



## Institute for International Trade

# INDUSTRIAL SUBSIDIES, STATE-OWNED ENTERPRISES AND MARKET DISTORTIONS: PROBLEMS, PROPOSALS AND A PATH FORWARD<sup>1</sup>

### Executive Summary

Industrial subsidisation is an area identified for WTO rule-strengthening by the European Union (EU) and the Trilateral Trade Ministerial Cooperation (hereafter Trilateral Cooperation).<sup>2</sup> The aim is to curb certain trade practices spearheaded by China's state-owned enterprises (SOEs), which allegedly engender over-capacity, distort markets and undermine the effectiveness of the WTO Agreement on Subsidies and Countervailing Measures (ASCM). The obligations of transparency and notification prescribed by the ASCM require strengthening, too.

A key issue with certain Chinese SOEs centres around their operation model, whereby the boundaries between a private business entity and public body become obscure such that proving the case for countervailing a subsidy using ASCM will be challenging. As a result, the Chinese government's involvement in the market continues, and the ASCM would be less effective in identifying prohibited or actionable subsidies for sanctions. This whole undertaking becomes more onerous when the requirements of subsidies notification prescribed by the ASCM are not met by China (and other WTO members).

To seek redress, the EU and the Trilateral Cooperation (in the name of its individual members) have proposed in July 2019 a number of solutions to the relevant WTO councils, including the US proposal to strengthen the disciplines on notification submitted to the WTO Council for Trade in Goods. At a national level the US Department of Commerce (USDOC) made attempts to define a "public body" but the analytical framework it established were quashed by the WTO Appellate Body in the cases of United States – Countervailing Duty

Measures on Certain Products from China (DS437), and United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436).

After presenting the context of the specific areas for strengthening industrial subsidies disciplines, this policy brief outlines the questions that certain Chinese SOEs have raised and why the present relevant ASCM provisions are no longer effective. The country's unsatisfactory discharge of its subsidy notification obligations will also be highlighted, together with China's commitments pledged at the WTO within the remit of the ASCM. Subsequently, the brief recounts the initiatives to rectify the ASCM that are proposed by the EU and the US, and the positions taken by the Trilateral Cooperation. Finally, the brief analyses the drawbacks of these initiatives and suggests a practical way forward to enhance the industrial subsidies disciplines.

### The context: specificity, SOEs, public body, and notification

By definition a subsidy is money that is paid by a government or an organisation to reduce either the costs of services or of producing goods. The ASCM regulates how a WTO member may use subsidies as domestic support that could result in adverse effects and injure other WTO members. It provides two avenues to an injured member for seeking to remove such adverse effects, namely to resort to the WTO DSB for the subsidy's withdrawal or removal, or; a member may launch its own so-called countervailing duty investigation and ultimately charge extra duties on injuriously subsidised imports to offset the subsidisation.

<sup>1</sup> The author is indebted to Edwin Vermulst, partner at VVGB Advocaten, for his invaluable comments on the draft of this policy brief.

<sup>2</sup> Since announcing their cooperation in December 2017, the three trade ministers of the EU, Japan and the United States of America (US) meet periodically, often in the margins of multilateral meetings to discuss means and ways to address "non-market-oriented policies and practices of third countries" which distort markets and undermine the proper functioning of international trade—that present WTO rules appear unable to effectively address.

The areas of non-market-oriented trade policies and practices identified by the Trilateral Cooperation include: industrial subsidies; SOEs; forced technology transfer; transparency, monitoring and development status within the remit of WTO reform; digital protectionism and better data security; investment review to enhance national security; and export credits. It is obvious the "third country" that the Trilateral Cooperation aims to deal with is China. The inference can be drawn from the US government report presented at the WTO Trade Policy Review 2018 (WT/TPR/G/382, 12 November 2018, at p.20.) and reflected by the statement delivered by the American Ambassador to the WTO on 17, 19 December 2018.



## Specificity

ASCM disciplines will be triggered when a subsidy is prohibited or actionable. By virtue of Article 3 of the ASCM subsidies are prohibited outright if they are granted for the purposes of supporting exports, or for the use of domestic over imported goods. Actionable subsidies are those subsidies that cause adverse effects to a member's interests. Therefore it is essential to identify the nature of a subsidy. Before this is possible one must first ensure that a subsidy exists and that it is specific. This prerequisite requires a three-step test.

The first step is to establish the identity of the provider so that a subsidy can be deemed to exist. In accordance with Article 1.1(a) (1) of the ASCM, a financial contribution must be provided by a government or any public body within the territory of a member that confers a benefit has the potential to qualify as a subsidy. The next step is to examine the identity of the recipient of a subsidy and to ascertain if it is an enterprise, industry, group of enterprises or group of industries, referred to as “certain enterprises” by Article 2.1, within the jurisdiction of the granting authority. After establishing recipient identity, the third step is to examine how a subsidy is granted in order to decide the specificity of the subsidy. This can be done by checking against the six scenarios prescribed by Articles 2.1-3 of the ASCM. For example, a subsidy is deemed specific if it grants explicitly limited access to certain enterprises only.

## SOEs and the definition of “public body”

For the purpose of Article 1.1(a)(1) of the ASCM, “government” includes “government” and “public body”. However, while “government” is a straightforward concept, “public body” is not. The ASCM does not lay down the definition of “public body” and the WTO has no rules to govern an entity outside of the government, with ties to it, that provides subsidies to a “certain enterprise” within the jurisdiction of the “public body” in question. This silence causes problems when an SOE acts as a government agent by undertaking governmental functions. When such a situation arises, does the SOE in question remain a company or has it become a public body? Examples in this regard are when a state bank provides preferential loans to other SOEs; or when one SOE sells assets below-market price to another. So far, the Appellate Body has only provided guidance on this question but not a definitive answer.

In United States — Countervailing Duty Measures on Certain Products from China (DS437) the WTO Appellate Body decided that

the concept of “public body” is subject to interpretation, on an entity-to-entity, state-to-state, and case-by-case basis. In this particular case the USDOC was found acting inconsistently with Article 1.1(a) (1) of the ASCM when it determined that certain Chinese SOEs were “public bodies” based solely on the grounds they were majority owned, or otherwise controlled, by the Government of China. The panel also found the USDOC’s “rebuttable presumption” approach to determine whether an SOE is a “public body” to be inconsistent with Article 1.1(a)(1) of the Agreement.<sup>3</sup> In United States — Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (DS436), it was also established that a government’s “meaningful control”, by ownership and other factors, would not automatically give rise to the constitution of a public body.<sup>4</sup>

## Notification

Articles 25.1-6 of the ASCM specify the timing (by 30 June each year) and requirements concerning content and format for notification. In particular, Article 25.3 prescribes that members should submit sufficiently specific notifications to enable other members to evaluate the trade effects and to understand the operation of notified subsidy programmes. Compliance is poor in general and has deteriorated in recent years, as described by the EU in its 2018 Concept Paper *WTO modernisation – Introduction to future EU proposals*. Without due notification, prohibited and actionable subsidies would more easily escape sanctions putting the effectiveness of the ASCM in doubt.

## Certain Chinese SOEs’ identity, operation model, and the country’s compliance with notification obligations

Based on the context just described, the challenges confronted by the ASCM vis-à-vis China are three-fold:

1. Identifying when SOEs are acting as a public body.
2. Assessing the true extent of government’s interference in the market through SOEs.
3. Weak compliance with regard to ASCM notification obligations.

## The challenge of identifying a public body

The Chinese government has engaged market-orientated reforms in its SOE sector over the past four decades<sup>5</sup>, with considerable successes.<sup>6</sup> Nevertheless, the government has not completely withdrawn from the market due to its substantial SOE presence in

<sup>3</sup> On other issues, the US Department of Commerce was found to have acted in consistency with the relevant provisions of the ASCM. This includes, benefit benchmark, specificity, “facts available” and export restraints. [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds437\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds437_e.htm), accessed 3 October 2019.

<sup>4</sup> [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds436\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds436_e.htm), accessed 19 December 2019.

<sup>5</sup> SOE reform took place in stages. The first stage, starting towards the end of 1980s, focused on “decentralisation and profit-sharing” when the SOEs and employees began to have autonomy in making operational decisions as well as in enjoying profits. Reforms in the second stage (1987-92) saw SOE ownership separated from management to provide further operational autonomy. The third stage consisted of restructuring and converting them into modern corporate entities (e.g. joint stock companies), while the government only sought to exercise its control over large monopolies and strategic resource sectors. See Pelkmans J., Hu W. and Francois J., *Tomorrow’s Silk Road*, accessing an EU-China free trade agreement, CEPS and Rowman and Littlefield International, London (2018), at p.188.

<sup>6</sup> For example, some SOEs are nowadays in the higher echelons of the Global Fortune 500. The SINOPEC Group, China National Petroleum and State Grid rank second, fourth and fifth, respectively on the list of Fortune Global 500 (2019). All of them are SOEs.

key sectors, with the upshot being that the identity of these SOEs can ambiguously straddle the line between a business entity and a public body. Consequently, proving that a given SOE is acting as a public body becomes a challenge. A typical example would involve a state-owned bank listed in the world's major stock exchange markets, and therefore classed as a commercial entity, providing lending with below-market interest rates and the automatic rolling over of unpaid principal and interest for national development reasons, but which would not be in the commercial interests of the bank. For the purpose of identifying a subsidy in this example it is not especially difficult to determine a state bank as a public body. This is because their governmental function is often stated in the statutes and therefore easy to prove. For example, the business overview of the Industrial and Commercial Bank of China (ICBC) contains the goal "to support the supply-side structural reform and economic transformation"<sup>7</sup>. Rather, it is the non-financial SOEs' ambiguous identity that makes identifying them as "public body" a cumbersome undertaking. Many Chinese SOEs are not explicitly designated by the government to implement national economic, social, development or industrial policies, but may nevertheless fulfil such a role, rendering them possible public bodies.

### The government's interference in the market through the SOEs

When SOEs serve as public bodies, the government could influence the functioning of the market. For example, the State-owned Asset Supervision and Administration Commission (SASAC) functions as a regulator, investor and business operator acting as the government's agent in non-financial markets at home and abroad, with the structure duplicated at local levels. The Central Huijin Limited (Huijin) shares the same operation model with SASAC, and is in control of the state-owned financial institutions (**Box 1**). In addition

to these bodies, the Ministry of Finance (MOF) also regulates some enterprises subordinate to central administrative institutions, such as China Publishing Group Corp., some financial enterprises, and the SOEs having financial relations with the MOF.

### Notification

Possible distortions in the market caused by the SOEs' opaque identity and operation model become more difficult to detect when China's subsidy notifications do not meet the requirements prescribed by the ASCM. For example, according to the 2018 WTO Trade Policy Review China's subsidies, notifications are generally delayed for years, with missing information and the notifications submitted not going beyond the notified programmes. However, it is known that China has continued to provide substantial support for a number of sectors, including intelligent manufacturing, advanced technologies, new energy vehicles and fisheries. The WTO Secretariat further stated that "some notifications including those on state-trading enterprises, domestic support, and subsidies provided by the central government remain pending".<sup>9</sup>

### China's WTO accession commitments on SOEs' operation model and subsidies notification

The realities just described are in marked contrast to China's WTO accession commitments.

With regard to the SOEs' operation, China stated at its WTO accession that SOEs would be reformed by "a separation of government from enterprise", and the growth of the state-owned sector would occur through independent operation and competitive market discipline.<sup>10</sup>

## BOX 1: THE OPERATION MODELS OF SASAC AND HUIJIN

### SASAC

Established in 2003 as a ministerial agency under the direct supervision of the State Council, SASAC is responsible for managing government assets and reform of non-financial SOEs at the central level. SASAC's basic function includes drafting laws, regulations and departmental rules relating to the management of state-owned assets, and representing the government in performing investor functions in state-invested enterprises (SIEs<sup>8</sup>); other departments or agencies may also be authorised to do so. These commissions, departments and agencies are collectively referred to as "agencies performing investor functions". Over the years, SASAC has been reducing the number of central-level non-financial SOEs under its control from about 150 to 96 (as at December 2019). However, SASAC is still the world's largest controlling shareholder. SASAC's all-encompassing authorities are bestowed by the Law on State-owned Assets of Enterprises, which came into force in 2008. The law aims to consolidate and develop China's SOE assets and enable SOEs to play a dominant role in the national economy, especially in key sectors. Specific provisions of the law are designed to reduce administrative interference in SIE and require the government to perform its investor function according to law. Still, the State Council may decide on merger, separation, dissolution or bankruptcy of SIEs in which the state has a controlling stake, and other important matters need to be reported or approved by the government (Article 34). Agencies performing investor functions are also entitled to appoint and remove an SIE's management or make suggestions on such appointments and removals (Article 22).

### Huijin

Established in 2003, the principal shareholder rights of Huijin are exercised by the State Council. The financial institutions controlled by Huijin, including some of the world's largest banks such as the ICBC, typically undertake policy lending to SOEs to launch national industrial strategies, such as the *Made in China 2025* strategy. This lending allegedly may include preferential loans to SOEs, automatic rollover of unpaid principal and interest, forgiven and non-performing loans, and selective use of below-market interest rates.

<sup>7</sup> <http://icbc.com.cn/ICBC/EN/AboutUs/BriefIntroduction/>, accessed 11 December 2019.

<sup>8</sup> According to Article 5 of the Law on State-owned Assets of Enterprises, state-invested enterprises refer to wholly state-owned enterprises and companies, state holding companies, and companies in which the state holds shares.

<sup>9</sup> See Trade Policy Review, Report by the Secretariat, China, WT/TPR/S/375, 6 June 2018, at pp.12, 34.

<sup>10</sup> See Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, at pp.1,2.

## China also committed to reforms whereby the government would no longer directly administer the human, finance and material resources, and operational activities such as production, supply and marketing.

Rather the state-owned banks were to be commercialised and lending to SOEs would take place exclusively under market conditions. With regard to financial contributions provided by SOEs, including state-owned banks, China committed that SOEs, including banks, should be run on a commercial basis and be responsible for their own profits and losses.<sup>11</sup>

For subsidies notification obligations within the remit of the ASCM, China committed that subsidies provided to SOEs would be viewed as specific if, for example, SOEs are the predominant recipients of such subsidies or SOEs receive disproportionately large amounts of such subsidies. And, overall, the government committed to notify any subsidy programme at all levels of government, including subsidies provided at provincial level and at lower administrative level, and in law or in fact. China also pledged that the information provided in notifications should be as specific as possible, and to progressively work towards full notification<sup>12</sup> of subsidies as required by Article 25 of the ASCM and Annexes 5A and 5B of its Accession Protocol.<sup>13</sup>

Given China's unfulfilled WTO accession commitments under the ASCM and its leading position in international trade nowadays, meaning more damages to the international trade order may be caused as a result, to redress the EU has proposed a number of initiatives for modernising the relevant provisions of the ASCM. Likewise, the reform aim raised by the Trilateral Cooperation directly aim at China.

### The EU's attempt to modernise relevant rules on industrial subsidy

Within the remit of the ASCM, the EU's reform aim is three-fold:

1. To improve transparency and subsidies notification.
2. To better capture SOEs when they are an instrument for the state to decisively govern and influence the economy, often with market distortive effects.
3. To capture more effectively the most trade-distortive types of subsidies.<sup>14</sup>

### Transparency and notifications

The EU has proposed creating incentives for WTO members to fully comply with their notification obligations. To achieve this objective the EU suggests to install a general rebuttable presumption procedure. This means if a subsidy is not notified or is counter-notified, the financial contribution in question would be presumed to be a subsidy or even be presumed to be a subsidy causing serious prejudice.<sup>15</sup>

On behalf of the three partners of the Trilateral Cooperation and a few other members, the US submitted a proposal to the Council for Trade in Goods (dated 27 June 2019), which has introduced a number of punitive administrative measures across a list of agreements and understandings administered by the Council for enhanced disciplines when notification obligations are not met.<sup>16</sup>

### SOEs and public body

To better capture SOEs when they serve as public bodies, the EU aims to clarify what constitutes a public body, on the basis of a case-by-case analysis to determine whether a state-owned or a state-controlled enterprise performs a government function or furthers a government policy, as well as how to assess whether a member exercises meaningful control over the enterprise in question.<sup>17</sup>

### Capture more effectively the most trade-distortive types of subsidies

This component of the ASCM reform aims to effectively capture some actionable subsidies that currently may be able to escape the disciplines yet contribute to serious trade distortion. At the moment, to prove injury a member must establish the adverse effects caused by a subsidy, the injuries suffered, and the causal link between the two, which is an onerous process. The EU therefore has proposed to subject certain types of subsidies, which are in principle permissible under the current rules to stricter rules by, for example, expanding the list of prohibited subsidies or by creating a rebuttable presumption of serious prejudice similar to the lapsed Article 6.1 of the ASCM.<sup>18</sup>

### Drawbacks of the initiatives and a practical way forward

Despite the EU's initiatives generally being in agreement with the Trilateral Cooperation's position, the three partners are yet to reach common ground with regard to an expanded list of prohibited subsidies, and to agree on what is absolutely prohibited and what could be admissible but with qualifications. For example, the US requested to prohibit all subsidies while the EU proposed to exempt certain types, while Japan wanted to keep those subsidies granted at provincial level. Therefore, it is necessary to scrutinise some drawbacks of the different reform initiatives before contemplating a way forward. Drawbacks of the different reform initiatives First of all, any rule changing at the WTO will be time consuming and a long process. Within the present context, establishing a general rebuttable presumption procedure for enhanced notification disciplines requires an amendment of Article 25.7 of the ASCM.<sup>19</sup> This will certainly be a very long process for consensus to be reached, and then awaiting

<sup>11</sup> See Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October, at pp.8,9,34.

<sup>12</sup> "Full notification" refers to the examples of subsidies that are not in Annexes 5A (Notification Pursuant to Article XXV of the Agreement on Subsidies and Countervailing Measures), nor in 5B (Subsidies to be Phased Out) of the Report of the Working Party on the Accession of China, but members made queries against the comprehensiveness of China's notifications, as noted in the Working Party's Report. The examples of "full notification" include: state support through the banking system, notably government-owned banks, in the form of policy loans, the automatic rollover of unpaid principal and interest, forgiven and non-performing loans, and the selective use of below-market interest rates. Some members also referred to unreported tax subsidies, investment subsidies and subsidies provided by subnational governments, some of which favoured exporting firms. Other members mentioned subsidies granted to the telecommunications, footwear, coal and shipbuilding sectors.

<sup>13</sup> See Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, at pp.34,78.

<sup>14</sup> See WTO modernisation – introduction to future EU proposals – concept note, 18 September 2018. [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf), accessed 9 December 2019.

<sup>15</sup> See Improving Disciplines on Subsidies Notification, TN/RL/GEN/188, 30 May 2017.

<sup>16</sup> See Procedures to Enhance Transparency and Strengthen Notification Requirements under WTO Agreements, JOB/GC/204/Rev.2, JOB/CTG/14/Rev.2, 27 June 2019. This proposal, co-sponsored by Argentina, Australia, Canada, Costa Rica, the EU, Japan, New Zealand and Chinese Taipei, is intended to apply to 14 agreements and decisions overseen by the 12 committees under the Goods Council, including agreements on agriculture, market access, subsidies, anti-dumping measures, safeguards, state trading, import licensing, sanitary and phytosanitary measures, technical barriers to trade, rules of origin, etc.

<sup>17</sup> See WTO modernisation – introduction to future EU proposals – concept note, 18 September 2018. [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf), accessed 9 December 2019.

<sup>18</sup> Article 6.1 of the ASCM prescribes four scenarios upon which serious prejudice to the interests of another member will be deemed to exist, including the total ad valorem subsidisation of a product exceeding five per cent, and subsidies to cover operating losses sustained by an industry.

<sup>19</sup> This is because Article 25.7 of the ASCM holds notification of a subsidy measure without prejudice. But in the light of a possible "rebuttable presumption", a subsidy which is not notified or counter-notified would be presumed actionable for causing serious prejudice to other members within the meaning of Article 6 of the ASCM. See also Hu W., China as a developing member, is it a problem? CEPS Policy Insights, No 2019/16, November 2019.

acceptance of two thirds of the members—a legal procedure in its own right<sup>20</sup>—before the change could be incorporated in the ASCM.<sup>21</sup>

Secondly, at national level within the meaning of Part V of the ASCM members may seek to impose countervailing measures to redress the adverse effects caused by an actionable or a prohibited subsidy. However, their action is bound by the provisions of Article VI of GATT 1994 and the terms of the ASCM, as illustrated by the decisions laid down by the WTO Appellate Body in the case *United States – Countervailing Duty Measures on Certain Products from China (DS437)* as mentioned above.

Thirdly, there is a question whether special rules should apply to or exceptions be made for developing members. As mentioned above, the US led the proposal aiming to install a few punitive administrative measures for enhanced transparency across 14 agreements and understandings administered by the WTO Council for Trade in Goods. As a counter proposal, a number of members have already called for an “inclusive approach” to transparency on the grounds of developing members’ constrained capacity in fulfilling their notification obligations.<sup>22</sup> As a result the issue has spilled over into another WTO reform area—Special and Differential Treatment for developing members—which has itself been in an open-ended reform process since the Uruguay Round.

Fourthly, differences remain among the Trilateral partners in relation to expanded prohibited subsidies beyond Article 3.1 of the ASCM in a WTO-plus fashion. One can imagine that, as soon as national interests kick in, negotiations may hit an impasse. This caveat casts doubts on the plurilateral approach that the EU or the Trilateral Cooperation may elect for bringing forward their reform initiatives.

### A way forward

Of course, the Trilateral partners share more consensus than differences. Indeed, together with like-minded members, the EU and the Trilateral Cooperation may go plurilateral so that their reform objectives would probably succeed more swiftly whenever consensus prevails. However, if China’s participation in the plurilateral process is absent the efforts for enhancing subsidies disciplines would miss its target and become redundant. Thus, the Trilateral Cooperation may wish to convince China to join its reform process. But, then, China is certainly not regarded as a “like-minded” member by the EU, nor by the Trilateral Cooperation.

The Trilateral Cooperation has in fact aimed at isolating China, and therefore it has been trying to form coalitions among like-minded members in order to prevent China from circumventing possible punitive measures imposed by the Trilateral partners. When reading, for example, Article 32.10.5 of the *United States – Mexico – Canada Agreement (USMCA)*, one may be surprised to discover the three parties are not only under obligation to inform each other should one of them negotiate a free trade agreement (FTA) with “a non-market economy”, they are also essentially prohibited to conclude such an FTA. This is because if such an FTA is concluded, the USMCA will be terminated and replaced by a bilateral agreement between

the remaining parties without the one that concludes the FTA. It is evident that China is targeted as such a “non-market economy”.<sup>23</sup> Notably, ensuring transparency and taking appropriate action if the EU negotiates an FTA with a non-market economy is equally a US objective when negotiating a trade agreement with the EU.<sup>24</sup> It is therefore doubtful if the Trilateral Cooperation would reverse its tactic and invite China into the group.

China may not wish to participate in the Trilateral Cooperation or the EU’s reform course, either. After all, it has its own WTO reform philosophy advocating development interests for developing members,<sup>25</sup> which does not meet the EU’s objectives of making the WTO more relevant and adaptive to a changing world, and strengthening the WTO effectiveness.<sup>26</sup> And, it is in striking contrast with the Trilateral Cooperation’s objective of eliminating “unfair market distorting and protectionist practices by third countries”.<sup>27</sup> On the other hand, China has its own base of support, for example among the WTO developing members,<sup>28</sup> though one must concede that their trade powers are much less significant to China, compared to the Trilateral partners.

This being the case, a practical way forward to strengthen industrial subsidies disciplines will be to engage China and encourage it to expeditiously implement its outstanding WTO accession commitments with regard to subsidies notification obligations and SOE operations. Once this step is complete, one could see whether the country would be prepared to work towards further commitments for prohibiting other kinds of industrial subsidies, beyond those two prescribed by Article 3 of the ASCM.

Unlike the time during China’s WTO accession negotiations<sup>29</sup>, presently the leverages available for the EU and the Trilateral Cooperation over China are limited. The key question is, what are the incentives for China to continue its reform path? Fulfilling its WTO accession obligations is one for credibility’s sake, and living up to its aspiration as a defender of multilateralism is another. Only then can China claim its leadership role in improving global economic governance.

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<sup>20</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/depositary\\_guide\\_e.htm](https://www.wto.org/english/docs_e/legal_e/depositary_guide_e.htm), accessed 10 December 2019.

<sup>21</sup> As an example, it took 14 years for the “Paragraph 6 system” to be incorporated into the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights). On grounds of public health, the “Paragraph 6 system” is the protocol amending the TRIPS Agreement, which allows low-cost generic medicines to be produced and exported under a patent compulsory licence exclusively for the purpose of serving the needs of least developed countries when they have insufficient or no capacities in manufacturing pharmaceutical products. Members established the system in 2003 and the WTO General Council adopted it in 2005 and opened it for acceptance by members. On 23 January 2017, upon acceptance of the Protocol by two thirds of the members, the system became a permanent part of the Agreement. [https://www.wto.org/english/tratop\\_e/trips\\_e/accept\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/accept_e.htm), accessed 9 December 2019.

<sup>22</sup> See *An Inclusive Approach to Transparency and Notification Requirements in the WTO*, JOB/GC/218, JOB/CTG/15 JOB/SERV/292, JOB/IP/33 JOB/DEV/58, JOB/AG/158, 27 June 2019.

<sup>23</sup> According to Article 32.10.1 of the USMCA, a non-market economy is a country that on the date of signature of the Agreement (a) a Party has been determined to be a non-market economy for purposes of its trade remedy laws; and (b) with which no Party has signed a free trade agreement.

<sup>24</sup> See *United States – European Union Negotiations, Summary of Specific Negotiation Objectives*, Office of the United States Trade Representative, January 2019, at p.14.

<sup>25</sup> See China’s proposal on WTO reform published in May 2019. Among others, it argues for safeguarding the development interests of developing members, particularly in the areas of agriculture, trade remedy rules, fisheries subsidies, e-commerce and new issues, such as investment facilitation. See *China’s Proposal on WTO Reform*, WT/GC/W/773, 13 May 2019.

<sup>26</sup> See *WTO modernisation – introduction to future EU proposals – concept note*, 18 September 2018. [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf), accessed 9 December 2019.

<sup>27</sup> Trilateral trade ministers have stated that their cooperation would be in the WTO and in other forums in order to achieve their objective through consensus building. See *Joint Statement by the US, European Union and Japan at MC11*, 12/12/2017. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>, accessed 8 December 2019.

<sup>28</sup> For example, China’s proposal the Continued Relevance of Special and Differential Treatment in Favour of Developing Members to Promote Development and Ensure Inclusiveness, WT/GC/W/765/Rev.2, 26 February 2019, was co-sponsored by India, South Africa, Venezuela, Laos, Bolivia, Kenya and Cuba.

<sup>29</sup> China conceded to accept many WTO-plus obligations in order to accede to the WTO. For details, see Qin J. (2003), ‘WTO-plus’ obligations and their implications for the World Trade Organization system – an appraisal of the China Accession Protocol’, *Journal of World Trade* Vol.37, No. 3, pp. 483–522.

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