidies, import substitution and export subsidies, are prohibited.²² For a Member to take action against a "harmful" subsidy of another Member that is actionable, it has to be specific and the adverse effects have to be demonstrated.²³

The SCM committee's notification questionnaire, therefore, requires Members to notify "a) all *specific* subsidies ... and b) all other subsidies, which operate directly or indirectly to increase exports" (emphasis added).²⁴ The legal text and the jurisprudence fail, however, to clarify the conditions under which subsidies are specific, perhaps because the concept lacks solid economic justification.²⁵ What also makes determining notification obligations difficult is that part of the questionnaire that requests "Statistical data permitting an assessment of the *trade effects* of the subsidy" (emphasis added).²⁶ Whether a subsidy has trade effects requires a judgment by the notifier, one that does not lend itself to a quick assessment by government officials. Moreover, such data may be perceived as a confession inviting a dispute, and thus, not surprisingly, are rarely provided.²⁷ Given the different, incomplete, and sometimes unclear notifications that Members have submitted to the WTO, it seems that they are confused about what the definition covers and, as a consequence, are unclear on which subsidies they ought to notify. Rubini thus concludes that all subsidies should be notified to the WTO, allowing questions to be asked in the committee.²⁸ But given that the Appellate Body has determined that understandings reached in the committee can have the status of "subsequent agreement" in the sense of Article 31 of the Vienna Convention on the Law of Treaties and thus be enforceable in dispute settlement, as happened in *US-Tuna II*,²⁹

²¹ Articles 3, 5 and 8 of the ASCM.

²² Article 3 of the ASCM.

²³ Articles 2, 5, and 6 of the ASCM.

²⁴ WTO, 'Questionnaire Format for Subsidy Notifications Under Article 25 of the Agreement on Subsidies and Countervailing Measures and Under Article XVI of GATT 1994' (ASCM Questionnaire), Committee on Subsidies and Countervailing Measures, G/SCM/6/Rev.1, 11 November 2003, at 1, para. 1.

²⁵ Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (2009) 359-66.

²⁶ ASCM Questionnaire, above n 24, at 3, para. 10.

²⁷ Collins-Williams and Wolfe, above n 14, at 575.

²⁸ Rubini, above n 25.

²⁹ WTO Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS841/AB/R, adopted 16 May 2012, para. 371; see also Gregory Shaffer, 'The WTO Tuna-Dolphin II Case: United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products', 1 *American Journal of International Law* (2013), at 6.

Members might be reluctant to go that far. Such hesitation exemplifies the risk that hard law dispute settlement impedes consensual decision making through informal, soft law mechanisms.

The committee process ought to be central. As a result of questions and challenges posed before the SCM Committee, a government may provide more information, change policy, or pressure other units of government to respond. ASCM article 26 mandates the committee to examine subsidy notifications on a regular basis. The agreement also contains provisions for “reverse notification” pursuant to which Members may request information on subsidies that they think another Member was obliged to notify,³⁰ and can notify measures that they think a trading partner should have notified.³¹ The United States (US) has submitted extensive reverse notifications of Chinese and Indian subsidies,³² but few other Members have the capacity to generate such analysis of another Member’s policies.

A recent EU proposal in the Doha Round negotiating group on Rules addresses many of these issues.³³ The proposal suggests that the Secretariat could examine the Semi-Annual reports in which Members list the programs they have countervailed to establish if those programs have been notified by the Member granting the subsidy.³⁴ Where the subsidies have not been notified, the Secretariat could prepare a notification in the usual format and circulate it as a supplement to any notification of the Member granting the subsidy.³⁵ Next, they suggest that notified subsidies would benefit from a rebuttable presumption of non-actionability or an increase in the standards for action under the ASCM in order to create an incentive for more notification leading to greater committee oversight.³⁶ The EU also suggested improvements to the template for the notification for fishery subsidies under the ASCM, which includes elements additional to those for other sectors.³⁷ Here too the EU proposes that duly notified fisheries subsidies would be presumed to be non-actionable or at least be more difficult to challenge.³⁸

Members differ hugely in their ability to ask questions in the committee. Collins-Williams and Wolfe found that a small number of Members consistently asked questions in the SCM and Agriculture committees in 2006–07, and were also consistently targets.³⁹ The nearly 900 questions asked in the SCM Committee from 2008 to 2012 were asked by only 16 Members, all but two of whom are G20 countries, but the questions were posed to 58 Members (counting the EU as one).⁴⁰ This disparity shows most clearly in the bars on the right of Figure 1 — other developing countries receive many more questions than they pose.

³⁰ Article 25.8 of the ASCM

³¹ Article 25.10 of the ASCM

³² For example, on fisheries support, see WTO, ‘Subsidies: Request From the United States to China Pursuant to Article 25.8 of the Agreement’, Committee on Subsidies and Countervailing Measures, G/SCM/Q2/CHN/52, 17 April 2015.

³³ WTO, ‘Rules Negotiations – Transparency: Communication From the European Union’ (Communication from the EU), Negotiating Group on Rules, TN/RL/W/260, 16 July 2015.

³⁴ *Ibid.*, at 2.

³⁵ Mavroidis and Wolfe see this as the Secretariat acting as the common agent of Members. See Mavroidis and Wolfe, above n 10, at 5-6.

³⁶ WTO, ‘Communication from the EU’, above n 33, at 2.

³⁷ *Ibid.*, at 3-4.

³⁸ *Ibid.*

³⁹ See Collins-Williams and Wolfe, above n 14, at 566, 570.

⁴⁰ The numbers in this section were compiled by Robin Fraser from SCM Committee minutes and other documents.

Figure 2 shows what these questions concerned. Noteworthy is how seldom Members ask about trade effects, and how often they ask about eligibility and local content — that is, about specificity, which would make the subsidies actionable. We have not investigated whether the questioners were satisfied with the answers, or whether the answers clarified the matter, or provided the information necessary to launch a new dispute. Informality can be hampered by a fear that comments made in a committee discussion, or even accepting that the matter was a legitimate subject for discussion, might form the basis for a ruling in a subsequent dispute.

Subsidies are often mentioned in preferential trade agreements (PTAs), but the disciplines are weak, and PTAs generally do not create either notification requirements for subsidies, or a body where such notification could be reviewed. PTAs also lack a secretariat able to support a robust transparency process, which could be a reason PTA partners rarely use their anemic dispute settlement provisions. Not surprisingly, therefore, PTA partners make good use of the WTO committee review mechanism. Since 2008, eight of the 16 Members that posed questions in the SCM Committee posed them to a PTA partner. Only three of the 59 questions asked by Australia went to its PTA partners, but 46 of 126 questions posed by Canada went to the US, its North American Free Trade Agreement (NAFTA) partner, and the EU and the US asked each other 128 of the 880 questions posed in the committee (98 were questions the US posed of the EU, and 30 were questions the EU posed of the US). In other words, PTAs formally often include both formally binding rules and formal dispute settlement to enforce them. Yet these hard law mechanisms may be much less effective in disciplining subsidies than informal law mechanisms of notification and peer review.

A. Trade Policy Review Mechanism

A helpful alternative forum within the WTO to generate more information about subsidies with an opportunity for discussion is the Trade Policy Review Body (TPRB). The central objective of the TPRB is “to contribute to ... the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members.”⁴¹ The TPRB generates three sorts of reports — (i) the periodic Trade Policy Review

⁴¹ Annex 3(A)(i) of the Agreement Establishing the World Trade Organization.

(TPR) of each Member; (ii) the annual review of the state of the trading system; and (iii) the monitoring reports on measures taken in response to the financial crisis.⁴² In these reports to the TPRB, issued on the authority of the Director-General (and not of Members), the Secretariat sometimes warns or expresses concerns on the basis of its analysis, but never criticizes Members explicitly, and never comments on their rights and obligations under the WTO agreements. Discussion in the TPRB therefore does not imply either that a measure is or is not actionable.

The core of each TPR report is based on notifications from Members, but each report builds from a far wider range of information. The Secretariat collects data from official sources (questionnaires to Member under review) and non-official sources, including from other international organizations, media reports, and NGOs.⁴³ To ensure accuracy, the Secretariat seeks verification of the data from non-official sources when discussing the draft of its report with the Member.⁴⁴ Given the difficulties devising disciplines regarding subsidies of service providers under the General Agreement on Trade in Services (GATS), and thus the lack of notification obligations under it, we only know about services subsidies because of those that surface in TPR reports.⁴⁵

Subsidies clearly increased after the 2008 financial crisis and they have been a particular concern in the crisis-monitoring exercise of the TPRB because of their effects on the trading system, for good as well as ill. Annex 4, added to the 2012 WTO annual monitoring report,⁴⁶ is a valiant attempt to address subsidies (called “General Economic Stimulus Measures”), although the Secretariat observed that assessment is inevitably biased because of the paucity of information provided by Members, sometimes because they claim in response to the Director-General’s questionnaire that the relevant supports are not “new measures” and hence not covered by the process.⁴⁷ While the reports are one of the few sources of systematically collected subsidies data, they are not strictly comparable, the Secretariat observes, because absence or presence of data in the report on any one country may be an artifact of information problems, rather than an indication that the Member does or does not maintain such subsidies.⁴⁸ TPR reports on individual Members face the same difficulty, showing considerable variation in coverage of the major economies. A recent report on the EU had seven pages on subsidies and government assistance,⁴⁹ and that on the

⁴² WTO, ‘Overview of Developments in the International Trading Environment’ (Overview of Developments), Trade Policy Review Body, WT/TPR/OV/14, 21 November 2011, para. 178ff. To access country specific Trade Policy Reviews, see WTO, ‘Trade Policy Reviews: The Reviews’, https://www.wto.org/english/tratop_e/tp_r_e/tp_rep_e.htm (visited 11 September 2015).

⁴³ See Julien Chaisse and Mitsuo Matsushita, ‘Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism’, 16(1) *Journal of International Economic Law* 9 (2013), at 21; Arunabha Ghosh, ‘Strengthening WTO Surveillance: Making Transparency Work for Developing Countries’, in Carolyn Deere Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge University Press, 2011) 394-441, at 431.

⁴⁴ See WTO, ‘Overview of Developments’, above n 42, para. 180.

⁴⁵ See WTO, ‘Subsidies for Services Sectors Information Contained in WTO Trade Policy Reviews’, Working Party on GATS Rules, S/WPGR/W/25/Add.6, 18 March 2013.

⁴⁶ WTO, (2012) ‘Overview of Developments in the International Trading Environment: Annual Report by the Director-General,’ World Trade Organization, WT/TPR/OV/15, 29 November 2012. WTO, ‘Report to the TPRB from the Director-General on Trade-Related Developments’, Trade Policy Review Body, WT/TPR/OV/W/6, 28 June 2012.

⁴⁷ *Ibid.*, para. 112.

⁴⁸ *Ibid.*, para. 118.

⁴⁹ WTO, ‘Trade Policy Review Report by the Secretariat: The European Union’, Trade Policy Review Body, WT/TPR/S/317, 18 May 2015, at 64-72.

US had two pages under “Measures Affecting Investment and Trade.”⁵⁰ The Japan report had five paragraphs on “Subsidies and support,”⁵¹ the Korea report only briefly touched on export subsidies.⁵² The TPR for China has more than three pages about “Subsidies and other government assistance,” but notes that “very few details are available on China’s subsidies and other government assistance, particularly at the sub-central level, on their type and size, the financial outlays involved, and the objectives of the programmes and their results.”⁵³ In contrast, coverage on subsidies issues was not obvious in the reports on Brazil, Mexico, and Indonesia, though the latter in particular is known to be a heavy provider of fossil fuel subsidies.⁵⁴

The coverage of subsidies in TPR reports may reflect the extent to which the Secretariat sees the issue as a challenge for the country, but it could also be a reflection of the reluctance of Members to provide information. We contend that where notification is weak, the Secretariat should act as the “common agent” of all participants in the trading system, actively seeking information.⁵⁵ For example, the TPR of Malaysia in 2014 used public sources to go well beyond the country’s 2009 and 2011 SCM notification, and the US 2012 reverse notification, to demonstrate that the country was one of the most heavily subsidized in its region.⁵⁶

In sum, informal mechanisms can have bite, but they depend on social interaction. When drafting the ASCM, negotiators worried that some legitimate government measures might meet the test of being a subsidy, but should not face sanction in the dispute settlement system, and so they created a category of “non-actionable” subsidies in Article 8. That provision lapsed after five years, and will likely not be recreated. Yet that provision can still reflect a normative understanding among Members even though it is not formally in effect. For example, Article 8 covered government support for research. Such support is ubiquitous, which might lead one to think that it risks being subject to countervail. And yet in all the years since Article 8 lapsed, government support for research came up only a handful of times in questions in the SCM Committee, and seems to be mentioned in formal disputes only in the infamous Boeing-Airbus saga. We suggest that this tacit acceptance of support for research is a case of Members acting “as if” the subsidies are covered by the now lapsed provisions of Article 8. That is, the “non-actionable” category lives on implicitly in Members’ understanding of appropriate policy. This phenomenon reflects what could be called Members’ social understanding of WTO law diffused throughout the WTO community.⁵⁷ It can be argued, therefore, that the interactional opportunities for the development and affirmation of a shared understanding of what fidelity to WTO obligations entails allows actors (or at least, active participants who represent a subset of the membership) to know what the WTO law is without formal amendment of the treaty or an Appellate Body decision.

⁵⁰ WTO, ‘Trade Policy Review: Report by the Secretariat - United States’, Trade Policy Review Body, WT/TPR/S/307, 11 November 2014, at 80-81.

⁵¹ WTO, ‘Trade Policy Review: Report by the Secretariat - Japan’, Trade Policy Review Body, WT/TPR/S/310, 19 January 2015, at 52-53.

⁵² WTO, ‘Trade Policy Review: Report by the Secretariat - Korea’, Trade Policy Review Body, WT/TPR/S/268, 15 August 2012, at 81.

⁵³ WTO, ‘Trade Policy Review: Report by the Secretariat - China’, Trade Policy Review Body, WT/TPR/S/264/Rev.1, 20 July 2012, at 68-72.

⁵⁴ See TPR reports for Brazil (WT/TPR/S/283), Mexico (WT/TPR/S/279) and Indonesia (WT/TPR/S/278).

⁵⁵ See Mavroidis and Wolfe, above n 10.

⁵⁶ WTO, ‘Trade Policy Review: Report by the Secretariat - Malaysia’, Trade Policy Review Body, WT/TPR/S/292, 27 January 2014, at 9, para. 16, 59, 66-67 (looking at speeches, news articles, OECD reports, banking data, and other sources, to find the extent of Malaysia’s subsidies).

⁵⁷ Fuller, above n 6, at 106, Brunnée and Toope, above n 7, at 34, 8, 64, 101.

Some WTO committees have a policy-oriented discussion on the margins of the regular committee meetings through which normative understandings of a rule's interpretation and appropriate implementation can be developed. Examples include discussions in the Committee on Sanitary and Phytosanitary (SPS) Measures, the Committee on Technical Barriers to Trade (TBT), and the Committee on Trade and the Environment (CTE). These committees tend to bring together technocratic officials specialized in particular domains. But such policy discussions do not occur in connection with the SCM Committee. Why not? One reason appears to be constraints on WTO Secretariat resources. But it could also be that governments do not want to discuss the issues, perhaps for political reasons, or out of concerns about the balance of rights and obligations. One weakness of the WTO, ironically, could therefore be its codification of "binding" obligations in a treaty that includes formalized dispute settlement that traders perceive as "hard" law. The result is that amendments, revisions, and new obligations have become difficult, if not impossible, to negotiate.

The organization of specific fora that bring together discrete networks of regulatory officials also appears to matter, as exemplified by WTO Members' distinct handling of agricultural subsidies. Our discussion so far has focused on the procedural aspects of informal WTO disciplines on all non-agricultural subsidies. The distinction between agricultural and non-agricultural subsidies is significant. Export subsidies under GATT 1947 were illegitimate only for "non-primary" products.⁵⁸ Contracting Parties were only enjoined to "avoid" applying export subsidies to primary products, and, if export subsidies were applied, they should not result in a Contracting Party having "more than an equitable share of world export trade in that product."⁵⁹ At the 1982 GATT ministerial, participants agreed to examine all subsidies affecting agriculture separately, especially export subsidies, and the 1986 Punta del Este declaration maintained that negotiations should aim at "improving the competitive environment by increasing discipline on the use of all direct and indirect subsidies and other measures affecting directly or indirectly agricultural trade, including the phased reduction of their negative effects and dealing with their causes."⁶⁰ The eventual 1994 Uruguay Round Agreement on Agriculture (AoA) hived off agriculture subsidies from the ASCM.⁶¹ Efforts to develop further disciplines on agricultural subsidies, especially domestic support, but also on export credits in agriculture after a failure at the OECD,⁶² remain a central element of the Doha Round, to be handled apart from industrial subsidies.

The implication of the example of agricultural subsidies is that the general or "horizontal" disciplines of the ASCM may not be suitable for all sectors; and experience in other areas suggests that the WTO itself may not be the appropriate forum for all sectors. While the 1979 plurilateral Agreement on Trade in Civil Aircraft mentions subsidies,⁶³ it has never been invoked in a GATT or WTO complaint. The 1992 EC-US bilateral Agreement on Trade in Large Civil Aircraft had

⁵⁸ Article XVI(3) of the General Agreement on Tariffs and Trade (1947).

⁵⁹ Ibid.

⁶⁰ Ministerial Declaration on the Uruguay Round, GATT Doc. No. MIN.DEC, 20 September 1986, at 6.

⁶¹ Robert Wolfe, 'Endogenous Learning and Consensual Understanding in Multilateral Negotiations: Arguing and Bargaining in the WTO', Canadian Agricultural Trade Policy and Competitiveness Research Network CATRPN Working Paper No. 2010-02 (2010), at 22.

⁶² See Mike Roberts, 'OECD and Agricultural Credits: A Singular Failure', in *Smart Rules for Fair Trade: 50 years of Export Credits* (OECD Publishing, 2011) 107-11 (finding that the failure to obtain consensus on agricultural export credits was an exception to the usual success of the OECD export credit family).

⁶³ Article 6.1 of the Agreement on Trade in Civil Aircraft, done at Geneva, 12 April 1979, OJ L71, 17/03/1980, at 58.

strong language on transparency,⁶⁴ but weak institutional provisions. The agreement was unilaterally terminated by the US in 2004 when it filed its WTO complaint about Airbus subsidies, but the US cited the subsidies commitments of the bilateral agreement in its WTO complaints. The long-running Canada-US softwood lumber conflict, resulting in numerous WTO and NAFTA disputes, is now subject to a bilateral accord.⁶⁵ The special characteristics of the steel and shipbuilding industries led to initiatives for distinct disciplines at the OECD, as did export credits, itself containing both general provisions and sectoral annexes. And, of course, discussion on fisheries subsidies and fossil fuel subsidies occurs in many places in addition to, or instead of, the WTO. In the next section we address the role and operation of other fora for such sectoral disciplines.

III. SECTORAL CASE STUDIES

The law of subsidies should be viewed on a continuum. Most generally, collective understandings on the definition of subsidies and mutual obligations may eventually be codified or even adjudicated in the WTO, but those understandings begin to emerge elsewhere. More particularly, other organizations may hold data on the incidence of subsidies that is more comprehensive than that held in the WTO, and these other organizations may be better placed to develop disciplines separately or as a complement to those in the WTO. The information and disciplines generated can feed into and inform the WTO peer-review and dispute settlement processes. And such WTO mechanisms may play no, or only a minor, role in disciplining particular types of subsidies compared to such other organizations.

We have selected four sectoral cases for examination that represent variation in (i) the conceptualization of the subsidy as a trade or public goods problem; (ii) the number of countries affected; (iii) the definition of a the sectoral subsidy; (iv) the extent of formal obligation; (v) the extent of data and transparent reporting and peer review; and (vi) the organizations addressing the issue. Two case studies (concerning fisheries and fossil fuel subsidies) entail subsidies defined as a public goods problem involving a large number of countries. The other two case studies (concerning export credits and shipbuilding subsidies) entail subsidies defined as a trade problem involving a relatively smaller number of countries. The OECD disciplines in these domains differ in their degree of formal obligation, with export credits being governed by formally non-binding rules, while shipbuilding initiatives aimed (but failed) to create formally binding rules backed by dispute settlement. We first consider the OECD's work on export credits and shipbuilding subsidies.

A. OECD's Work on Export Credits

An export credit is a loan issued by a government or private bank that generally allows purchasers to defer payment for industrial products such as capital goods or commercial aircraft, or for services, notably engineering services. Foreign buyers may base their purchasing decision on whether an exporter can provide acceptable financing terms. This financing may be too costly or simply unavailable from commercial lenders due to incomplete information and the risk of default.

⁶⁴ Article 8 of the Agreement between the European Economic Community and the Government of the United States of America concerning the application of the GATT Agreement on Trade in Civil Aircraft on trade in large civil aircraft, done at Brussels and Washington, 17 July 1992, OJ L301, 17/10/1992, at 33-34.

⁶⁵ Softwood Lumber Agreement, U.S.-Canada, 29 May 1996, 35 I.L.M 1195 (1996).

Export credit agencies (ECAs) are public or semi-public banks that fill these gaps in private export financing by providing loans, insurance, and guarantees at below-market rates. ECAs receive government support in the form of access to treasury funds and public capital markets — subsidies, in other words. These export finance subsidies create trade distortions since buyers make purchasing decisions on the basis of the export credit terms rather than the price and quality of the goods.

International cooperation on export credit policy began in 1934 with the formation of the Berne Union, a multilateral group of private and state ECAs that sought to reduce commercial risk through the exchange of information on foreign borrowers.⁶⁶ In the 1970s, facing large trade deficits due to rising oil prices, nations increasingly subsidized export credits to boost exports, resulting in a sharp increase in ECA lending. Talks among OECD trade ministers resulted in the 1978 Arrangement on Officially Supported Export Credits (Arrangement). Since 1978, the Participants to the Arrangement (Participants) have significantly developed the Arrangement to adapt to changing circumstances and to close loopholes.⁶⁷ It has helped build a shared social understanding of appropriate export credit practices that have shaped state action.

The Arrangement formally lies outside of the OECD, but is serviced by the OECD secretariat. The Working Party on Export Credits and Credit Guarantees (ECG), created in 1963, operates as an official OECD committee. Both the Arrangement and the ECG define export credits as a trade problem. The ECG brings together export credit and trade and treasury officials from all OECD members (other than Chile and Iceland) to review the operation of both member and non-member export credit systems. In addition, partly in response to pressure from NGOs, the ECG has developed principles of good governance on issues such as anti-bribery measures, and environmental and social due diligence.⁶⁸

The Arrangement is based on consensus, and not on formally international binding law.⁶⁹ Its Participants include a majority of the states that provide officially supported export finance—Australia, Canada, the EU (with 20 EU members having ECAs), Japan, Korea, New Zealand, Norway, Switzerland, and the US.⁷⁰ The European Commission participates alone in the Arrangement, although EU member states participate directly in the ECG. The Participants are not bound by the OECD rules of procedure, allowing for the participation of non-OECD members, thus creating a more informal and inclusive negotiation process.⁷¹ Many countries observe the process in some way. Israel and Turkey, for example, are observers at Participants' meetings, and Brazil is a full Participant in the Arrangement's Sector Understanding on Export Credits for Civil Aircraft.⁷²

⁶⁶ For an overview of the Arrangement's history, see Andrew M. Moravcsik, 'Disciplining Trade Finance: The OECD Export Credit Arrangement', 43(1) *International Organization* 173 (1989), at 178-81 and Francois de Ricolfis, 'A Long History in Facing Challenges' in *Smart Rules for Fair Trade: 50 Years of Export Credits* (2011) 101-106.

⁶⁷ See Janet West, 'Export Credits and the OECD', in *Smart Rules for Fair Trade: 50 Years of Export Credits* (Paris: OECD Publishing, 2011) 19-40, at 24-26, 38-39; Moravcsik above n 66, at 185-86.

⁶⁸ See Michael H. Wiehan, 'The OECD and Civil Society in the Fight Against Corruption', in *Smart Rules for Fair Trade: 50 Years of Export Credits* (2011) 120-24; West, above n 67, at 23-24.

⁶⁹ Janet Koven Levit, 'The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credit', 45 *Harvard International Law Journal* 65 (2004), at 101.

⁷⁰ Article 3 of the Arrangement.

⁷¹ Nicola Bonucci, OECD Work on Export Credits: A Legal and Institutional Laboratory', in *Smart Rules for Fair Trade: 50 Years of Export Credits* (OECD 2011) 49-55, at 52.

⁷² OECD, 'The Participants to the Export Credit Arrangement', <http://www.oecd.org/tad/xcred/participants.htm> (visited 9 September 2015).

The Arrangement has been effective because of its precision, involving clear, comprehensive, detailed commitments, and because of its flexibility, adaptability, and ease of revision to address new circumstances, and to address particular sectors through sector understandings.⁷³ In the past decade alone, the Participants negotiated new or updated sector rules on civil aircraft (2011), nuclear power plants (2009), climate change (2014), and rail projects (2014). The Arrangement clearly defines the types of government support measures covered,⁷⁴ and the most favorable terms ECAs can offer prospective borrowers.⁷⁵ These specific, technical definitions remove ambiguity, and thus facilitate implementation and monitoring through the Arrangement's procedures for information exchange and notification.⁷⁶ Repayment terms such as the minimum interest rate are set by specific, technical formulae that automatically adjust based on commercial interest rates and other economic indicators.⁷⁷ These automatic adjustment mechanisms allow the Arrangement to maintain its flexibility and relevance despite changing market conditions.

The Arrangement also provides for transparent derogations from its guidelines, subject to compliance with clear procedures based on reciprocal notifications and information exchange.⁷⁸ These procedures accommodate changing contexts while maintaining trust. Participants must notify other Participants when they intend to offer financing terms that utilize a permitted exception or derogates from the Arrangement guidelines.⁷⁹ Other Participants then can engage in face-to-face consultations about the derogations, and they have the ability to match the non-conforming terms and conditions.⁸⁰ This notification and match procedure is described as the "heart" of the Arrangement because it tolerates non-adherence to its substantive rules if Participants follow the agreed procedures.⁸¹ This process recognizes that derogation is inevitable, and so it emphasizes information exchange and transparency while providing procedures that permit matching the derogation to eliminate any competitive advantage. Taken together, these procedures provide a mechanism where Participants can exchange information and resolve disagreements before a transaction is finalized, building trust and giving Participants the confidence that the rules are being followed.⁸²

Participants also can use an enquiry procedure to ask other Participants about the most favorable credit terms and conditions they would be willing to support in a given transaction, as

⁷³ There are sector understandings for ships; nuclear power plants; civil aircraft; renewable energy, climate change mitigation and adaptation, and water projects; and rail infrastructure. These understandings are incorporated into Annexes I-V of the Arrangement. OECD, 'Export Credits Sector Understandings' (7 July 2014), <http://www.oecd.org/tad/xcred/sector-understanding.htm> (visited 1 September 2015).

⁷⁴ Article 5 of the Arrangement (defining the forms of official support covered by the Arrangement).

⁷⁵ Chapter 2 of the Arrangement.

⁷⁶ See Levit, above n 69, at 105 (noting the Arrangement's specificity may enhance compliance by eliminating ambiguities that disguise non-compliance).

⁷⁷ Articles 11-12 of the Arrangement (setting maximum repayment terms according to the World Bank's calculation of per capita GNI); Articles 19-22 of the Arrangement (establishing minimum interest rates based on government bond yields).

⁷⁸ Chapter IV of the Arrangement.

⁷⁹ Articles 43, 47-50 of the Arrangement.

⁸⁰ Articles 18, 42, 45-46, 52-53, 57 of the Arrangement.

⁸¹ Levit, above n 69, at 109-10.

⁸² David Drysdale, 'Why the OECD Arrangement Works (Even Though It Is Only Soft Law)', in Andreas Klasen and Fiona Bannert (eds), *The Future of Foreign Trade Support—Setting Global Standards for Export Credit and Political Risk Insurance* (Wiley-Blackwell, 2015).

well as information regarding third-party countries, institutions, and methods of doing business.⁸³ ECAs can then use the responses to gather information on how best to structure and evaluate their own financing packages. This process gives Participants access to “real time transparency” by providing a procedure and a forum for the timely exchange of confidential transaction data.⁸⁴

The status of the Arrangement within the OECD and as a commitment is one of “useful ambiguity.”⁸⁵ As a “Gentleman’s Agreement among the participants” the Arrangement is not an Act of the OECD, although the OECD Secretariat provides administrative support. The “soft” nature of the Arrangement works to its advantage by lowering the bar to commitment for the Participants. Because the instruments are not formally binding, they can more easily be reviewed, modified, amended, and strengthened.⁸⁶

The Arrangement and ECG engage a small, close-knit, technical group of government officials engaged in export credit practices, the ECAs themselves. Their constant interaction facilitates adaptations and revisions of the Arrangement over time, as well as its incorporation into domestic laws and regulations. Officials from ECAs participate in delegations alongside national trade and treasury representatives. As a result, the instruments are developed and implemented by practitioners, giving them legal coherence and making them operationally sound. This technocratic network of ECA officials has developed a sense of camaraderie and collegiality over time.⁸⁷ Repeated interaction through the notification and consultation procedures builds trust, since these procedures magnify the reputational and professional costs of non-compliance.⁸⁸

The Arrangement, although formally non-binding, has been implemented in whole or part, directly or by reference, into the laws and regulations of the EU, US, and other Participants.⁸⁹ Countries also have adopted rules to implement the sector understandings, including Brazil for aircraft subsidies. Most importantly, the Arrangement and sector agreements have affected the understandings of appropriate credit practices in the ECAs themselves. These instruments thus can be viewed as helping to create a transnational legal order since the law is not limited to the international plane but includes domestic law and agency regulation and practices.⁹⁰ Levit’s detailed study of ECA financing programs found that Participant compliance with the Arrangement was “high, sustained, and steady throughout the Arrangement’s life.”⁹¹ To date, only

⁸³ Articles 55-56 of the Arrangement.

⁸⁴ See Drysdale, above n 82.

⁸⁵ John Ray, ‘The Arrangement from the Inside’, in *The Export Credit Arrangement: Achievements and Challenges 1978-1999* (1998), 33-37 at 33; Levit, above n 69, at 116 (finding the agreement’s legal ambiguity played a significant role in the Arrangement’s initial adoption).

⁸⁶ See Bonucci, above n 71, at 50-51.

⁸⁷ See Ray, above n 85, at 35 (finding that the success of the 1989 Helsinki negotiations came from the camaraderie developed from informal social meetings between the Participants).

⁸⁸ Levit, above n 69, at 127.

⁸⁹ The Arrangement’s guidelines are incorporated into EU regulations. See Regulation (EU) No 1233/2011 of the European Parliament of 16 Nov 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, 2011 OJ (L. 326) 45. The United States, Australia, Switzerland, New Zealand, and one of Norway’s ECAs (Export Credit Norway), each make explicit reference to the OECD Arrangement in its respective charter. Canada and Norway’s other ECA (GIEK) make indirect reference to the Arrangement. Confirmed to authors in emails in 2015 from ECA officials.

⁹⁰ Halliday and Shaffer, above n 8.

⁹¹ Levit, above n 69, at 94.

one export credit dispute among the Participants has reached the WTO, and it involved shipbuilding where the understanding is less precise.⁹²

Although the Arrangement is limited to only a subset of countries, in 1995, it was incorporated by reference as a carve out to the illustrative list of prohibited export subsidies in Annex 1 of the ASCM (as item k). Any WTO member who acts within the framework of the Arrangement, even without being a formal Participant to it, is deemed to comply with WTO obligations. In this way, the Arrangement has become a worldwide standard.⁹³ WTO panels have addressed the Arrangement in aircraft subsidy disputes, such as between Canada and Brazil, which in turn has led to revisions of the sector understanding, as well as Brazil's joining the sector understanding on civil aircraft.

This multilateralization of the Arrangement without the participation of all affected countries, however, creates both legitimacy and practical challenges. Brazil, China, Colombia, India, Iran, Israel, Jordan, Mexico, Russia, Sri Lanka, Turkey, Indonesia, Argentina, Ecuador, Zimbabwe, Singapore, Oman, Thailand, Trinidad and Tobago, Hong Kong, Uzbekistan, and South Africa are not formal participants in the Arrangement, but have officially supported ECAs.⁹⁴ These non-Participant ECAs have not undertaken commitments under the Arrangement, and they can provide repayment terms and interest rates that are more competitive than Participants, but they tend not to because they would be at risk of a complaint in the WTO. The growth of non-Arrangement based financing is reducing the Arrangement's effectiveness.⁹⁵ Participants thus are working to develop new ways to entice non-Participants to abide by the Arrangement's constraints. Were membership in the Arrangement to expand significantly, however, the adaptation and development of the Arrangement by consensus could become more difficult.

The Arrangement demonstrates that formally non-binding rules developed outside the WTO can effectively discipline subsidies when a relatively small group of trading partners is affected and the scope of the agreement is circumscribed. The Arrangement uses precise and comprehensive language that helps ensure that common understanding informs practice. Automatic adjustment mechanisms enable adaptation to changing economic conditions. Information exchange and notification procedures build professional trust. By allowing some leeway on substantive compliance while insisting on transparent procedures and notification mechanisms, these instruments provide state actors with more autonomy, while preserving transparency and reducing informational asymmetry. This transparency encourages actors to conform to the discipline. The development and continual evolution of the Arrangement shows that, at least in small groups, consensus decision-making is possible to facilitate updating and compliance with normative commitments. Where the barriers to entry are low for observers and new members, such mechanisms can ensure inclusiveness so that understandings do not unravel.

⁹² Drysdale, above n 82.

⁹³ Bonucci, above n 71, at 51.

⁹⁴ Based on data from Benjamin Esty, 'Export Credit Agencies', Harvard Business School, <http://www.people.hbs.edu/besty/projfinportal/ecas.htm> (visited 3 September 2015).

⁹⁵ Export Import Bank of the United States, 'Report to the U.S. Congress on Global Export Credit Competition – June 2015' (2015) available at http://www.exim.gov/sites/default/files/reports/EXIM%202014CompetReport_0611.pdf, at 9 (describing the potency of the Arrangement as 'waning' due to non-rules-based financing outside of the Arrangement).

B. OECD Shipbuilding Initiatives

The OECD is also the primary forum for discussion of the trade issues related to steel and shipbuilding.⁹⁶ The OECD Steel Committee and the Working Party on Shipbuilding allow major producers in these sectors to exchange information and examine conditions and trends in the market. The demand for ships and steel is cyclical, with increased pressure for government intervention in these politically powerful sectors during periods of low demand. The OECD's technical expertise and experience, combined with a membership that includes many of the major players in these sectors, made it a natural forum for the development of new subsidy disciplines for steel and shipbuilding. We focus on the shipbuilding initiatives.

Worldwide shipbuilding capacity has long exceeded demand due to the prevalence of shipbuilding subsidies. Post-war Japan (and later South Korea and China) provided support to domestic shipyards as a tool to promote economic growth and development. As European shipbuilders lost market share to Japanese shipyards in the 1950s, they sought subsidies rather than close mismanaged and outdated shipyards. Increased state aid in the form of easy credit terms, new construction subsidies, and buyer incentives caused significant overcapacity in the sector, severely depressing the price of ships. In response, OECD members created the Council Working Party on Shipbuilding (WP6) in 1966 to identify and progressively eliminate subsidies and other measures that distort the shipbuilding market. Spurred by a drop in demand, WP6 members developed policies to stabilize the shipbuilding industry with the 1972 "General Arrangement for the Progressive Removal of Obstacles to Normal Competitive Conditions in the Shipbuilding Industry," which encouraged members to reduce domestic subsidies and notify support measures. The 1976 General Guidelines for Government Policies in the Shipbuilding Industry pushed for shipbuilding capacity reductions and increased transparency.⁹⁷ Although these guidelines were non-binding, domestic shipbuilding policies in Japan and Europe conformed to these informal commitments.⁹⁸ Referencing the General Guidelines, Japan cut shipbuilding capacity by 35% between 1976-1986.⁹⁹ In nearly the same period, the European Community reduced its capacity by an estimated 48%.¹⁰⁰ Between 1973 and the mid-1980s, shipbuilding capacity was reduced by 50 percent in the OECD area.¹⁰¹ However, overcapacity and subsidization remained a problem, partially due to new producers entering the market, prompting calls for a binding agreement on shipbuilding subsidies.¹⁰²

In 1989, the US initiated negotiations for an agreement on shipbuilding subsidies at the urging of the Shipbuilders Council of America. The agreement was completed and signed in 1994 by countries representing eighty percent of the world's shipbuilding capacity, but it failed in the US Senate due to opposition from large domestic shipbuilding interests who objected to certain

⁹⁶ Fabrizio Pagani, *OECD Steel and Shipbuilding Subsidy Negotiations: Text and Legal Analysis* (London: Cameron May, 2008) 26.

⁹⁷ OECD, 'General agreements related to Shipbuilding', <http://www.oecd.org/sti/ind/generalagreementsrelatedtoshipbuilding.htm> (visited 31 August 2015).

⁹⁸ OECD, *Trade and Structural Adjustment: Embracing Globalisation* (Paris: OECD Publishing, 2005) 246, 248-49.

⁹⁹ David Blair, *Trade Negotiations in the OECD* (London: Routledge, 2010) 228.

¹⁰⁰ Ibid.

¹⁰¹ OECD, *Trade and Structural Adjustment: Embracing Globalisation*, above n 98, at 51.

¹⁰² Blair, above n 99, at 226.

terms, which, they believed, favored other parties.¹⁰³ It thus did not enter into effect. A second series of talks at the OECD from 2002 to 2005 was aimed at resurrecting the shipbuilding agreement and bringing about normal competitive conditions in the industry.¹⁰⁴ The negotiations resulted in a draft text that would have mirrored the ASCM, and included a dispute resolution mechanism, a list of prohibited and non-actionable subsidies, and separate disciplines for developing countries. The talks were suspended in 2005, however, and ultimately terminated in 2010, due to inability to reach a consensus on pricing rules.¹⁰⁵

The WP6 nonetheless continues to provide an informal mechanism to discipline shipbuilding subsidies. It updates the shipbuilding support database, providing a yearly inventory of OECD and non-OECD support measures, and it conducts peer reviews of national shipbuilding industries.¹⁰⁶ It conducts workshops for the exchange of ideas and best practices in the shipbuilding industry. And WP6 members also developed the sector understanding on export credits in shipbuilding noted above.

This working party provides the primary international forum for non-state actors, like the International Chamber of Shipping, to engage with government representatives on shipbuilding subsidies, although it largely passes under the radar of NGOs. These processes of information exchange and peer review shape normative understandings of shipbuilding subsidies that create a form of discipline that is underappreciated because it does not involve formally binding law. But this informal law that emerges through social interaction in WP6 does have behavioral effects, reflected, for example, in shipbuilding policies in the EU and Japan in the 1970s.

C. Fisheries Subsidies

Fishing provides both jobs and food security, which makes fisheries subsidies politically and economically popular in many countries. Yet subsidies that promote capacity building accelerate the process of fishery depletion, a major global problem. A study of global fisheries estimated that 57.4 percent of fish stocks were fully exploited, and 29.9 percent of those stocks were overexploited.¹⁰⁷ Many commercially important species are becoming endangered and are vulnerable to collapse. The challenge of responsibly managing fisheries, especially those on the high seas, is exacerbated because fisheries are open-access resources.

Estimates indicate that the fisheries sector receives more than US\$35 billion in subsidies each year, with US\$20 billion for capacity building.¹⁰⁸ These numbers are only estimates, however, because notifications of subsidies to the WTO are limited in part because of conceptual

¹⁰³ United States International Trade Commission, 'The Year in Trade 1999: Operation of the Trade Agreements Program – 51st Report', Investigation No. 332-412 (2000), at 36 (finding that most US shipbuilders supported the agreement but six large defense-oriented builders and their trade associations opposed it).

¹⁰⁴ Pagani, above n 96, at 20.

¹⁰⁵ OECD, 'Negotiations on a Shipbuilding Agreement', <http://www.oecd.org/sti/ind/negotiationsonashipbuildingagreement.htm> (visited 8 September 2015).

¹⁰⁶ For a summary of the activities of the WP6 see, OECD, 'The OECD Council Working Party on Shipbuilding' <http://www.oecd.org/sti/ind/shipbuilding.htm> (visited 8 September 2015).

¹⁰⁷ FAO, 'Review of the State of World Marine Fishery Resources', FAO Fisheries and Aquaculture Technical Paper No. 569 (Rome: FAO, 2011) 13.

¹⁰⁸ U. Rashid Sumaila et al., 'A Bottom-up Re-Estimation of Global Fisheries Subsidies', 12(3) Journal of Bioeconomics 201 (2010) 213.

ambiguity about the classification of such subsidies under WTO rules,¹⁰⁹ and they are underreported in other organizations. Between 2000 and 2003, the US reported more than US\$1 billion in Government Financial Transfers (GFT) to fisheries to the OECD, but notified only US\$79 million to the WTO under its narrower definition of a subsidy.¹¹⁰ The WTO concluded that “a common feature of all official data available on fisheries subsidies (looking at OECD, APEC and WTO data) is that they provide a very limited coverage of fisheries subsidies granted by countries other than the EU(15), United States, Canada, Norway, Iceland, Australia and New Zealand.”¹¹¹ The weakness of ASCM notification and surveillance reduces the usefulness of data available in the WTO, undermining attempts to discipline the sector through the WTO.¹¹²

For a generation, states have been looking for better disciplines on fisheries subsidies on two tracks, one through United Nations (UN) organizations and the other through the WTO, with both being spurred by NGOs. On one track, the UN, through the United Nations Convention on the Law of the Sea (UNCLOS) and the Fish Stocks Agreement, created a legal regime for sustainable fishery management that included compliance mechanisms but made no explicit reference to subsidies.¹¹³ In parallel, the UN Food and Agriculture Organization (FAO) negotiated a series of non-binding fisheries rules, and one of its International Plans of Action explicitly called for assessment and elimination of subsidies and other factors that contribute to excessive fishing capacity.¹¹⁴ In addition, the FAO worked to clarify and define fisheries subsidies through its technical guide on identifying, assessing and reporting on fisheries subsidies.¹¹⁵ The United Nations Environment Program (UNEP) focused on the trade aspects of fisheries subsidies in concert with NGOs, such as the WWF to engage experts, international institutions and key officials and to raise awareness of the anti-competitive impact of fisheries subsidies on developing countries.¹¹⁶

The effect of these efforts is mixed. Compliance with the norms developed by these organizations was limited by the weak, voluntary nature of these agreements, as well as the lack of effective peer review or enforcement mechanisms to secure compliance.¹¹⁷ But these soft-law contributions improved the definitions, data, and international commitment towards fisheries subsidy reform, and paved the way for discussions regarding a fisheries subsidies discipline within the WTO.¹¹⁸ For example, supporters and opponents of fisheries disciplines alike could draw upon

¹⁰⁹ Chen-Ju Chen, *Fisheries Subsidies under International Law*, Hamburg Studies on Maritime Affairs, Vol 20 (2010) 5.

¹¹⁰ WTO Secretariat, *World Trade Report 2006: Exploring the Links between Subsidies, Trade and the WTO* (2006) 164-65.

¹¹¹ Ibid.

¹¹² See Margaret A. Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (2011) 91-92.

¹¹³ U. Rashid Sumaila et al., 'Fishing for the Future: Trends and Issues in Global Fisheries Trade', E15 Initiative, International Center for Trade and Sustainable Development (ICTSD) and World Economic Forum (2014) 12.

¹¹⁴ FAO, 'International Plan of Action for the Management of Fishing Capacity' (1999) art 25-26.

¹¹⁵ FAO, 'Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector', Fisheries Technical Paper No. 438 (Rome: FAO, 2004); Chen, above n 109, at 8-9.

¹¹⁶ See UNEP, 'Fisheries Subsidies: A Critical Issue for Trade and Sustainable Development at the WTO' (UNEP 2008) 15 (giving an overview of UNEP activity on fisheries); Olav Stokke and Clare Coffey, 'Institutional Interplay and Responsible Fisheries: Combating Subsidies, Developing Precaution, in Sebastian Oberthur and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance* (Cambridge, MA: MIT Press, 2006), 137-38.

¹¹⁷ See Tony Pitcher et al., 'Not Honouring the Code', 457 *Nature* 658 (2009) (finding dismayingly poor compliance with the FAO Code of Conduct).

¹¹⁸ Stokke and Coffey, above n 116, at 139.

FAO definitions and data to support policy positions.¹¹⁹ Similarly, developing countries could point to UNEP country studies to make their case for subsidy reductions in developed countries. In this way, the FAO and UN surmounted their institutional limitations by playing a supportive and facilitative role toward the development of subsidy disciplines regarding fisheries within the ASCM.¹²⁰

The second track is within the WTO.¹²¹ The ASCM applies to fisheries subsidies, but only to the extent that it covers any subsidy, so that it contains no specific rules relating to fish. In the 1986 Punta del Este declaration launching the Uruguay Round, fish was only indirectly mentioned in connection with the negotiations on natural resource-based products, where the aim was simply to enhance market access.¹²² At the WTO Seattle ministerial meeting in 1999, the fisheries trade issue was specifically characterized for the first time as involving subsidies that contribute to overcapacity and overfishing.¹²³ Many members, however, expressed concerns relating to intrusions on domestic policy space, the need for development exceptions, and the possibility of defining a category of acceptable fisheries subsidies.¹²⁴ The 2001 Doha Development Agenda, the mandate for the Doha Round negotiations, expressly linked subsidies and environmental concerns, but the topic was assigned to the Rules negotiations together with other ASCM issues.¹²⁵

The Doha Round negotiations on fisheries subsidies have moved even more slowly than other aspects of the round. In his report after the 2008 breakdown the Chair concluded that unlike other Rules issues where he provided a draft text, all he could do on fish was provide a road map.¹²⁶ Convergence on the issues was difficult because negotiators advanced differing conceptual premises that may simply mask their view of national interests in light of the structure of their fisheries industry and the nature of any state support provided. Despite all sorts of opportunities for informal information sharing and learning in workshops outside the WTO organized by international organizations such as UNEP, and by NGOs such as WWF and ICSTD, and despite the evident fingerprints of NGOs in a draft fisheries text,¹²⁷ the expert consensus on what needs to be done had not been translated into consensual understanding among negotiators. The Chairperson observed that “all participants recognize the global crisis of overcapacity and overfishing,” attributing the negotiation impasse to divergence in understanding of the issue and the rules that should apply, with wide conceptual gaps on such basic factors as which subsidies

¹¹⁹ All delegations to the fisheries negotiations relied on FAO statistics. WTO, ‘Communication from the Chairman’, Negotiating Group on Rules, TN/RL/W/254, 21 April 2011, at 48, para. 12.

¹²⁰ See Jon Birger Skjærseth, Olav Schram Stokke, and Jørgen Wettestad, ‘Soft Law, Hard Law, and Effective Implementation of International Environmental Norms’, 6(3) *Global Environmental Politics* 104 (2006), at 113.

¹²¹ In parallel, there is some potential through other trade agreements that could provide templates for a future trade agreement with more global coverage in the WTO. Participants in the Trans-Pacific Partnership negotiations also attempted to make progress in this area. At the time of writing we had not yet seen the TPP text, which apparently contains aspirational language on fisheries subsidies and a limited prohibition on some harmful fisheries subsidies.

¹²² ‘Ministerial Declaration on the Uruguay Round’, above n 60, at 5.

¹²³ WTO, ‘Preparations for the 1999 Ministerial Conference Ministerial Text: Revised Draft,’ World Trade Organization, JOB(99)/5868/Rev.1, 19 October 1999 at page 23.

¹²⁴ See Chen, above n 109, at 49-55.

¹²⁵ WTO, ‘Ministerial Declaration – adopted on 14 November 2001’, Doha Ministerial Conference, Fourth Session, WT/MIN(01)/DEC/1, 20 November 2001, para. 28-29.

¹²⁶ See WTO, ‘New Draft Consolidated Chair Texts of the AD and SCM Agreements,’ Negotiating Group on Rules, TN/RL/W/236, 19 December 2008, Annex

¹²⁷ Margaret A. Young, ‘Fragmentation or Interaction: The WTO, Fisheries Subsidies, and International Law’, 8(4) *World Trade Review* 477 (2009), at 510-12.

should and should not be prohibited, the special needs of developing countries, and the criteria for general exceptions.¹²⁸

Why have the negotiations stalled? Negotiators could not build on existing concepts, since the usual motivation for disciplines in the ASCM is the effects of a measure on trade. Nothing in the ASCM deals with overcapacity or resource management. Farm subsidies, the source of endless disputes in the GATT, are covered by the Agreement on Agriculture. Such subsidies may be easier to discipline because they demonstrably hurt farmers in other countries. Although fisheries subsidies also have negative economic externalities for the fishing sector in other countries, they have not formed the major basis of any formal WTO complaint, and only two complaints have had even a tangential connection to the fish trade.¹²⁹

The draft text on fisheries subsidies provides an example of how informal law can emerge and influence subsidy disciplines. Reaching consensus on the notion that fisheries subsidies represented a suitable subject for WTO negotiations took years of effort by international organizations, governments, and NGOs.¹³⁰ First was the patient work of the FAO, UNEP, regional fishery commissions, and the OECD in gathering information on the state of fish stocks and monitoring the effects of fishery operations. Second was a series of multilateral agreements that began to build a governance regime for fisheries management. Third was the building of an unconventional alliance of countries concerned with the impact of fisheries subsidies on efforts to manage fish stocks sustainably. Fourth was the analytic and campaigning power of civil society groups like the WWF and the ICTSD. These groups demonstrated the need for reform, reframed the issue in WTO language, and created pressure for action. But rules negotiators struggled to reach a consensual understanding on the causal connections between fisheries subsidies, the trading system, and the environmental impact of overfishing, so the disciplines remain weak.

D. Fossil Fuel Subsidies

Disciplines on fossil fuel subsidies are essential to combat climate change, but difficult for political reasons because of their popularity in developed and developing countries where consumption subsidies often are viewed as progressive in providing assistance to the poor and middle classes, and production subsidies are claimed to be necessary to promote economic growth. Fossil fuel subsidies are viewed primarily as a public goods issue, rather than as a trade problem adversely affecting other countries' producer interests. Just as for fisheries subsidies, current efforts by NGOs and other international organizations on fossil fuel subsidies can set the stage for discussions to create disciplines in the future. This case study looks at how international organizations are addressing the issue of fossil fuel subsidies, particularly in their approach to definitions, transparency, and obligations. We look at the WTO, OECD, International Energy Agency (IEA), IMF, G-20, and the UN.

The ability to generate consensus and compromise on international fossil fuel subsidies begins with the quality of the data available through notification and reporting processes, which,

¹²⁸ WTO, 'Informal Open-Ended Meeting with Senior Officials: 25 November 2009 - Statement by the Chairman', Negotiating Group on Rules, TN/RL/W/246, 27 November 2009, at 8.

¹²⁹ Young, *Trading Fish Saving Fish*, above n 112, at 91-92; Chen, above n 109, at 41.

¹³⁰ Liesbeth Casier et al., 'Shining a Light on Fossil Fuel Subsidies at the WTO: How NGOs Can Contribute to WTO Notification and Surveillance', 13(4) *World Trade Review* (2014), at 5.

in turn, depends on the definition of a “subsidy.”¹³¹ The WTO general subsidy definition covers a defined list of financial contributions or price or income support provided by a government, and requires that a benefit be conferred to the recipient and WTO rules further narrow the definition of those subsidies that Members must notify to “specific” subsidies.¹³² Ambiguity as to whether a measure confers a benefit or is sufficiently specific provides Members with a justification not to notify it. In contrast, other organizations such as the OECD and IMF use economic rather than trade-related definitions that can be tailored to the subsidy at issue,¹³³ with the result that they are able to gather more data, which both enhances transparency and is useful for analytic purposes.

OECD definitions differ in practice for industrial subsidies, fossil fuel subsidies, environmentally harmful subsidies, and agriculture “support.” The OECD inventory measures fossil fuel support (referencing the Producer and Consumer Subsidy Equivalents [PSE-CSE] framework used in Agriculture) in terms of measures that support or favor fossil fuel use or production.¹³⁴ Although the inventory uses a deliberately broad definition, it does not measure support provided through risk transfers, concessional loans, or market price support.¹³⁵ The OECD inventory is useful because it provides policy information beyond the amount of the subsidy, such as information about the type of subsidy and the conditions necessary to receive the subsidy. The IEA provides complementary data to supplement the OECD inventory because it measures the difference between the price to consumers and an international reference price (price-gap method), capturing the market price support that the OECD definition does not address. The IEA definition, however, would not capture the support measures that do not directly affect the consumer price of fossil fuels.¹³⁶

The IMF defines energy subsidies broadly to include both production and consumption subsidies. It measures consumption subsidies using a price-gap approach and includes a corrective tax intended to reflect the negative externalities of fossil fuel production in their “reference” price.¹³⁷ According to this broader definition, IMF estimates of global energy subsidies, not all of which affect fossil fuels, are much higher.¹³⁸

The weakest definition of fossil fuel subsidies is in the ambiguous G-20 commitment to reduce “inefficient” fossil fuel subsidies that encourage “wasteful” consumption.¹³⁹ Given such an ambiguous definition, countries have greater incentives to avoid notifying fossil fuel subsidies. The relationship between the definition used and subsequent transparency is readily apparent when comparing notifications of fossil fuel support measures between these organizations. Between 2008 and 2013, there were 640 notifications for fossil fuels reported in the OECD inventory, compared to 64 WTO SCM notifications, and only 35 notified in the G-20.¹⁴⁰

¹³¹ Ibid, at 6, 8.

¹³² Ibid, at 8.

¹³³ Ibid, at 6-7.

¹³⁴ OECD, *Inventory of Estimated Budgetary Support and Tax Expenditures for Fossil Fuels - 2013* (Paris: OECD Publishing, 2013) 16.

¹³⁵ Ibid, at 17.

¹³⁶ Casier, above n 130, at 7.

¹³⁷ David Coady et. al, 'IMF Working Paper: How Large Are Global Energy Subsidies?', Fiscal Affairs Department, WP/15/105 (2015) 31 (clarifying the differences in subsidy estimation methods between IEA, OECD and IMF).

¹³⁸ Global energy subsidy estimates for 2011 ranged from \$523 billion (IEA) to \$2.0 trillion (IMF, post-tax estimate). Ibid, at 31.

¹³⁹ G-20, 'Leaders' Statement: The Pittsburgh Summit 24-25 September 2009' at 3, para 24, available at https://g20.org/wp-content/uploads/2014/12/Pittsburgh_Declaration_0.pdf (visited 6 September 2015).

¹⁴⁰ Casier, above n 130, at 9, 23.

Turning to existing organizational efforts to discipline fossil fuel subsidies, we find wide variation in organizational activity. Within the WTO, little attention has been given to the issue. WTO Members asked only 14 questions about fossil fuel subsidies in the SCM Committee between 2008 and 2013.¹⁴¹ The G-20 process, in contrast, has focused on understanding and comparing each country's fossil fuel policies and sharing reform experiences. The 2009 G-20 commitment required countries to create and share their implementation plans for the reduction of fossil fuel subsidies.¹⁴² The data is poor, however, because of the ambiguous definition and inconsistent voluntary reporting, which reduces transparency and trust that partners are reciprocally notifying their subsidies and meeting their commitments. In other words, good data is critical to drive discussions of fossil fuel subsidies and the creation of new disciplines.

At the 2012 Los Cabos Summit, G-20 members reported on the implementation of their commitments.¹⁴³ Some countries had made notable progress with their implementation plans, but the G-20 reiterated the need to improve how fossil fuel subsidies are defined, and to standardize reporting.¹⁴⁴ In 2013, G-20 finance ministers agreed to undertake a "voluntary peer review process for fossil fuel subsidies" and later developed a methodology for that process.¹⁴⁵ A 2014 roundtable by the Friends of Fossil Fuel Subsidy Reform¹⁴⁶ noted that the US and China had voluntarily agreed to undergo peer review under the G-20, while Peru and New Zealand did the same under a similar Asia-Pacific Economic Cooperation (APEC) framework.¹⁴⁷ Suggestions for improving transparency in the sector include standardizing the submission process for subsidy information, requiring justifications for excluding certain subsidies from the G-20 commitment, separating subsidy reporting from the reform of rules to build transparency, establishing an oversight board, and setting more definite timelines to ensure G-20 members can meet their commitments.

The UN system has contributed nothing to definitions or data, so far. In the outcome document for the September 2015 UN Summit, "Transforming our World: The 2030 Agenda for Sustainable Development," goal 12.c calls on members to "rationalize inefficient fossil-fuel subsidies that encourage wasteful consumption by removing market distortions, in accordance with national circumstances, including by restructuring taxation and phasing out those harmful subsidies."¹⁴⁸ Intensive work is now under way on designing review and follow-up on these new

¹⁴¹ Ibid, at 10, table 1.

¹⁴² G-20, 'Leaders' Statement', above n 139, at 3, para. 25.

¹⁴³ G-20, 'Summary of Progress Reports to G-20 Leaders on the Commitment to Rationalize and Phase out Inefficient Fossil Fuel Subsidies' (2012) available at <http://www.g20india.gov.in/pdfs/Rationalize-and-Phase-Out-Inefficient-Fossil-Fuel-Subsidies.pdf> (visited 9 September 2015).

¹⁴⁴ Ibid, at 1.

¹⁴⁵ See G-20, 'Methodology for G-20 Voluntary Peer Reviews on Inefficient Fossil Fuel Subsidies That Encourage Wasteful Consumption' (2013) available at http://www.g20australia.org/official_resources/methodology_g_20_voluntary_peer_reviews_inefficient_fossil_fuel_subsidies (visited 9 September 2015).

¹⁴⁶ This group consists of non-G20 countries supporting reform, which includes Costa Rica, Denmark, Ethiopia, Finland, New Zealand, Norway, Sweden, and Switzerland.

¹⁴⁷ Robert F. Cekuta, 'Fossil Fuel Subsidy Reform Roundtable Highlights a Global Problem', U.S. Department of State Blog, April 17 2014, <https://blogs.state.gov/stories/2014/04/17/fossil-fuel-subsidy-reform-roundtable-highlights-global-problem> (visited 8 September 2015).

¹⁴⁸ United Nations, 'Draft outcome document of the United Nations summit for the adoption of the post-2015 development agenda', A/69/L.85, 12 August 2015.

sustainable development goals, but fossil fuel subsidies are unlikely to receive much attention.¹⁴⁹ Fossil fuel subsidy reform ought to be included as part of any strategy to reduce greenhouse gas (GHG) emissions, but the UN Framework Convention on Climate Change (UNFCCC) has not prioritized subsidy reform in its agenda.¹⁵⁰ It could be that many countries will include fossil fuel subsidies reform in their Intended Nationally Determined Contributions (INDC) submitted for the 2015 Paris Conference of the Parties. We have not conducted an analysis of Section J on transparency of action and support in the UNFCCC draft negotiating text for Paris, but the UNFCCC will have an intensive review process that may well cover fossil fuel subsidies in INDCs.¹⁵¹

The IMF's studies and analyses can increase pressure for reform by revealing the harmful impact of subsidization. Unlike the other organizations involved to date, the IMF has a coercive tool to reduce fossil fuel subsidies through the financial leverage it can apply, at least against developing countries and countries in transition. The IMF's assistance agreement with Ukraine provides an example. In April 2014, the IMF and Ukraine agreed on a US\$17 billion loan, with disbursements dependent on performance.¹⁵² Part of the deal called for broad reductions in energy subsidies, which were as high as eight percent of gross domestic product (GDP).¹⁵³ Overall, the IMF mechanism of conditioning aid on the implementation of subsidy reform, along with technical support, has had mixed success, however.¹⁵⁴ The asymmetry of IMF treatment of large developed and small developing countries affects the legitimacy of IMF actions, which can lead to developing country resistance.

In sum, subsidy disciplines on fossil fuels are at best nascent. Nonetheless, they are now on the global agenda as actors work toward developing social consensus, primarily through formally non-binding initiatives. These initiatives will be much more effective if meaningful reporting, transparency, and peer-review mechanisms can be developed within one or more organizations.

IV. Conclusion: What Works?

Disciplining government support through formally binding rules is notoriously difficult. We thus asked: Can informal rules offer a complement and alternative? And if so, what works? The simple answer is, nothing works really well, but that answer applies to formal as well as informal rules. At the WTO with its formally binding rules, the dispute settlement system is not always useful, negotiations on new rules are blocked, and the less formal surveillance mechanisms are hampered by patchy data and the reluctance of some Members to challenge each other with

¹⁴⁹ Alice Tipping and Robert Wolfe, 'Trade and Sustainable Development: Options for Follow-up and Review of the Trade-Related Elements of the Post-2015 Agenda and Financing for Development', Working Draft, ICTSD and IISD (2015).

¹⁵⁰ Virginia Benninghoff, 'Prioritizing Fossil-Fuel Subsidy Reform in the UNFCCC Process: Recommendations for Short-Term Actions', IISD (2013), at 3-4; Kerry Lang et al., 'Increasing the Momentum of Fossil-Fuel Subsidy Reform: A Roadmap for International Cooperation' (IISD 2010), 37-40.

¹⁵¹ Laura Merrill et al., 'Fossil-Fuel Subsidies and Climate Change: Options for Policy-Makers within Their Intended Nationally Determined Contributions', IISD (2015), at 6.

¹⁵² IMF, 'IMF Executive Board Approves 2-Year US\$17.01 Billion Stand-by Arrangement for Ukraine, US\$3.19 Billion for Immediate Disbursement', (Press Release No. 14/189' (IMF, 2014).

¹⁵³ IMF, IMF Country Report No. 14/263, Ukraine: First Review under the Stand-by Arrangement' (IMF, 2014).

¹⁵⁴ See IMF, 'Energy Subsidy Reform: Lessons and Implications' (IMF, 2013), at 22.

questions. Sectoral (or vertical) discipline of agriculture subsidies, however, does seem stronger than the horizontal disciplines, a point that helped motivate our turn to other case studies. Thus, the more complex answer to the question, what works, is a comparative institutional one.¹⁵⁵

Our expectation at the outset was that definitional clarity (dimension 1) allows for stronger discipline (dimension 2) because everyone understands the obligations. More data means more sunshine (dimension 3), which allows trading partners and stakeholders to apply pressure for reform; and such pressure is more readily applied (dimension 4) in organizations with a strong institutional structure. Informal law can lead to social sanctions (such as consumer boycotts), or affect financing (such as from the IMF or World Bank), and thus work through coercion. It can work through reciprocity such as in WTO and OECD peer-review systems based on reciprocal commitments, reporting, monitoring, and evaluation. It can lead to policy learning through information sharing and deliberation. And it can lead to social emulation and model mongering affecting practice. We expected that the success of any process depends on generating trustworthy data, identifying the relevant actors, and providing a forum for bringing them together.

Certain organizations and mechanisms have comparative advantages over others, whether as alternatives or as complements. In the case of subsidies, our four case studies demonstrate that institutional choice varies with the issue area, and that institutional effectiveness depends on the clarity of definition, consensus over obligation, access and trustworthiness of information, and institutional monitoring structure. These factors affect participation, decision making, and organizational practice, which, in turn, affect outcomes.

The OECD-based export credit Arrangement shows how a formally non-binding mechanism can give rise to a transnational legal order that permeates national law and practices. It created detailed rules that were formally non-binding, but were defined and clarified by consensus decision making over time, combined with notification and peer review mechanisms to ensure compliance. These mechanisms gave rise to normative settlement across the governmental and quasi-governmental bodies that administer export credits in OECD countries. Despite the Arrangement's considerable success, however, it now faces new challenge of whether its virtues (limited membership and flexible procedures) can survive the necessary expansion to include large emerging countries that traditionally have not been part of the OECD club but increasingly use export credits to subsidize exports.

The OECD's initiatives on shipbuilding subsidies, in contrast, focused on developing formally binding law backed by dispute settlement. From the conventional perspective of lawyers, such hard law should give rise to broader compliance with agreed norms. The focus on hard law backed by dispute settlement, however, made reaching agreement much more difficult. With its smaller membership (compared to the WTO's almost global coverage), and its ability to include important, non-OECD shipbuilding countries, insiders viewed the WP6 as representing a "feasible, faster and leaner alternative to WTO negotiations."¹⁵⁶ Because the issues were focused on a particular sector and because membership was small in light of the few countries producing large ships, many expected that disciplines — whether formal (through a binding agreement) or informal (through formally non-binding undertakings) — should be easier to develop. This narrow focus on only one sector, as opposed to the WTO's broad scope, nonetheless, had a disadvantage, at least for negotiating formally binding rules backed by formal dispute settlement, since it reduced the

¹⁵⁵ See Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994) and Gregory Shaffer, 'Comparative Institutional Analysis and a New Legal Realism', 2 Wisconsin Law Review 607 (2013).

¹⁵⁶ Pagani, above n 96, at 42.

possibility for “package deals” that involve more than one industry. As a result, a group of powerful domestic constituencies, in the U.S. in particular, was able to derail the negotiations.

The linkage of the trade effects of fisheries subsidies to the broader concern of sustainable fishing practices activated a broad array of actors that included NGOs. This decades-long, inclusive process made the development of disciplines more likely by generating the data and technical skills, and building toward the consensus necessary, to place fisheries subsidies on the global trade agenda. The data produced by the monitoring efforts of groups like the OECD made it possible to analyze the effects of different types of subsidies. Yet, because fisheries subsidies have been defined predominantly as a public goods issue, rather than a trade issue, agreement within the WTO and elsewhere has been more difficult to achieve, whether involving formally binding rules or non-binding mechanisms.

One approach to the impasse on fisheries subsidies could be to reference the principles and definitions developed by other institutions to define the extent of Member obligations in a WTO agreement,¹⁵⁷ similar to the incorporation by reference of the Arrangement on Export Credits into an Annex of the ASCM.¹⁵⁸ The 2007 draft Chairman’s text went in this direction by including a provision allowing an exception to subsidies disciplines if fisheries-related information was notified to the relevant body of the FAO, where it would be subject to peer review prior to the granting of the subsidy.¹⁵⁹ The FAO transparency exercise would pertain only to things like the quality of the country’s fisheries management system. Review of the subsidy as such would still take place in the SCM Committee. Most delegations resisted this idea, arguing that the WTO should be able to conduct surveillance of its own rules, but some delegations saw it as an effective way to deal with a technically complex issue.¹⁶⁰ The recent EU proposal on subsidies notification might prove more acceptable.¹⁶¹

The inability to reach a consensus on the framing of the issue of fossil fuel subsidies similarly limited the ability to agree on and apply new disciplines. In particular, parties could not resolve the inherent tensions between viewing such subsidies as a problem of general domestic economic policy (hence whether they are “inefficient”), a global public goods problem (as a contributor to climate change), or as a trade issue (involving externalities for trading partners). The confusion about purposes became reflected in confusion over definitions. Vague definitions, in turn, hampered notifications because it was not clear what countries must notify. As a result, data on fossil fuel subsidies remains poor, and there has been inadequate surveillance in all bodies with a mandate to oversee them. The governance of fossil fuels subsidies thus remains a global challenge. Nonetheless, for the first time, fossil fuel subsidies are on the global agenda, and networks of NGOs work with governments and international organizations to improve data. It is only through such ongoing interaction and data sharing that social consensus eventually may develop regarding such subsidies, so that new disciplines emerge.

One thread running through the four case studies is that subsidies defined as public goods problems involve different organizations and dynamics compared to subsidies defined in purely trade terms. Countries have found it more difficult to reach the social consensus necessary for comprehensive disciplines on subsidies that pose public goods challenges either within or outside of the WTO. It has been difficult even to agree on the definition of the subsidies to be notified in

¹⁵⁷ See Young ‘Fragmentation or Interaction’, above n 127, at 499.

¹⁵⁸ Annex 1 of the ASCM

¹⁵⁹ WTO, ‘Communication from the Chairman’, above n 119, at 47-48, para. 10-11.

¹⁶⁰ Ibid, at 66, para. 102.

¹⁶¹ WTO, ‘Rules Negotiations - Transparency: Communication from the European Union’, above n 33.

these areas, which is the first step for obtaining information to enhance social understanding and facilitate discipline.

The other thread running through the case studies is that disciplines on subsidies begin with information, and that this public good is under-supplied. The OECD arguably has the largest and most up-to-date database on subsidies of all international organizations, although it is predominantly sector specific, and does not use consistent definitions of subsidies across its databases for industrial subsidies, agricultural subsidies, and environmentally harmful subsidies. This shortcoming of the OECD is illustrative of the general problem — data are not neutral. The information available depends on the definitions used, and that reflects consensus on the purpose for which the information is being gathered and thus what the international organization and its members are trying to do. Some bodies exist to facilitate learning and promote consensual understanding; others aim to support negotiations on rules, and ensure credible commitments, or manage conflict among states; while others aspire to promote domestic policy change. All of these objectives must be part of an effort to discipline subsidies. All of the international organizations examined in this article have all of these objectives, but their emphasis varies. Given that a simple integrated structure of binding rules is not likely soon, we contend that the path to better disciplines begins with more transparency.

How can we generate more and better information? There are limits to subsidies notification by governments, not least because trade ministries may not have the information easily at hand, or be sure of what to report, and where. Reverse notification by trading partners helps, but no country has an incentive to provide this under-supplied public good. WTO Members are also sensitive about notifying things on which they are negotiating. During the intense period of Doha Round agriculture negotiations, even the largest Members were late with notification. One option is for the WTO Secretariat to become more active in collecting information and making it available. The inadequate notifications by WTO Members can be partially mitigated by giving the Secretariat increased scope and resources to act as the “common agent” of Members in assembling information that was or ought to have been notified, adding data from all other international organizations and NGOs to create a better picture of the incidence of subsidies in a sector or a market, with an opportunity for the Member concerned to verify the information.¹⁶²

Our story in the end, as Justice Brandeis argued a century ago, is that sunshine helps. Informal rules may or may not be more “efficient” than codified law, but they can provide discipline, and thus can be viewed as law. In the case of subsidies, with better information, and robust surveillance, governments providing them will need to explain themselves to their peers and to citizens. Such interactive processes of information exchange, knowledge production, and reason giving can generate new consensual understanding about subsidies disciplines, which is where all law, whether formal or informal, begins.

¹⁶² See Mavroidis and Wolfe, above n 10, at 5.