

ARTICLE

Special Issue: The Resurgence of the State as an Economic Actor—International Trade Law and State Intervention in the Economy in the Covid Era

# Disciplining Subsidies Through Free Trade Agreements (FTAs): Emerging Developments in Japan's FTAs and Their Implications

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(Received 20 January 2023; accepted 20 January 2023)

## Abstract

The international economic order is undergoing significant change. Most recently, key countries have been seeking to increase their level of economic security, including through increased industrial subsidies. Regulating subsidies is controversial, but undisciplined subsidy payments could be harmful for the healthy functioning of markets and balanced development among nations. In this regard, the GATT-WTO has regulated subsidies, but it has not been fully functional in recent years, and reform efforts do not appear to be bearing fruit soon. Therefore, in parallel with WTO reform efforts, reliance on other approaches, such as discipline through free trade agreements (FTAs), should be considered. Disciplining subsidies through FTAs is inherently difficult, given the cross-border nature of subsidies on the one hand and the geographical limitations of the FTA's scope of application on the other. In recent years, however, such disciplines in FTAs have begun to appear, starting with EU FTAs. Thus, this article explores the possibilities and limitations of the discipline of subsidies through FTAs, using Japan's FTAs as a case study, to approach the path to international control of subsidies. Accordingly, this article first reviews the range of related issues and developments, including characteristics of subsidies, the rationale for subsidy discipline in trade agreements, recent challenges to multilateral subsidy discipline, the current status of subsidy discipline through FTAs, and the background of subsidy discipline in EU FTAs. The article then identifies the WTO-plus elements that are distinct to subsidy disciplines in EU FTAs and discusses their implications. Through these, it highlights the perspectives needed when considering subsidy discipline through FTAs, examines Japan's FTAs in light of these perspectives, and presents the findings and implications thereof. Considerations are given to Japan's FTA/trade policy as a background for its subsidy discipline through FTAs, the current status and characteristics of subsidy disciplines in Japan's FTAs, the Agreement Between the European Union and Japan for an Economic Partnership's (JPN-EU) subsidy-related provisions as drastic change, the effects on the Asia-Pacific region, and future prospects.

**Keywords:** Subsidies; subsidy discipline; free trade agreements; FTAs; Japan

## A. Introduction

The international economic order is undergoing significant change. The escalating trade tensions between China and the U.S. that have gradually surfaced since the mid-2010s have developed into a struggle for hegemony. This, combined with the COVID-19 pandemic and digitalization, has led to more countries increasing their market intervention. Most recently, coupled with Russia's

invasion of Ukraine, key countries have been seeking to increase their level of economic security through, for example, “friend-shoring,”<sup>1</sup> and increased industrial subsidies.

Regulating subsidies is controversial,<sup>2</sup> but undisciplined subsidy payments could be harmful, for example, by impeding the healthy functioning of markets and hindering balanced development among nations. In this regard, it is the GATT-WTO that has regulated subsidies, but it is not fully functioning in recent years, as evidenced by the stalled Doha Round and the suspension of the functions of the Appellate Body. Meanwhile, the number of FTAs<sup>3</sup> has gradually increased, and the international economic order now consists of the WTO and a myriad of FTA networks. Recently, new “friend-shoring” frameworks such as the Indo-Pacific Economic Framework (IPEF) have been added, making this order more multi-layered.

As to the WTO, some limitations have been pointed out in its subsidy rules, and reform efforts have been made to improve them, including in the WTO Rules Negotiations and in discussions on modernizing the WTO. Along with the discussions in the WTO, the EU, Japan, and the U.S. (hereinafter called “Trilateral Group”) have issued a joint statement on strengthening subsidy discipline,<sup>4</sup> and other countries have similarly proposed improvements to the relevant agreement, the Agreement on Subsidies and Countervailing Measures (ASCM).<sup>5</sup> However, a consensus in the WTO is likely to remain difficult to reach, mainly due to the presence of reluctant Members such as China, who has been a source of controversy in the WTO over its huge subsidy expenditures and its failure to notify subsidies.<sup>6</sup>

Therefore, in parallel with reform efforts for the WTO, reliance to other approaches, such as discipline through FTAs, should also be explored. In addition, given the interaction between

<sup>1</sup>“Friend-shoring” is used in the sense of building supply chains with “friends,” such as credible countries. See, e.g., THE WHITE HOUSE, BUILDING RESILIENT SUPPLY CHAINS, REVITALIZING AMERICAN MANUFACTURING, AND FOSTERING BROAD-BASED GROWTH 8 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>; Atl. Council, *Transcript: US Treasury Secretary Janet Yellen on the Next Steps for Russia Sanctions and ‘Friend-Shoring’ Supply Chains*, ATL. COUNCIL: NEW ATLANTICIST (Oct. 25, 2021), <https://www.atlanticcouncil.org/news/transcripts/transcript-us-treasury-secretary-janet-yellen-on-the-next-steps-for-russia-sanctions-and-friend-shoring-supply-chains/>.

<sup>2</sup>For example, Bagwell and Staiger point out that, with regard to the subsidy discipline in terms of protecting market access commitments, “these disciplines are now more constraining of governments than the tariff commitments they negotiate within the GATT/WTO,” and as to domestic subsidies, “WTO subsidy rules may ultimately do more harm than good to the multilateral trading system.” Kyle Bagwell & Robert W. Staiger, *Will International Rules on Subsidies Disrupt the World Trading System?*, 96 AM. ECON. REV. 877–79 (2006).

Regarding export subsidies, while there is some consensus about their lowering of overall global welfare as Sykes indicates, Janow and Staiger point out that the discipline in the GATT/WTO to curb export subsidies lacks a sound economic underpinning. Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures* 1, 18–19 (John M. Olin Program L. & Econ., Working Paper No. 186, 2003), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1515&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1515&context=law_and_economics); Merit E. Janow & Robert W. Staiger, *Canada – Measures Affecting the Importation of Dairy Products and the Exportation of Milk in THE WTO CASE LAW OF 2001* 236, 246–236 (Henrik Horn & Petros C. Mavroidis eds., 2003). At the same time, Sykes is skeptical of subsidy discipline, pointing to difficulties in identifying and measuring subsidization in any meaningful sense. Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. LEG. ANAL. 473, 520 (2010).

<sup>3</sup>For the sake of simplicity, this Article refers to free trade agreements and customs unions, which GATT Article XXIV distinguishes, collectively as free trade agreements (FTAs), unless otherwise noted.

<sup>4</sup>The Trilateral Group focuses on specifically new disciplines on subsidies leading to overcapacity, on implicit government guarantees, and on lending on non-commercial terms. JOINT STATEMENT OF THE TRILATERAL MEETING OF THE TRADE MINISTERS OF JAPAN, U.S. AND EU, WASHINGTON, D.C. (2020), <https://www.meti.go.jp/press/2019/01/20200114007/20200114007-2.pdf>.

<sup>5</sup>On the overview of the international policy debate on strengthening subsidy discipline in recent years, see, e.g., STAFF OF THE IMF, OECD, WORLD BANK, AND WTO, SUBSIDIES, TRADE, AND INT’L COOPERATION 23–25 (2022), <https://thedocs.worldbank.org/en/doc/0534eca53121c137d3766a02320d0310-0430012022/original/Subsidies-Trade-and-International-Cooperation-April-19-ci.pdf>.

<sup>6</sup>China has indicated it is open to talks on subsidies as long as all subsidies are included, from industrial to agricultural. Hannah Monicken, *Ellard: ‘Real Interest’ Among WTO Members in Pursuing Subsidy Talks*, INSIDE U.S. TRADE (Jan. 26, 2022, 4:19 PM) (quoting DDG Ellard’s wording), <https://insidetrade.com/daily-news/ellard-%E2%80%98real-interest%E2%80%99-among-wto-members-pursuing-subsidy-talks>. Such an approach by China would not be acceptable to the Trilateral Group, who would prefer to discuss the two separately.

discipline in FTAs and the WTO rules,<sup>7</sup> it is important that lessons and implications from the discipline of subsidies through FTAs be considered at the multilateral level to help shape international trade law to be more compatible with the changing international economic order.

Obviously, disciplining subsidies through FTAs is inherently difficult and is not an easy task. While the subject of discipline in an FTA is subsidies that have cross-border effects, such effects spill over outside the FTA. Multilaterally, trade-distorting aspects of subsidies are subject to discipline in the ASCM, and subsidies that are considered highly distortive, such as export subsidies, are prohibited.<sup>8</sup> But if such subsidies are disciplined in an FTA, similar subsidies from a third country may not be properly addressed, and the fruits of intra-regional discipline may be enjoyed in some form by countries outside the FTA, creating a free rider problem. In fact, subsidy-related provisions in FTAs are said to have been ancillary or procedural, apart from following the relevant WTO rules,<sup>9</sup> and provisions on countervailing duties (CVDs) in FTAs are also said to be largely unchanged from the relevant WTO agreements.<sup>10</sup>

In recent years, however, the disciplines of subsidies through FTAs have begun to appear, starting with EU FTAs. In particular, recently concluded FTAs are strengthening such disciplines and expanding their geographic distribution. Yet, varying patterns exist in the content of the discipline,<sup>11</sup> and thus they are heterogeneous.<sup>12</sup> Rules on subsidies to state-owned enterprises (SOEs)<sup>13</sup> are also beginning to emerge, as seen in the Trans-Pacific Partnership Agreement (TPP)<sup>14</sup> (now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)).<sup>15</sup>

Against this background, this article explores the possibilities and limitations of disciplining subsidies through FTAs, using Japan's FTAs as a case study, so as to approach a way to international control of subsidies. The reasons for focusing on Japan's FTAs are as follows. First, subsidy rules in FTAs are said to be largely divided into three patterns: EU-type, NAFTA-type, and others.<sup>16</sup> Japan's FTAs have both patterns, as Japan has an FTA with the EU and the CPTPP, which is influenced by the U.S. Second, Japan has led the conclusion of

<sup>7</sup>A recent example is the interaction between the fisheries subsidy agreement and the fisheries subsidy discipline in the environmental chapter of the CPTPP. See, e.g., Chen-Ju Chen, *Current Developments of Fisheries Subsidies Regulations After the Failure of WTO Doha Round Negotiations with a Focus on the Asia-Pacific Region*, 17 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 41 (2022).

<sup>8</sup>On export subsidies considered to be distortive as an example of trade-distorting subsidies, and thus are prohibited under WTO multilateral agreements, see, e.g., Sykes, *supra* note 2. See also Andrew J. Green & Michael Trebilcock, *The Enduring Problem of WTO Export Subsidies Rules*, L. & ECON. CONTINGENT PROT. IN INT'L TRADE 116, 125 (Kyle W. Bagwell et al. eds., 2010).

<sup>9</sup>Luca Rubini, *Subsidies*, in *HANDBOOK DEEP TRADE AGREEMENTS* 427, 458 (Aaditya Mattoo et al. eds., 2020).

<sup>10</sup>Thomas Prusa, *Anti-Dumping and Countervailing Duties*, in *HANDBOOK DEEP TRADE AGREEMENTS* 319, 322, 335 (Aaditya Mattoo et al. eds., 2020).

<sup>11</sup>According to previous studies, they are classified into four (Borlini & Dordi) or seven patterns (Sekine), for instance. Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: The (Different) Legal Regimes of Subsidies in SOEs the EU Bilateral Preferential Trade Agreements*, 23 *COLUM. J. EUR. L.*, 551, 553–576 (2017); Takemasa Sekine, *Possibility of Developing and Expanding the Regulation of Subsidies through Free Trade Agreements (FTAs): Analysis Focusing on a Trend in FTAs Concluded by the EU*, 16 *PUB. POL'Y REV.* 1, 4 (2020), [https://www.mof.go.jp/english/pri/publication/pp\\_review/ppr16\\_05\\_07.pdf](https://www.mof.go.jp/english/pri/publication/pp_review/ppr16_05_07.pdf).

<sup>12</sup>One of the most significant differences is whether to position subsidy discipline as part of competition policy under an FTA. For the example of placing as part of the competition chapter, see Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part, Oct. 6, 2010, 2011 O.J. (L 127) 6 [hereinafter EU-Korea], and for the example otherwise, see Agreement Between the European Union and Japan for an Economic Partnership, July 7, 2018, 2018 O.J. (L 330) 4 [hereinafter JPN-EU].

<sup>13</sup>Because the details of SOE disciplines are beyond the scope of this article, SOE issues will only be touched upon to the extent relevant to the purpose of this article.

<sup>14</sup>*Text of the Trans-Pacific Partnership*, N.Z. FOREIGN AFFS. & TRADE, <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership/> [hereinafter TPP].

<sup>15</sup>*Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, N.Z. FOREIGN AFFS. & TRADE, <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/comprehensive-and-progressive-agreement-for-tpp/> [hereinafter CPTPP].

<sup>16</sup>Rubini, *supra* note 9, at 458.

the Regional Comprehensive Economic Partnership Agreement (RCEP),<sup>17</sup> to which China is a party whose subsidies have been particularly controversial. Third, as the Asia-Pacific region recently has come into greater focus in the growing debate on economic security, Japan is one of the hubs for FTAs in the region.

To this end, following this introduction, Section B provides a brief overview of the previous analytical and policy discussions on FTAs and subsidies. In particular, it reviews the rationale for disciplining subsidies through trade agreements, followed by a description of the current state of international disciplines of subsidies. It then identifies the WTO-plus elements that are distinct to subsidy disciplines in EU FTAs and discusses their implications. Next, Section C analyzes Japan's discipline of subsidies through FTAs and the findings are presented. Specifically, in Section C, Japan's FTA/trade policies are first reviewed to identify the underlying background for its subsidy discipline through FTAs, and then, the overall trend is identified. The JPN-EU, where drastic changes were found, will be discussed separately. Finally, conclusions will be presented along with future perspectives.

## B. FTAs and Subsidies

### 1. Analytical and Policy Discussions on Subsidies and Trade Agreements

Defining subsidy is a conceptually challenging issue,<sup>18</sup> as can be seen in the negotiating history of subsidy rules in the GATT-WTO. In the context of trade, subsidy is now defined in the ASCM.<sup>19</sup> The rationale for subsidies being regulated by trade agreements is said to be as follows:<sup>20</sup> First, to prevent subsidies from frustrating market access gains obtained through trade negotiations; second, to deter the negative impact on the competitive process with foreign competitors. The latter is that subsidies would change the cost and profit structure of the beneficiary firms, which in turn would change the behavior of the firms, and affects the competitive process with competing industries, thereby distorting the functioning of the market<sup>21</sup> and creating inefficiencies.<sup>22</sup> At the same time, subsidies are also used to address market externalities and for other legitimate policy purposes. In this way, subsidies can have both positive and negative effects and can be ambivalent in nature. Their policy objectives can also be mixed, such as for environmental purposes while at the same time protecting domestic industry. These characteristics make the discipline of subsidies controversial.<sup>23</sup> In any case, in light of the aforementioned ambivalence, the discipline of subsidies requires consideration of the balance between positive and negative effects of subsidies, which in turn entails consideration of total welfare. Further, to control subsidies internationally means to consider such total welfare on a transnational basis, which is not such an easy task given, for example, that subsidies

<sup>17</sup>Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, [2022] ATS 1, [https://www.mofa.go.jp/policy/economy/page2e\\_000001.html](https://www.mofa.go.jp/policy/economy/page2e_000001.html) [hereinafter RCEP].

<sup>18</sup>See, e.g., WTO, WORLD TRADE REPORT 2006: EXPLORING THE LINK BETWEEN SUBSIDIES, TRADE AND THE WTO 47–49 (2006).

<sup>19</sup>In this Article, the definition of subsidy follows that of the ASCM. This definition was elaborated as “[t]he concept of subsidy defined in Article 1 of the SCM Agreement captures situations in which something of economic value is transferred by a government to the advantage of a recipient” by the Appellate Body. Appellate Body Report, *United States–Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 51, WTO Doc. WT/DS257/AB/R (adopted Feb. 17, 2004).

<sup>20</sup>See, e.g., Luca Rubini, *The Definition of Subsidy and State Aid* 37–67 (2009).

<sup>21</sup>According to JOHN BLACK, OXFORD DICTIONARY OF ECONOMICS (5th ed. 2017), distortion is defined as:

Any features of the economy that result in prices failing to reflect marginal social valuations. In a competitive economy with no market failure . . . prices reflect social valuations and guide choices to ensure an efficient allocation. When distortions are present, this will not be the case. Distortions can be caused by externalities, taxes, or monopoly power.

In other words, distortions prevent choices resulting in efficient allocation through prices, and subsidies are added to the list of causes of such distortion.

<sup>22</sup>Economic inefficiencies in relation to subsidies have been described as follows: Subsidies can lead to allocative inefficiency (resources are not used in the best possible way), productive inefficiency (goods and services are not produced at least cost), dynamic inefficiency (firms are encouraged to undertake the wrong amount/type of innovation), and X-inefficiency (publicly owned companies are encouraged to undertake the wrong amount/type of innovation). See RUBINI, *supra* note 20, at 42, 53.

<sup>23</sup>On a variety of views on the discipline of subsidies, see *supra* note 2.

affect trade—they affect exports to many markets—and that the economic impact of subsidies can be global.<sup>24</sup>

Moreover, subsidy is a form of state intervention in the market, and the degree of state intervention depends on the economic, social, and political context, including the country's stage of economic development and its economic and political system, as well as the common understanding within the country depending on these factors. Therefore, there can be differences among countries in their views on the degree of state intervention, and these differences can act as a factor that makes international control of subsidies difficult. International control of subsidies would require a common understanding of such discipline in the case of multilateral agreements, and the same would be true in the case of FTAs.<sup>25</sup> For example, it is well known that the EU is the pioneer of subsidy discipline through FTAs, and previous studies that have analyzed its novel disciplines point out that the inclusion of WTO-plus provisions in FTAs—in particular, the justification factor—is an indication that the EU and its FTA partners have certain values and objectives in common and that certain core elements of the model for society are shared.<sup>26</sup> On the multilateral side, some of the issues with China's recent controversial industrial subsidies appear to be due to fundamental differences in thinking about the nature of state intervention, and previous GATT and WTO agreements did not seem to anticipate the existence of such powerful and different ideas.<sup>27</sup>

To counteract subsidies, countervailing duties (CVDs), one of the measures of trade remedy measures, may be included in trade agreements. The reasons are generally explained as follows: First, due to the political economy of protectionism, whereby import-competing domestic industries, as a result of trade liberalization through the conclusion of trade agreements, demand protection and seek to ensure a level playing field; second, CVDs serve as a pragmatic tool to respond to such political demands and the corresponding adjustment costs provoked by trade liberalization. These explanations would seem to make it easier for member states to provide such protection in FTAs, but this is not the case. The reasons for this are generally explained to be that the liberalization through FTA preferences reduces the room for price discrimination and the need to counteract such discrimination, and also political pressure makes it difficult to include CVD rules in FTAs.<sup>28</sup> Nevertheless, it is also pointed out that trade remedy measures, including CVD, can secure political support for an FTA and can also have a cushioning effect of the FTA for domestic industries.<sup>29</sup> After all, it seems that stronger subsidy discipline could lower the demand for remedies, but as we will see in Section C, this has not been successful in many FTAs.

## II. WTO Subsidy Disciplines: Overview and Recent Challenges

Multilateral disciplines on subsidies in the WTO are mainly the ASCM for non-agricultural goods, the Agreement on Agriculture for agricultural goods, and the General Agreement on Trade in

<sup>24</sup>See, e.g., OECD, POLICY ROUNDTABLES: COMPETITION, STATE AIDS AND SUBSIDIES 45–47 (2010) <https://www.oecd.org/daf/competition/sectors/48070736.pdf>.

Horlick and Clarke observe that evaluating the cross-border impact of subsidies by using current methods of economic analysis for subsidies is one way to rethink the discipline of subsidies and emphasize the importance of data development as a prerequisite for such an approach. Gary Horlick & Peggy Clarke, *Rethinking Subsidy Disciplines for the Future's Policy Options for Reform*, 20 J. INT'L ECON. L. 673, 677–678 (2017).

<sup>25</sup>See Rubini, *supra* note 20, at 36–37 (pointing out the concept of community, where an even distribution of benefits and costs are required and that this concept would play a crucial role in ensuring that a complex subject such as subsidy control finds an appropriate discipline in the world trading system).

<sup>26</sup>See Borlini & Dordi, *supra* note 11, at 585.

<sup>27</sup>As evidenced by the existence of GATT Article XVII, some degree of state intervention was anticipated from the outset, but as Mavroidis and Sapir discuss, the implicit “liberal understanding” has been shared as the essential background in the GATT/WTO, and China lacks this, resulting in the current controversy. PETROS C. MAVROIDIS & ANDRE SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS 5–7 (2021).

<sup>28</sup>See Prusa, *supra* note 10, at 323–324.

<sup>29</sup>See Prusa, *supra* note 10, at 325.



Services (GATS) for services, which provides for the negotiation of rules for subsidies on services, but have yet to be concluded. For the purpose of this article, the ASCM is focused in this section.

In brief, the ASCM provides the definition of a subsidy and classifies subsidies meeting certain conditions into two categories: Prohibited subsidies, consisting of export subsidies and local content subsidies, and actionable subsidies. It also provides for “remedies” for both categories, namely, CVDs as unilateral “remedies,” and referring the matter to the WTO’s expedited dispute settlement procedures as a multilateral “remedy.”

The ASCM has no preamble, which reflects the difficulty of reaching multilateral consensus on grounds for subsidy discipline. The ambivalence of subsidies was previously taken into account to some extent in the ASCM by, *inter alia*, providing for the third category of non-actionable subsidies in Article 8 in addition to the above two categories, but this provision expired at the end of 1999 due to lack of consensus among Members. The provisions of the Agreement on Agriculture give some consideration to the ambivalence of subsidies, such as the provisions of so-called “green box” subsidies.

In recent years, the ASCM has faced several challenges. For example, although the ASCM requires notification of subsidies to ensure transparency, this obligation has not been fully complied with, and discussions on strengthening discipline have been held in the Doha Round.<sup>30</sup> In particular, with the rise of China, its subsidies leading to excessive production, its large amount of industrial subsidies, and its failure to notify these subsidies, among others, have become particularly contentious, as well as its subsidies to and through SOEs. Recently, it has been even more recognized that these issues can’t be effectively addressed by the ASCM as it stands, and reforms have been advocated for, as seen in the joint statement by the Trilateral Group, which has become one of the crucial elements of the WTO reforms. At the same time, growing concern for economic security, intertwined with the COVID-19 pandemic and digitalization, has led key countries, including the Trilateral Group, to provide large amounts of subsidies for semiconductors and other critical goods and industries.<sup>31</sup> It is ironic that the Trilateral Group itself is increasing its subsidy spending. Under these circumstances, it seems unlikely that the WTO will soon be able to improve the discipline of subsidies on a multilateral basis. In this context, FTAs can be seen to complement the WTO, filling in to some extent as “laboratories” where the WTO is allegedly lacking.<sup>32</sup>

### III. Subsidy Related Provisions in FTAs: Overall Trend

Previous studies examining subsidy<sup>33</sup>-related provisions in FTAs that focus on the depth of discipline across FTAs are limited. A pioneering example is a 1998 study by the WTO<sup>34</sup> and the most recent and comprehensive studies are Rubini<sup>35</sup> for subsidy discipline and Prusa<sup>36</sup> for CVDs.

<sup>30</sup>See, e.g., STAFF OF THE IMF ET AL., *supra* note 5, at 23–25.

<sup>31</sup>See, e.g., Rieko Miki, *Chips and Batteries: Japan to Ramp Up Supply Chains with Subsidies: Tokyo Follows U.S. and EU, but Program Could Violate WTO Rule*, NIKKEI ASIA (Jan. 17, 2022), <https://asia.nikkei.com/Spotlight/Supply-Chain/Chips-and-batteries-Japan-to-amp-up-supply-chains-with-subsidies>.

It has also been observed, however, that subsidies provided by China, the EU, and the U.S. were large in the first place, and not just during the crisis. Simon Evenett & Johannes Fritz, *Subsidies and Market Access: New Data and Findings from the Global Trade Alert*, VOXEU COLUMNS (Oct. 25, 2021), <https://cepr.org/voxeu/columns/subsidies-and-market-access-new-data-and-findings-global-trade-alert>. See also EVENETTS & FRITZ, *SUBSIDIES AND MARKET ACCESS: TOWARDS AN INVENTORY OF CORPORATE SUBSIDIES BY CHINA, THE EUROPEAN UNION AND THE UNITED STATES* (2021), <https://www.globaltradealert.org/reports/gta-28-report>.

<sup>32</sup>FTAs are often referred to as “laboratories” for addressing new issues and ways. See, e.g., WTO, *WORLD TRADE REPORT 2018* 178 (2018) [https://www.wto.org/english/res\\_e/publications\\_e/world\\_trade\\_report18\\_e.pdf](https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf).

<sup>33</sup>They are sometimes labelled “state aids” in FTAs.

<sup>34</sup>WTO Secretariat, *Inventory of Non-Tariff Provisions in Regional Trade Agreements*, ¶¶ 37–38, WTO Doc. WT/REG/W/26 (May 5, 1998).

<sup>35</sup>Rubini, *supra* note 9.

<sup>36</sup>Prusa, *supra* note 10.

These studies indicate that while FTAs have traditionally included subsidy-related provisions,<sup>37</sup> many are simply “a high level of alignment”<sup>38</sup> with WTO rules or are of a general nature.<sup>39</sup> Many of the WTO-plus provisions are also of ancillary or procedural nature.<sup>40</sup> However, there has been a trend toward strengthening discipline by increasing the types of prohibited subsidies, for example, with the EU being a pioneer in this direction. From a geographical perspective, FTAs signed by the EU or countries and regions close to the EU, such as the European Free Trade Association (EFTA), tend to have the most enhanced provisions in terms of the variety of subsidy provisions—from definitions to provisions on subsidies that distort trade or competition, agricultural export subsidies and agriculture support, legitimate subsidies, public services, sectoral aid, transparency requirements, CVDs, dispute settlement, and institutional mechanisms dealing with transparency and enforcement—and, consequently, a high level of regulatory content, besides EU’s FTAs increasing the types of prohibited subsidies. Conversely, FTAs signed by the U.S. seem to be the exact opposite, adopting a “minimal approach” to subsidy regulation, and other groups are said to be somewhere in between these two extremes.<sup>41</sup>

Turning on CVD provisions in FTAs, one approach would be to strengthen the discipline of subsidies within the region and reduce the need to invoke CVDs, but in practice, this has not been the case in most FTAs.<sup>42</sup> Looking across FTAs,<sup>43</sup> there has been no major innovation in CVD rules and practices since originally set in the relevant WTO agreements.<sup>44</sup> The main reason for the current situation is said to be the absence of agreement in FTAs on meaningful or significant curbs on subsidies.<sup>45</sup>

However, a small number of FTAs, in particular EU-related FTAs—EU expansions, EFTAs, or FTAs involving the EU or EFTA—that are more deeply integrated,<sup>46</sup> tend to strengthen discipline

<sup>37</sup>WTO Secretariat, *supra* note 34, ¶¶ 37–38 (noting that the majority of RTAs studied, and virtually all RTAs concluded after 1990, contain provisions related to subsidies); Rubini, *supra* note 9, at 440 (noting that 269 of the 283 FTAs surveyed—FTAs notified to the WTO and in force, February 2016, but including the TPP—contain subsidy-related provisions, and that this has been one of the characteristics of FTAs traditionally—since 1957). To note, while the WTO (1998) refers to subsidy provisions that directly regulate subsidies or state aid, such as export subsidies and agricultural subsidies, Rubini (2020) refers to “subsidy provisions,” including subsidies disciplines, NT provision, and CVD provisions. In any case, the above-mentioned trend remains unchanged.

<sup>38</sup>Rubini, *supra* note 9, at 458.

<sup>39</sup>WTO, *supra* note 34, ¶ 38.

<sup>40</sup>Rubini, *supra* note 9, at 458.

<sup>41</sup>Rubini, *supra* note 9, at 449, 458. As to geographic consideration, when considering SOE disciplines, comprehensive SOE-related subsidy rules were first included in the TPP—now CPTPP—to which the U.S. was a party, and the FTAs that the U.S. subsequently concluded also followed these rules. *See, e.g.*, Agreement Between the United States of America, the United Mexican States, and Canada (USCMCA), OFF. U.S. TRADE REPRESENTATIVE (Jul. 1, 2020), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. Therefore, the idea of using FTAs to fill gaps in WTO rules itself does not seem to be lacking in the U.S.

<sup>42</sup>One of the important issues in the relationship between FTAs and CVDs is the issue of GATT Article XXIV, which requires the elimination of restrictive trade regulations for substantially all the trade. However, there is no clear guidance on whether or not CVDs are included in these restrictive trade regulations, and scholars have differing views on the issue. *See, e.g.*, Prusa, *supra* note 10, at 324.

<sup>43</sup>Prusa, *supra* note 10, at 331–332 (discussing that of the 283 FTAs surveyed, around 5% prohibited intra-CVD, 35% had no rules, 40% complied with the ASCM and GATT Article XVI, and 20% had some detailed provisions on CVDs). This means that, in effect, about 75% of FTAs surveyed just require compliance with the ASCM and GATT Article XVI. At the same time, silence could mean something for the 35% of FTAs having no rules, and so they could be worth further exploration on a case-by-case basis.

<sup>44</sup>Also noted is that it is not clear whether strengthening discipline on trade remedies is immediately desirable. *See* Prusa, *supra* note 10, at 322, 325 (discussing possible redirection of trade remedy measures to outside of the FTAs as a result of strengthening discipline on intra trade remedies, thereby threatening the “delicate give-and-take balancing of incentives” set in the WTO negotiations, and making it more difficult for non-FTA Members to agree to liberalization in the WTO negotiations).

<sup>45</sup>Prusa, *supra* note 10, at 332, 335.

<sup>46</sup>Prusa, *supra* note 10, at 335 (describing deep integration, here, as evidenced either by the adoption of common or harmonized behind-the-border policies and high shares of intra-regional trade).

on CVD.<sup>47</sup> Further, more than 75% of FTAs with rules restricting subsidies are said to be also prohibiting or discouraging CVDs.<sup>48</sup> In these limited cases, CVD is dispensed with as a result of strengthened subsidies discipline.

In sum, while the subsidy-related provisions in FTAs are generally limited, there are cases where advanced rules can be found. In particular, in EU-related FTAs and those close to the EU, and in FTAs that are becoming more integrated, subsidy-related disciplines are developing as indicated above, and also EU's FTAs further being described in the following section. The World Bank's prior work, including Rubini and Prusa, which this section builds on, covers FTAs that were notified to the WTO and in force at the end of 2016 with the addition of the TPP, but the number of EU FTAs has increased since then and it currently amounts to forty-five, the largest in the world.<sup>49</sup> According to one previous study<sup>50</sup> that examined subsidy-related provisions in EU FTAs up to around 2019, a chronological review shows a trend of gradual expansion of the content of subsidy provisions in EU FTAs. In fact, the contents seem to be even enhancing since the World Bank's work (e.g., JPN-EU). Therefore, the next section provides an overview of the background for and the analysis of the EU's inclusion of subsidy-related provisions in its FTAs.

#### IV. Subsidy Related Provisions in EU FTAs: A Novel Case

According to Borlini and Dordi, who examined subsidy discipline in EU FTAs, “double legal standards” created as a result of the EU State aid rules are driving the inclusion of subsidy-related provisions in EU FTAs to respond to the effect of such standards.<sup>51</sup> In brief, the EU State aid rules are placed as part of competition law and administered and supervised by the EU commission. Under these rules, state aid is generally prohibited, except for certain types of payments, such as those for legitimate policy purposes.<sup>52</sup> Thus, the EU members are constrained to provide subsidies within the region, while outside the region, countries, including the EU's FTA partners, are subject only to the WTO rules, thereby facing the EU states with double—intra and extra-EU—legal standards. The result of the “double legal standard” could have a negative effect on the interests of EU members in countries with less strict rules, while the EU's FTA partners need to prevent possible “redirection” of EU members' subsidies to their markets to support EU members' national companies. Therefore, the majority of EU FTAs include subsidy-related provisions to address such concerns on both sides. By including such provisions, different approaches are required for each FTA partner country, depending on, *inter alia*, the level of development, the degree of convergence of competition policies, and the degree of use of industrial subsidies. Further, FTAs themselves have various objectives, such as trade promotion, convergence of laws and regulations, and economic development of the partner country. As a result, subsidy-related provisions in EU FTAs are fragmented, and if the rules are strengthened, they can sometimes be an alternative to trade remedies.<sup>53</sup> Including subsidy-related provisions in EU FTAs, may also be due to the EU's tendency to export its regulatory framework and systems, as has been observed.<sup>54</sup>

<sup>47</sup>Prusa, *supra* note 10, at 333 (showing that the number of customs unions is especially large here and explaining that customs unions are far more likely to prohibit the use of CVDs, which is understandable given the expected depth of integration being greater than FTAs).

<sup>48</sup>Prusa, *supra* note 10, at 332. The population of the 75% is 34, which is not a large number.

<sup>49</sup>WTO, FACTS & FIGURES: 1st SEMESTER 2022 (2022), [https://www.wto.org/english/tratop\\_e/region\\_e/rtfactfig\\_e.pdf](https://www.wto.org/english/tratop_e/region_e/rtfactfig_e.pdf) (last visited Jul. 31, 2022).

<sup>50</sup>Sekine, *supra* note 11.

<sup>51</sup>Borlini & Dordi, *supra* note 11, at 553.

<sup>52</sup>Consolidated Version of the Treaty on the Functioning of the European Union art. 107, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

<sup>53</sup>Borlini & Dordi, *supra* note 11, at 553–554.

<sup>54</sup>See, e.g., Marise Cremona, *The Single Market as a Global Export Brand: Exporting the Single Market*, 5 EUR. BUS. L. REV. 663, 670 (2010).



Looking at EU FTAs, they appear to follow three patterns,<sup>55</sup> namely, FTAs with EU candidate or potential candidate countries, FTAs aimed at building cooperative relations including those concluded before 2006 that primarily focus on tariff reduction on goods, and “new generation agreements”<sup>56</sup> with so-called “strategic partners” introduced after the 2006 EU trade policy. Although the subsidy-related provisions in these FTAs are diverse, as stated above, if broadly classified based on the above-mentioned studies, FTAs with candidate and potential candidate countries inevitably have characteristics and features similar to the EU’s State aid rules, while FTAs primarily aimed at building cooperative relationships often do not stipulate detailed subsidy rules, or even stipulate such rules at all. Conversely, new-generation FTAs, including EU-Korea, EU-Sing.,<sup>57</sup> EU-Viet.,<sup>58</sup> and JPN-EU, are gradually enhancing their subsidy-related rules and stipulating WTO-plus provisions. Therefore, for the purpose of this section, focus is on the new generation FTAs that are irrelevant to accession and that also provide enhanced subsidy disciplines.

The new generation FTAs, mostly with developed countries having advanced economies and key industries and service sectors, require the reconciliation of interests on both sides, especially those arising from the “double legal standards.” For the EU, if there are no subsidy rules in the FTA, the FTA partner can provide subsidies within the scope of WTO rules, and the FTA partner and its industries may have a competitive advantage over EU members and their industries. Although the subsidy-related provisions of the new generation of FTAs are a mixture of WTO-plus disciplines and country-specific approaches, making them heterogeneous, notable WTO-plus elements can be extracted as follows: Specification of objectives and principles,<sup>59</sup> consideration of ambivalence,<sup>60</sup> two additional types of prohibited subsidies<sup>61</sup>—unlimited guarantees and subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan,<sup>62</sup> rules on subsidies for services,<sup>63</sup> enhanced transparency,<sup>64</sup> enhanced consultation,<sup>65</sup> application as or reference to competition law and policy,<sup>66</sup> and incorporation of general exceptions.<sup>67</sup>

These indicate that elements allegedly lacking or in need of improvement in the WTO rules have been added or supplemented. In addition, the newly added two types of prohibited subsidies reflect past attempts of multilateral rule-making, such as the EU proposal in the WTO rules negotiations and the recent joint statement by the Trilateral Group. Conversely, successful experiences in FTAs

<sup>55</sup>See, e.g., *Report on Implementation of Free Trade Agreements 1 January 2018 – 31 December 2018*, at 4–5, COM (2019) 455 final (Oct. 4, 2019) (classifying EU FTAs into four categories, but if the “first generation” FTAs are included in the FTAs aimed at building cooperative relations, there will be three categories).

<sup>56</sup>The concept of “new generation agreements” was first introduced in the 2006 EU Trade Policy, which is so called in later EU trade policies in 2010 and 2015, together with “strategic partners.”

*Global Europe: Competing in the World - A Contribution to The EU’s Growth and Jobs Strategy*, at 8–10, COM (2006) 567 final (Oct. 4, 2006); *Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU’s 2020 Strategy*, at 10–11, COM (2010) 612 final (Nov. 9, 2010). *Trade for All: Towards a More Responsible Trade and Investment Policy*, at 5, COM (2015) 497 final (Oct. 14, 2015).

<sup>57</sup>Agreement Between Japan and the Republic of Singapore for a New-Age Economic Partnership, Japan-Sing., Jan. 13, 2002, 2739 U.N.T.S. 1, <https://www.mofa.go.jp/region/asia-paci/singapore/jsepa.html> [hereinafter JPN-Sing.].

<sup>58</sup>Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam, June 30, 2019, 2020 O.J. (L 186) 3 [hereinafter EU-Viet.].

<sup>59</sup>See, e.g., EU-Viet. art. 10.4.1; JPN-EU art. 12.1.

<sup>60</sup>See, e.g., EU-Sing. art. 11.7.3, annex 11-A; EU-Viet. art. 10.4.2.

<sup>61</sup>They are not per-se illegal like the prohibited subsidies under the ASCM because of the requirement of a significant negative effect on trade, and investment in the case of JPN-EU, between the Parties. In addition, under EU-Viet. granting of these two types of subsidies is conditional. See EU-Viet. art. 10.9(1).

<sup>62</sup>See, e.g., EU-Korea art. 11.11; EU-Sing. art. 11.7.2; JPN-EU art. 12.7.

<sup>63</sup>See, e.g., EU-Sing. art. 11.5.1; JPN-EU art. 12.3.1.

<sup>64</sup>See, e.g., EU-Sing. art. 11.9; EU-Viet. art. 10.7.

<sup>65</sup>See, e.g., EU-Viet. art. 10.8, JPN-EU art. 12.6.

<sup>66</sup>On application, see, e.g., EU-Korea art. 11.9 and on reference, see, e.g., EU-Sing. art. 11.8.1. Some of these provisions may be subject to FTA dispute settlement procedures.

<sup>67</sup>See, e.g., JPN-EU art. 12.9.

can also be utilized at the multilateral level<sup>68</sup> and later FTAs. In this way, they are interacting and the rules in FTAs, mutually interacting, could complement and interact with the WTO rules.<sup>69</sup>

Yet, with respect to novel provisions in EU's FTAs, whether the initial objective of reconciling the interests of parties arising from the double legal standards would be fully achieved, and whether the objective lies solely in that reconciliation, is not necessarily clear, and moreover, the rationale for the novel provisions of the EU FTAs may not be clear in some cases. For example, why only two types of prohibited subsidies are added is not necessarily clear, unlike the Trilateral Group joint statement, which proposed the four types—subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity and certain direct forgiveness of debt—in addition to EU's two types. Further, the terms used in some provisions are not always well defined, possibly affecting the actual operation,<sup>70</sup> and some provisions are not subject to the FTA dispute settlement procedures, which may weaken enforceability. In some cases, they are best-effort provisions and may not be effective enough. Furthermore, a thorough evaluation of the actual operation is yet to be made.<sup>71</sup> Nevertheless, the subsidy-related provisions in the EU's FTA, by taking into account the ambivalence of subsidies and strengthening discipline in a way that fills gaps where the WTO is allegedly lacking, offer one possible, if not perfect, approach to the international control of subsidies and may have a signaling effect, in that they interact with rulemakings in other fora.

In sum, the EU's pioneering discipline on subsidies through FTAs originally stemmed from the need to coordinate interests to ensure a level playing field, particularly with “new generation” FTA partners as a result of EU State aid rules, and from the need to coordinate or converge systems with EU accession and potential accession countries. However, given that the WTO-plus disciplines are developing as indicated above, especially in the “new generation” FTAs, along with a mixture of common and country-specific approaches, this can be seen as one form of international control of subsidies. It remains to be seen whether the EU's novel FTAs rules will further expand, as the actual operation has not been evaluated yet. Still, in terms of international control of subsidies, although it is not the best option like multilateral agreements, it is a complementary option that can have a signaling effect in shaping the rules for subsidies in multilateral rules and other FTAs.<sup>72</sup>

### C. Subsidy Disciplines in Japan's FTAs

The previous sections have highlighted several perspectives needed when considering discipline of subsidies through FTAs as one form of international control of subsidies: The need to consider ambivalence and transnational total welfare; a common understanding on the degree of state intervention in the market; and the complementary role to WTO agreements, especially with the importance of WTO-plus provisions.<sup>73</sup> Building on the above, the following sections will

<sup>68</sup>One of the recent examples is the WTO Agreement on Fisheries Subsidies, which partially follows the relevant rules of the CPTPP. See Chen, *supra* note 7.

<sup>69</sup>The interactions may not be only positive. See WTO, *supra* note 49.

<sup>70</sup>See Borlini & Dordi, *supra* note 11, at 590–599 (pointing out the possible effect on the actual operation). At the same time, they suggest that the difficulty can be addressed through interpretive processes.

<sup>71</sup>This is because most of the new generation FTAs have been concluded in recent years. Only EU-Korea has already been in effect for some time since its entry into force, and the Evaluation of the Implementation of the FTA has been issued. This report suggests, however, that the subsidy provisions in EU-Korea have not necessarily changed Korea's relevant policies. CIVIC CONSULTING & THE IFO INSTITUTE, EVALUATION OF THE IMPLEMENTATION OF THE FREE TRADE AGREEMENT BETWEEN THE EU AND ITS MEMBER STATES AND THE REPUBLIC OF KOREA: INTERIM TECHNICAL REPORT PART 1 152–154, 411–415 (2017), [https://trade.ec.europa.eu/doclib/docs/2017/june/tradoc\\_155673.pdf](https://trade.ec.europa.eu/doclib/docs/2017/june/tradoc_155673.pdf).

<sup>72</sup>According to the EU, this complementary option does not, however, provide a timely solution to foreign subsidies distorting the EU market, because the FTA only focuses on the effect on trade between the EU and its FTA partners. See Proposal for Regulation on Foreign Subsidies Distorting the Internal Market, at 53, COM (2021) 223 final (May 5, 2021). Therefore, the EU is in the process of introducing a system to deal with such subsidies as indicated by this proposal.

<sup>73</sup>In addition, there are said to be more than 50 FTAs that provide other types of remedies to counter subsidies, such as cooperation mechanisms to counter export subsidies granted by third parties. Rubini, *supra* note 9, at 446. Such cooperation

examine subsidy-related provisions in Japan's FTAs, after reviewing the evolution of Japan's FTA/trade policy as background for these provisions.

### *I. Japan's FTAs/Trade Policy: Background for its Subsidy Disciplines through FTAs*

Understanding Japan's trade policy holistically is not easy. One of the reasons for this is that there is no single authority like the EU Directorate-General for Trade or the United States Trade Representative (USTR) that has the primary jurisdiction over trade policy, and trade policy is formed through coordination among the relevant ministries and agencies in Japan. Just to name the most relevant ones, the Ministry of Foreign Affairs (MOFA) centrally manages overall foreign policy, while the Ministry of Economy, Trade and Industry (METI) has jurisdiction over industry and maintains a strong influence over trade policy. The Ministry of Agriculture, Forestry and Fisheries (MAFF) has jurisdiction over agricultural trade and is often involved in trade policy from a pro-domestic agriculture standpoint. The Ministry of Finance (MOF) is involved in taxation-related policy, in particular in customs duties and trade remedies. For issues such as subsidies, which could involve the jurisdiction of several or sometimes all of the above agencies, it is even more difficult to identify the exact policies. However, in the context of subsidies, especially industrial subsidies, an overview of the evolution of trade policy found in the White Paper ("Paper") issued by METI is useful, given that METI has a substantial influence on trade policy as the competent authority for industry, and is therefore reviewed in this section with an emphasis on FTAs. Japan's FTAs have been named the Economic Partnership Agreement ("EPA") and are so referred to in Japan,<sup>74</sup> but "FTA" is used in this article for the sake of brevity.

Until the late 1990s, Japan placed at the center of its trade policy the maintenance and strengthening of multilateralism under the GATT and WTO. While the 1998 Paper reluctantly described regional economic integration,<sup>75</sup> in the 1999 Paper, Japan shifted to a "multi-layered trade policy" that promotes multilateralism and FTAs in parallel.<sup>76</sup> The reasons for this shift include the global momentum for FTA negotiation and the fact that in 1998, Mexico approached Japan for an FTA. Because some Japanese companies operating overseas, like in Mexico, were beginning to experience competitive disadvantages due to other countries' FTAs, in 1999, Japan started studying for a FTA with Mexico and FTA negotiation with Singapore based on a proposal from Singapore. Then, Japan's first FTA was concluded in 2002 with Singapore, later followed by the one with Mexico.<sup>77</sup> For Japan, the opening of the agricultural market was highly contentious, but because Singapore is not an agricultural country, it was relatively easy for Japan to negotiate with Singapore.

Subsequently, FTA negotiations were actively conducted while gradually increasing the target level of the FTA ratio (the ratio of trade with FTA partners to total trade) setting it in 2013, from

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mechanisms are unique to FTAs and deserve further study but are not examined in this article because they are not found in Japan's FTAs to date.

<sup>74</sup>*Efforts Such as Japan's Economic Partnership Agreement (EPA/FTA)*, MINISTRY FOREIGN AFFAIRS JAPAN, <https://www.mofa.go.jp/mofaj/gaiko/fta/index.html> (last visited Jul. 31, 2022).

To note, the English version of this page somehow does not include the explanation of EPA or FTA that are included in that of the Japanese version. To note, the term "EPA" seems to have been chosen in part, instead of "FTA", which might provoke resistance to free trade by domestic agricultural protectionists.

<sup>75</sup>See MINISTRY INT'L TRADE & INDUS. JAPAN (MITI), WHITE PAPER ON INTERNATIONAL TRADE ch. 5, § 3 (1998), <https://dl.ndl.go.jp/info:ndljp/pid/1286052?tocOpened=1>. MITI is the predecessor of the METI.

<sup>76</sup>"Japan should seek to deepen intra-regional exchange and understanding in Northeast Asia ... applying itself with greater vigor to the development of regional cohesion and presenting a model which will contribute positively to the strengthening of the multilateral trading system." MITI, WHITE PAPER ON INTERNATIONAL TRADE: SUMMARY (1999), <https://dl.ndl.go.jp/info:ndljp/pid/1286051>. This is called "multi-layered trade policy, which appears in Chapter 7: New Trends and Challenges for the International Trading System. See also MITI, WHITE PAPER ON INTERNATIONAL TRADE Executive Summary, pt. II (2000), <https://dl.ndl.go.jp/info:ndljp/pid/1286053>.

<sup>77</sup>Agreement Between Japan and the United Mexican States for the Strengthening of the Economic Partnership, Japan-Mex., Sept. 4, 2004, 2768 U.N.T.S. 1 <https://www.mofa.go.jp/policy/economy/fta/mexico.html> [hereinafter JPN-Mex.].

then 19% to 70% by 2018.<sup>78</sup> By the entry into force of its 20<sup>th</sup> FTA, the RCEP covering China and Korea, this target has just been achieved in 2022 as the ratio is around 80%.<sup>79</sup>

According to the Paper by METI, Japan's trade policy during this period (2013–2022) has evolved as follows. The main three pillars that are: 1) promotion of economic partnerships; 2) strategic approaches to emerging countries; and 3) acceptance of excellent human resources and companies from overseas during 2013–2015<sup>80</sup> changed to 1) development of free, fair and high-level trade rules; 2) emerging country strategy; and 3) inclusive trade policy in 2018 emphasizing the need to respond to expanding digital trade, global excess production capacity, and the rapid change in the Chinese economy.<sup>81</sup> In the meantime, the “rule-making strategy” was introduced around 2015, where both government and business actively engage in global agenda setting and creating related institutions and mechanisms.<sup>82</sup> Followed by the launch of the “21st century-style trade policy” in 2017 that requires increased awareness of digitalization, mainly focusing on innovation and inclusive growth.<sup>83</sup> Very recently, reflecting the changes in global environment, including “competing for dominance in the high-tech area,”<sup>84</sup> economic security has been a focus, leading to the enactment of a domestic law on economic security in May 2022.<sup>85</sup> For the time being, Japan is likely to continue its economic security-oriented trade policy, while turning from its free trade-oriented policy, and increasing the role, or intervention, of the government.

Against this background, concerns about subsidies provided by other countries became apparent in Japan in the mid-2010s, and since then, these concerns have been growing year by year. Examples began with a reference to excess production capacity due to subsidies provided by China and other countries in 2016,<sup>86</sup> followed by a reference to China's acquisition of high-tech industries in developed countries in 2018,<sup>87</sup> and after extensively noting the increase in subsidies provided by China in 2019,<sup>88</sup> the latest Paper featured repeated warnings from METI to China to create a fair and equitable business environment, including eliminating market-distorting industrial subsidies.<sup>89</sup> Thus, the economic environment suggests that Japan had sufficient background and motivation to strengthen discipline on subsidies in some form, including FTAs.

<sup>78</sup>CABINET OF JAPAN, JAPAN REVITALIZATION STRATEGY 128 (2013), [https://www.cas.go.jp/jp/seisaku/seicho/pdf/en\\_saikou\\_jpn\\_hon.pdf](https://www.cas.go.jp/jp/seisaku/seicho/pdf/en_saikou_jpn_hon.pdf).

<sup>79</sup>*Id.*

<sup>80</sup>MINISTRY ECON., TRADE & INDUS. JAPAN (METI), WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE pt. II (2013), [https://www.meti.go.jp/english/report/index\\_whitepaper.html](https://www.meti.go.jp/english/report/index_whitepaper.html).

<sup>81</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE Outline & pt. III (2018), <https://www.meti.go.jp/english/report/data/gIT2018maine.html>.

<sup>82</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE 665–66 (2015), <https://www.meti.go.jp/english/report/data/WP2015/wp2015.html>.

<sup>83</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE Outline (2017), <https://www.meti.go.jp/english/report/downloadfiles/2017WhitePaper/outline.pdf>.

<sup>84</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE 193–194 (2019), [https://www.meti.go.jp/english/report/data/wp2019/pdf/2\\_2\\_2.pdf](https://www.meti.go.jp/english/report/data/wp2019/pdf/2_2_2.pdf).

<sup>85</sup>Keizaisesak wo ittaitekini kōzurukotoniyoru anzenhoshō no kakuho no suishin ni kansuru hōritsu [Keizaianzenhoshō suishinhō], Law No.43 of 2022 (Japan).

<sup>86</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE: SUMMARY OF THE REPORT 68–204 (2016), <https://www.meti.go.jp/english/report/data/WP2016/pdf/1-1-2.pdf>.

<sup>87</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE chs. 2, 3, pt. II (2018), <https://www.meti.go.jp/english/report/indexwhitepaper.html>.

<sup>88</sup>METI, *supra* note 86, at 193–209.

<sup>89</sup>METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE 230 (2021), <https://www.meti.go.jp/english/report/data/wp2021/wp2021.html>. There is no public English translation for the part III of the report at the time of writing. Other warnings are to strengthen intellectual property protection, to prohibit forced technology transfer, and to further open up the Chinese market to the outside world.

## II. Evolution of Subsidy Disciplines in Japan's FTAs

### 1. Methodology and Summary of Results

Among Japan's 20 FTAs in force,<sup>90</sup> 19 are comprehensive, except for the one with the US concluded under the former Trump administration which only covers market access of goods and the Agreement on digital trade. These 19 FTAs are shown in the Appendix in order of entry into force.

In reviewing the subsidy-related provisions in the above FTAs, the World Bank database<sup>91</sup> was referred to. However, because this database covers FTAs concluded up to 2016 and the TPP, later developments were added, namely, JPN-EU, JPN-UK, RCEP, and JPN-ASEAN (First Protocol) that adds rules on trade in services and investment to JPN-ASEAN. These additions are important in that JPN-EU made drastic changes to the subsidy disciplines in JPN's FTA, and in that China is one of the parties to the RCEP. "Subsidy-related provisions" in this survey refers mainly to provisions on agricultural subsidies, subsidies for non-agricultural goods, CVDs, subsidies for services, and national treatment on goods and investments. In principle, implementation of the provisions is not included in the survey.

The overview of the survey results shows that the majority of subsidy provisions in Japan's FTAs refer to the WTO rules on subsidies and also confirm the rights and obligations thereof, which is similar to the global trend as described in the previous section. However, since around 2010, Japan appears to have been gradually increasing its awareness on subsidy disciplines through FTAs, as indicated by inclusion of WTO-plus provisions particularly in services-related subsidy disciplines, the introduction of drastic disciplines in JPN-EU, and the inclusion of SOE subsidy disciplines in some FTAs concluded subsequent to the CPTPP. The drastic changes in JPN-EU may reflect the aforementioned EU's regulatory circumstances, yet it means that Japan agreed to such changes. This observation is reinforced by the fact that the RCEP, which includes China, a country allegedly reluctant to discipline subsidies, has succeeded in including provisions for consultations on subsidies at least for services, although consultation is not obligatory.<sup>92</sup>

The following section shows detailed analysis of subsidy related provisions in Japan's FTAs. JPN-EU and its analogue in terms of subsidy disciplines, JPN-UK, are treated in the separate section because their subsidy related provisions are significantly different from those of other FTAs of Japan.

### 2. Analysis

#### 2.1. Subsidies for Goods and CVD

Regarding subsidies for agricultural goods, most of Japan's FTAs confirm the Agricultural Agreement and the 2015 Ministerial Declaration<sup>93</sup> on export competition, and provide for the parties to cooperate to strengthen them.<sup>94</sup>

As for non-agricultural goods, except for JPN-Austl., no subsidy-related provisions were identified,<sup>95</sup> and as for CVDs, until the CPTPP, there were no specific provisions, or only provisions to confirm the rights and obligations of the ASCM. However, since the CPTPP, provisions on practices relating to CVD proceedings, although mainly best-effort provisions, are included to ensure transparency and legitimacy of the investigation procedures. They are not subject to the dispute settlement procedures of the CPTPP.

<sup>90</sup>The TPP has also been signed. In addition, there are three other FTAs under negotiation. *EPA/FTA*, *supra* note 74.

<sup>91</sup>WORLD BANK, DEEP TRADE AGREEMENTS: DATA, TOOLS AND ANALYSIS, <https://datatopics.worldbank.org/dta/table.html> (last visited Jul. 31, 2022).

<sup>92</sup>RCEP art. 8.22.

<sup>93</sup>World Trade Organization, Ministerial Decision of 19 December 2015 (Export Competition), WTO Doc. WT/MIN (15)/45 (Dec. 19, 2015).

<sup>94</sup>Exceptions are Japan's FTAs with Singapore, Mexico, ASEAN, and the Philippines that have no special provisions, and the WTO rules apply. Agreement between Japan and Australia for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Sept. 30, 2014) [https://www.mofa.go.jp/ecm/ep/page22e\\_000430.html](https://www.mofa.go.jp/ecm/ep/page22e_000430.html) [hereinafter JPN-Austl.] is discussed in the paragraph below.

<sup>95</sup>The CPTPP does have disciplines pertaining to fisheries subsidies. See Chen, *supra* note 7. In addition, JPN-EU and JPN-U.K. do have detailed subsidy related provisions as already mentioned.



A notable instance is JPN-Austl. where the introduction and maintenance of export subsidies destined for the other Party for both agricultural and non-agricultural goods is prohibited. The provisions are subject to dispute settlement procedures of the FTA, and are hence legally enforceable.<sup>96</sup>

### 2.2. Subsidies for Trade in Service

With regard to subsidies for services, since around 2010, an increasing number of Japan's FTAs have included provisions for obligation to consult, including the best effort provisions, in case one party is affected by the other party's subsidies,<sup>97</sup> and provisions for enhanced transparency to provide information on subsidies during consultations and to mutually notify subsidies. The number of such FTAs accounts for 7 out of 19—around 35%—which is higher than the proportion of such provisions in all FTAs—around 20%.<sup>98</sup> However, not all of these provisions are subject to the dispute settlement procedures of the respective FTAs.<sup>99</sup> These provisions are often accompanied by the provisions to conduct reviews in light of negotiations under Article XV of the GATS.

Notable instances are JPN-India, JPN-Peru, and JPN-Austl. JPN-India and JPN-Austl. both provide for consultations obligations, upon request, in case a Party considers that its interests have been adversely affected by a subsidy from the other Party.<sup>100</sup> During the consultations, the requested Party, if it deems fit, shall consider a request for information on subsidy such as (a) laws and regulations under which the subsidy is granted, (b) form of the subsidy, (c) policy objective or purpose of the subsidy, (d) dates and duration of the subsidy and any other time limits attached to it, and (e) eligibility requirements of the subsidy. However, these provisions are not subject to the dispute settlement procedures of the respective FTAs. JPN-Peru provides for a notification obligation in case of the introduction of any new subsidy or grant which significantly affects trade in services covered by its specific commitments under the GATS, and the possibility of request for consultations if a Party considers that it is adversely affected by a subsidy or grant of the other Party, together with the obligation of the requested Party to consider such a request.<sup>101</sup> This provision is subject to its dispute settlement procedures, and thus entails legal enforceability.

### 2.3. Subsidies for Investment

Most of the investment chapters in Japan's FTAs include subsidies in their scope of application, but Japan generally excludes subsidies in general, or subsidies for R&D, from national treatment (NT) and other obligations in its schedules. Similarly, Japan's FTA partner countries generally exclude subsidies from NT and other obligations. Only JPN-Austl. has a provision that appears to take into account the possible impact of subsidies.

As a notable instance, in JPN-Austl., subsidies are covered in the investment chapter, but the obligations on NT, most favored nation, and nationality requirement for senior management and boards of directors shall not apply to any measure that a Party adopts or maintains regarding

<sup>96</sup>JPN-Austl. arts. 2.7, 19.1.

<sup>97</sup>The First Protocol to Amend the Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations [hereinafter JPN-ASEAN (First Protocol)] provides for consultations if subsidies granted by a party significantly affect trade in services committed under the Agreement. JPN-ASEAN (FIRST PROTOCOL), MINISTRY FOREIGN AFFAIRS JAPAN art. 50.14., May 20, 2019, <https://www.mofa.go.jp/policy/economy/fta/philippines.html>. Some other FTAs such as the Comprehensive Economic Partnership Agreement Between Japan and the Republic of India [hereinafter JPN-India] and JPN-Austl. provide for consultations in case a Party to the Agreement considers that its interests have been adversely affected by the other Party's subsidy. See JPN-INDIA, MINISTRY FOREIGN AFFAIRS JAPAN art. 70, <https://www.mofa.go.jp/region/asia-paci/india/epa201102/index.html>; JPN-Austl. arts. 9, 11.

<sup>98</sup>Calculated by the author based on the World Bank database, WORLD BANK, *supra* note 91, and its reference paper, namely Rubini, *supra* note 9.

<sup>99</sup>As to JPN-ASEAN (First Protocol), the obligation to provide information is subject to dispute settlement procedures, JPN-ASEAN (First Protocol) art. 50.3, and the Agreement Between Japan and the Republic of Peru for an Economic Partnership [hereinafter JPN-Peru] is subject to dispute settlement procedures. JPN-Peru art. 204.

<sup>100</sup>JPN-India art. 30; JPN-Austl. art. 9.11.

<sup>101</sup>JPN-Peru art. 103.

subsidies or grants provided by a Party under Article 14.10.7. However, Annex 11 thereto provides that this provision may be reviewed by the Sub-Committee on Investment. This Annex also prescribes rather detailed rules as the same consultation obligations and provision of information, if deemed fit by the requested country, as those for subsidies for services mentioned above.<sup>102</sup> This annex is not covered by the dispute settlement procedures of JPN-Austl.

#### 2.4. Other Issues

The CPTPP is the first FTA to introduce comprehensive rules on SOEs, along with related rules on subsidies, non-commercial assistance,<sup>103</sup> and rules on fisheries' subsidies. All of these are subject to dispute settlement procedures under the CPTPP. Regarding SOEs, JPN-Austl. also recognizes the concept of "competitive neutrality" under Article 15.4, although it does not explicitly mention the term itself.

### III. JPN-EU FTA as a Drastic Change<sup>104</sup>

#### 1. Chapter on Subsidy in JPN-EU: Overview

Subsidy-related provisions in JPN-EU include a stand-alone chapter on subsidies, Chapter 12, provisions confirming the WTO 2015 Ministerial Decision on export competition for agricultural trade in Article 2.14, and provisions on CVD that are to ensure transparency and legitimacy of investigation procedures, while reserving the rights and obligations under GATT Article VI and the ASCM in Chapter 5 Section D. Section D is not subject to its dispute settlement chapter as provided in Article 5.11(2).

Chapter 12 consists of ten articles, specifically, 12.1 Principles, 12.2 Definitions, 12.3 Scope, 12.4 Relation to the WTO Agreement, 12.5 Notification, 12.6 Consultations, 12.7 Prohibited subsidies, 12.8 Use of subsidies, 12.9 General exceptions, and 12.10 Dispute settlement. The definition of a subsidy and its specificity is set forth by applying *mutatis mutandis* the relevant provisions of the ASCM, but JPN-EU includes subsidies for services in its scope of application unlike the ASCM. Chapter 12 applies to specific subsidies to the extent they are related to economic activities,<sup>105</sup> but excludes from its scope of application subsidies granted for providing services to the general public for public policy objectives under certain conditions, subsidies granted to compensate the damage caused by natural disasters or other exceptional occurrences, and audio-visual services as provided in Article 12.1 and 12.3. As to the relation to the WTO Agreement, it confirms the rights and obligations of each Party under the ASCM, GATT Article XVI and GATS Article XV.

There are three key obligations in Chapter 12: The obligation to notify the other Party of mutually detailed information on specific subsidies granted or maintained in Article 12.5; the obligation to consult, upon request, on subsidies that have or could have a significant negative effect on a requesting Party's trade or investment interests in Article 12.6; and the prohibition of two types of subsidies that have or could have a significant negative effect on trade or investment between the Parties, namely unlimited guarantees and subsidies for ailing or insolvent enterprises without a credible restructuring plan in Article 12.7. Each of these obligations excludes certain subsidies from its scope of application, sometimes conditionally as prescribed in Article 12.3. The notification and consultation obligation excludes subsidies below a certain amount (hereinafter, "de

<sup>102</sup>Regarding this Sub-Committee, it was confirmed that a Sub-Committee based on Article 14.18 has been established according to the website of the Australian side, but there is no reference to whether a review based on the Annex has been conducted or not. To note, it is not possible to confirm whether a sub-committee has been established according to the website of the Japanese side. For the Australian side, see, *Jaepa Review & Implementation Committees*, AUSTRALIAN GOV'T: DEPT. FOREIGN AFFS. & TRADE <https://www.dfat.gov.au/trade/agreements/in-force/jaepa/review/Pages/jaepa-review-and-implementation-committees#submissions> (last visited Jul. 31, 2022).

<sup>103</sup>CPTPP ch. 11.

<sup>104</sup>Because the provisions of the subsidy chapter are identical in JPN-EU and JPN-U.K., this section also applies to JPN-U.K.

<sup>105</sup>"Economic activities" is defined as those activities pertaining to the offering of goods and services in a market, except for education provided under each Party's domestic educational system. See JPN-EU arts. 12.2(a), 12.3 and accompanying footnote.

minimis” subsidies), and the notification obligation and prohibited subsidy provisions exclude agricultural subsidies and subsidies related to trade in fish and fish products. The prohibited subsidy provisions exclude temporary subsidies in response to national or global economic emergency<sup>106</sup> and subsidies granted by sub-central levels of government.

Chapter 12 requires Parties to ensure the use of subsidies only for their specific original purpose in Article 12.8. Another very interesting feature of Chapter 12 is the incorporation of the general exception clause of the GATT and the GATS, *mutatis mutandis* in Article 12.9. Chapter 12 is subject to the JPN-EU dispute settlement chapter, and thus accompanying legal enforceability, except for Article 12.6(5), which obliges the requested Party to accord sympathetic consideration regarding the consultation obligation.

## 2. Analysis

### 2.1. Objectives and Principles

Chapter 12 is innovative in that it clearly states the purpose of the discipline on subsidies in Article 12.1, unlike the ASCM and many other FTAs. The provisions stating the “principles” provide, in the first sentence, that, subsidies may be granted when necessary to achieve public policy objectives, but also provides,<sup>107</sup> in the second sentence, that certain subsidies have the potential to distort the proper functioning of markets and undermine the benefits of liberalization of trade and investment. The third sentence stipulates that, in principle, subsidies should not be granted by a Party when it finds that they have or could have a significant negative effect on trade or investment between the Parties.<sup>108</sup>

This “principles” is suggestive because it first states that subsidies can be used to achieve public policy objectives, and that it keeps in mind the ambivalence of subsidies. However, from the perspective of subsidies and trade and competition, there is some ambiguity as to the purpose of this provision. The second sentence refers to the possibility that subsidies “distort the proper functioning of markets” and “undermine the benefits of liberalization of trade and investment.”<sup>109</sup> The former seems to focus on “distortions,” that is subsidies distorting the efficiency of markets, while the latter appears to refer to the frustrating effect on market access commitments.<sup>110</sup> Distortions are said to occur when subsidies cause firms to lower prices or increase output, thereby affecting the competitive process with competing industries.<sup>111</sup> That is, while the principles” appears to be mindful of the effect on the competitive process, the third sentence states that a subsidy should not, in principle, be granted if a Party finds that it has a significant negative impact on trade or investment between the Parties, without referring to the competitive process and the text does not clarify what a significant negative effect is.

These points may make a difference as to whether the emphasis will be placed on the competition law perspective or the trade law perspective, so to speak, in the actual application of this chapter. If read plainly, it is likely that the emphasis will be placed to protect market access commitment, that is on the trade law perspective. The problem with subsidies, however, is that they can affect the price and production structure of firms in the form of lower prices/increased output, which in turn changes the behavior of firms and affects the competitive process. Whether or not this structure has been affected would require some economic analysis,<sup>112</sup> but there is no provision for such an analysis. In sum, while the word, “principles,” pays attention to the competitive perspective of subsidies, “the degree of competition perspective,” so to speak, is low when actually disciplining

<sup>106</sup>An emergency shall be understood as one that affects the whole economy of a Party. See JPN-EU art. 12.36 and accompanying footnote.

<sup>107</sup>JPN-EU art. 12.1.

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* Furthermore, because the terms “markets” and “benefits” are not limited to those of the parties, they can be understood as referring to something more general.

<sup>111</sup>Rubini, *supra* note 20, at 49–32, 381–392.

<sup>112</sup>Rubini, *supra* note 20, at 62–67. On suggesting the importance of economic analysis of subsidies more generally, see, e.g., STAFF OF THE IMF ET AL., *supra* note 5, at 4, 7, 30.

the subsidies. This is confirmed by the lack of specific indicators for significant negative effects on trade and investment in chapter 12. Chapter 12 refers to significant negative effect on trade and investment or its benefits in Article 12.1, 12.6 and 12.7, but there are no provisions on how to assess them. In addition, there is a *de minimis* standard for the amount of subsidy as a criterion for non-application of the obligation for notification and consultation, but the relationship between distortion or significant negative effect and the amount of subsidy is unclear—even small amounts may cause distortion—reinforcing the lack of indicators in this respect.

## 2.2. Consideration of Ambivalence

Chapter 12 of JPN-EU is suggestive in that it takes into account the ambivalence of subsidies. As mentioned, subsidies necessary to achieve public policy objectives are allowed under “principles,” and certain subsidies are excluded from the scope of Chapter 12, including those for services to the general public for public policy objectives and for compensation for the damages caused by natural disasters and other exceptional circumstances as provided by Articles 12.1, 12.3(2) and 12.3(3). But, when considering the actual application of the provisions, uncertainty remains as to the scope of legitimate purposes. It also incorporates general exception clauses of the WTO agreements as discussed later in this section.

## 2.3. Other WTOPlus Elements

The addition of the two types of prohibited subsidies can be credited as a response to the recent growing concern of the international community to strengthen discipline on subsidies, but uncertainty remains as to how to determine the significant negative effect, as already mentioned.<sup>113</sup>

The inclusion of subsidies for services in the scope of application is innovative, but the services covered are limited. In particular, audio visual (AV) services are excluded and services subject to notification obligations are limited.<sup>114</sup> This limited scope of coverage does not seem to be rationally grounded. For example, the exclusion of AV services may disguise protectionist intent, given that AV services have been excluded from EU’s liberalization commitment of trade in services under the GATS for the reason of the cultural exception.<sup>115</sup>

As for notification obligations, they detail the subject matter to be mutually notified, specifically the legal basis, the form, the amount or budget, and where possible, the name of the recipient. This notification shall be conducted every two years, but if made publicly available on an official website or notified to the WTO pursuant to Article 25.2 of ASCM, it is deemed sufficient.<sup>116</sup>

The obligation to consult is similarly reinforced in Chapter 12. For example, the party requested to consult is obligated to consider providing detailed information on the subsidy,<sup>117</sup> and the deadline for providing such information is set at 90 days from receipt of the request.

<sup>113</sup>Furthermore, the Trilateral Group proposal includes other types, and it is not necessarily clear on why only these types are included. Perhaps it is in line with previous EU FTA provisions.

<sup>114</sup>Only the following services are covered: Architectural and engineering services, banking services, computer services, construction services, energy services, environment services, express delivery services, insurance services, telecommunication services, and transport services. See JPN-EU art. 12.5(3).

<sup>115</sup>See, e.g., PATRICK A. MESSERLIN, ET AL., THE AUDIOVISUAL SERVICES SECTOR IN THE GATS NEGOTIATIONS, 5-6, 19 (2003), [https://www.aei.org/wp-content/uploads/2011/10/20040419\\_book760text.pdf?x91208](https://www.aei.org/wp-content/uploads/2011/10/20040419_book760text.pdf?x91208).

<sup>116</sup>Because the ASCM does not cover subsidies for services, notification to the WTO will not be enough in this respect. The first notification is supposed to be made within three years after the entry into force, and because JPN-EU entered into force on February 1, 2019, three years have passed at the end of January 2022. On this point, the EU’s 2nd Progress Report points out the need for notification of specific subsidies on the Japanese side for the period from 2020 to the end of 2021 and suggests the need for notification monitoring of the relevant subsidies. The next progress report covering the period from 2021 to the end of January 2022 should be released sometime after summer 2022 in light of the timing of the release of the second report. Japan’s implementation status has not been confirmed by public information as of July 2022 at the time of this writing. EUROPEAN COMMISSION, EU-JAPAN EPA PROGRESS REPORT: 1 FEBRUARY 2020 – 31 JANUARY 2021 23 (2021), [https://trade-ec.europa.eu/doclib/docs/2021/december/tradoc\\_159970.pdf](https://trade-ec.europa.eu/doclib/docs/2021/december/tradoc_159970.pdf).

<sup>117</sup>Those include the following: (a) the legal basis and policy objective or purpose; (b) the form; (c) dates and duration and any other time limits attached to it; (d) eligibility requirements; (e) the total amount or the annual amount budgeted for the

#### 2.4. General Exceptions

One of the novel features of Chapter 12 is the incorporation of the general exception clause of the GATT and GATS. However, this could theoretically raise some tensions between the application of Chapter 12 and the ASCM, given the expiration of Article 8 of the ASCM, which made certain subsidies that respond to market externalities, such as environmental subsidies, and those for legitimate policy purposes, nonactionable if they meet certain conditions. For example, a certain specific environmental subsidy provided by Japan could be considered as actionable under the ASCM, while it would be permissible under JPN-EU if it meets the requirements for the exception.

In this regard, Article 12.4 stipulates that nothing in the Chapter shall affect the rights and obligations of either Party under the WTO Agreements, but whether the ASCM is to be given priority when the objective is truly to protect the environment is a question that should be considered further. In reality, this issue is unlikely to actually occur, or could be resolved between Japan and the EU, but the underlying problem may not be limited to JPN-EU.

#### IV. Conclusions on Subsidy Discipline in Japan's FTAs

Looking at the recent enhancement of subsidy-related provisions in Japan's FTAs, including the drastic change in JPN-EU, it appears that Japan has been gradually increasing its awareness of subsidy discipline. This is due to the fact that, as confirmed in the section on the evolution of Japan's FTA/trade policy, there is a background of strengthening subsidy discipline in the trend of its trade policy. JPN-EU for the first time introduced a stand-alone subsidy chapter, and although this may be mainly due to the influence of the EU, Japan has also had the basis for accepting such a chapter. In addition, as concerns about foreign subsidies have grown since around 2015, there appears to have been a certain common understanding on the degree of state intervention in the market with the EU, with whom Japan shares such concerns and the common values such as protection of the environment and human rights, and more broadly, freedom, democracy and the rule of law.<sup>118</sup> Nevertheless, there are still issues to be further examined in JPN-EU, such as remaining uncertainties with regard to the actual application of its provisions, as is the case with the EU's FTA.

The majority of subsidy-related provisions in Japan's FTAs refer to the WTO rules on subsidies and confirm the rights and obligations thereunder, which is almost the same as the global trend. However, this excludes provisions on subsidies for trade in services. The development of discipline on subsidies for service is noteworthy in that WTO-plus provisions have increased, since around 2010, such as the obligation to consult (including best-effort provisions), upon request, in case if a Party considers that its interests have been adversely affected by the other Party's subsidy, and enhanced transparency (providing information on the subsidy during consultations, notification of subsidies), followed by JPN-EU having a stand-alone chapter on subsidies, covering subsidies for services as well. Still, with the exception of some FTAs, those provisions are not subject to dispute settlement procedures of respective FTAs, thus legal enforceability is not always ensured.

As for the ambivalence of subsidies and consideration of transnational welfare, not much can be drawn out, with the exception of JPN-EU. Nor were any provisions for cooperative counter-measures against extra-regional subsidies identified.<sup>119</sup>

#### D. Overall Conclusions

State intervention in markets is increasing in changing global landscapes, including the growing presence of China with strong economic power and somewhat different ideas about market mechanisms, as well as shifts in the international economic order. In order to respond to these changes,

subsidy and the possibility of limiting the subsidy; (f) where possible, the recipient; and (g) any other information. See JPN-EU art. 12.6(2).

<sup>118</sup>On the reference to common values from the Japanese government's perspective, see, e.g., METI, WHITE PAPER ON INTERNATIONAL ECONOMY AND TRADE: SUMMARY OF THE REPORT 34 (2021), [https://www.meti.go.jp/english/press/2021/pdf/0629\\_001b.pdf](https://www.meti.go.jp/english/press/2021/pdf/0629_001b.pdf).

<sup>119</sup>On this point, see *supra* note 73.



it is necessary to update existing rules and mechanisms and also to try new approaches. As presented in this article, with respect to subsidy discipline, some FTAs are certainly serving as laboratories for new attempts to fill gaps in WTO rules, and subsidy-related provisions in those FTAs provide a minimum line of how far countries can agree.

In the Asia-Pacific region, Japan's subsidy discipline through FTAs is gradually moving in the direction of strengthening, while including novel elements, and bringing them to the region. Specifically, through JPN-EU, CPTPP, RCEP, and others including the EU's new generation FTAs, the discipline of subsidies is gradually being incorporated into FTAs in this region. In this regard, it is interesting to note that China has applied to join the CPTPP, which has comprehensive disciplines on SOEs, although its true intentions are unclear. Furthermore, the inclusion of provisions on consultation regarding subsidies for services in the RCEP, which includes China, is one step forward for subsidy discipline through FTAs in this region. The expansion, albeit gradual, of tighter subsidy discipline into the Asia-Pacific region may indicate the potential for subsidy discipline through FTAs.

The disciplines of subsidies through FTAs are not perfect, as examined in this article, and there are some points to be improved and questions to be answered, as shown for the FTAs of the EU and Japan. Information on the actual application of subsidy-related provisions in FTAs is also awaited. These are the issues that should be further explored, and lessons drawn from subsidy discipline through FTAs should be shared among countries. Furthermore, it was noted that the subsidy-related provisions in FTAs are already heterogeneous in EU FTAs, and the same is more or less true for Japan's FTAs. This heterogeneity and the cross-border effects of subsidies also calls for the international community to share experiences, exchange views, and promote coordination among FTAs on subsidy discipline through FTAs, including those that could be reflected in multilateral agreements. Such a process will contribute to fostering the common understanding required for subsidy discipline. The WTO could be an effective forum for this purpose, and this would also enhance the role of the WTO and help revitalize it.

**Acknowledgments.** The draft of this Article was first presented at the Webinar on "Trade Rules and State Intervention in the Economy in the Covid Era" held at Bocconi University, Italy. I am grateful to the participants in the Webinar for their valuable comments.

**Competing interests.** None

**Funding statement.** No specific funding.

## Appendix

Name	Year (entry into force)
JPN-Sing.	2002
JPN-Mex	2005
JPN-Malay. <sup>120</sup>	2006
JPN-Chile <sup>121</sup>	2007
JPN-Thai. <sup>122</sup>	2007

(Continued)

<sup>120</sup>Agreement Between the Government of Japan and the Government of Malaysia for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Dec. 13, 2005), <https://www.mofa.go.jp/policy/economy/fta/malaysia.html>.

<sup>121</sup>Agreement Between Japan and the Republic of Chile for a Strategic Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Mar. 27, 2007), <https://www.mofa.go.jp/policy/economy/fta/chile.html>.

<sup>122</sup>Agreement Between Japan and the Kingdom of Thailand for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Apr. 3, 2007), <https://www.mofa.go.jp/policy/economy/fta/thailand.html>.

(Continued.)

JPN-Indon. <sup>123</sup>	2008
JPN-Brunei <sup>124</sup>	2008
JPN-ASEAN <sup>125</sup>	2008
JPN-ASEAN1 <sup>st</sup> Protocol <sup>126</sup>	2020
PN-Phil. <sup>127</sup>	2008
JPN-Switz. <sup>128</sup>	2009
JPN-Viet. <sup>129</sup>	2009
JPN-India <sup>130</sup>	2011
JPN-Peru <sup>131</sup>	2012
JPN-Austl. <sup>132</sup>	2015
JPN-Mong. <sup>133</sup>	2016
CPTPP	2018
JPN-EU	2019
JPN-UK <sup>134</sup>	2021
RCEP	2022

<sup>123</sup>Agreement Between the Republic of Indonesia and Japan for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Aug. 20, 2007), <https://www.mofa.go.jp/region/asia-paci/indonesia/epa0708/index.html>.

<sup>124</sup>Agreement Between Japan and Brunei Darussalam for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Jun. 18, 2007), <https://www.mofa.go.jp/policy/economy/fta/brunei.html>.

<sup>125</sup>Agreement on Comprehensive Economic Partnership Among Japan and Member States of the States of the Association of Southeast Asian Nations, MINISTRY FOREIGN AFFAIRS JAPAN (Apr. 14, 2008), <https://www.mofa.go.jp/policy/economy/fta/asean/agreement.html>.

<sup>126</sup>JPN-ASEAN (First Protocol).

<sup>127</sup>Agreement Between Japan and the Republic of the Philippines for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Sept. 9, 2006), <https://www.mofa.go.jp/policy/economy/fta/philippines.html>.

<sup>128</sup>Japan-Switzerland Economic Partnership Agreement, MINISTRY FOREIGN AFFAIRS JAPAN (Feb. 19, 2009), <https://www.mofa.go.jp/policy/economy/fta/switzerland.html>.

<sup>129</sup>Agreement Between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Dec. 25, 2008), <https://www.mofa.go.jp/policy/economy/fta/vietnam.html>.

<sup>130</sup>Comprehensive Economic Partnership Agreement Between Japan and the Republic of India, MINISTRY FOREIGN AFFAIRS JAPAN (Feb. 16, 2011), <https://www.mofa.go.jp/policy/economy/fta/india.html>.

<sup>131</sup>Agreement Between Japan and the Republic of Peru for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (May 31, 2011), <https://www.mofa.go.jp/policy/economy/fta/peru.html>.

<sup>132</sup>Agreement Between Japan and Australia for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (July 8, 2014), <https://www.mofa.go.jp/policy/economy/fta/australia.html>.

<sup>133</sup>Agreement Between Japan and Mongolia for an Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Feb. 10, 2015), <https://www.mofa.go.jp/policy/economy/fta/mongolia.html>.

<sup>134</sup>Agreement Between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership, MINISTRY FOREIGN AFFAIRS JAPAN (Oct. 12, 2020), [https://www.mofa.go.jp/ecm/ie/page22e\\_000914.html](https://www.mofa.go.jp/ecm/ie/page22e_000914.html).