



## Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

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### **Subsidies as a regulatory object: from trade subsidies to outward FDI subsidies**

by  
Keer Huang\*

According to the [OECD](#), global outward FDI (OFDI) stocks relative to global GDP increased dramatically between 2005 and 2021, from 25% to 44%. With the growth of OFDI stocks, [concerns](#) increasingly emerge regarding the use of OFDI subsidies, which may lead to negative effects like the distortion of the competitive environment of host countries or of third countries.

The term “OFDI subsidy” in this *Perspective* refers to a financial contribution that is directly or indirectly provided by a home country and confers a benefit to an OFDI at either the pre-establishment or post-establishment stage. Such subsidy is de facto or de jure limited to certain enterprises or industries. OFDI subsidies include not only subsidies targeting OFDI, but also those not primarily intended to benefit OFDI but used as such by MNEs, such as industry subsidies. As the scope of the rules on subsidies and countervailing measures has expanded from trade to investment, this *Perspective* calls attention to the need to improve the regulation of OFDI subsidies.

Current rules regulating OFDI subsidies can be divided into two categories. One set consists of multilateral subsidy rules. The [Agreement on Subsidies and Countervailing Measures \(ASCM\)](#) can potentially be used to address OFDI subsidies targeted at the production of goods, while remedies against subsidies may not be available when such subsidies are “transnational.” As for service providers, the [General Agreement on Trade in Services \(GATS\)](#) contains no specific provisions on service subsidies. Insofar as subsidizing and countervailing measures are “measures affecting trade in service,”<sup>1</sup> such measures are subject to most-favored-nation treatment; in sectors included in a WTO Member's Schedule of Specific Commitments, such measures are also subject to national treatment, unless limitations have been inscribed in the Schedule.

The other set includes rules in recent bilateral/plurilateral economic agreements and unilateral instruments (e.g., [CPTPP](#), [EU-UK TCA](#), [EU Foreign Subsidies Regulation](#)). These partly depart from the ASCM, inter alia, regarding the following aspects:

- *Coverage of rules.* Under the recent rules,<sup>2</sup> subsidy providers are no longer limited to “[a government or any public body](#)”; accordingly, state-owned enterprises not exercising governmental functions could be considered as subsidy providers. More importantly, the location of the benefit recipient is not geographically limited to the granting authority.<sup>3</sup>
- *Transparency requirements.* The transparency mechanism regarding subsidizing activities under the WTO framework has been criticized for its underperformance and ineffectiveness. Recent OFDI subsidy rules strengthened the disclosure requirements for information on subsidizing activities<sup>4</sup> and in certain cases, imposed disclosure responsibilities on investors.<sup>5</sup>

Differences between recent OFDI subsidy rules and the ASCM can also be observed in the determination of adverse effects, countervailing measures, dispute settlement mechanisms, etc. Recent OFDI subsidy rules trigger not only WTO law but international investment law concerns. Specifically, unilateral and potentially country-specific regulatory measures, like an ex post and ad hoc investigation of subsidized OFDI,<sup>6</sup> may raise doubts as to the compatibility of international investment agreement (IIA) provisions, especially non-discrimination ones.

Countries should work together at different levels when addressing OFDI subsidies. At the multilateral level, [international cooperation](#) is needed to fill gaps in existing international subsidy rules, for differences over subsidy practice exacerbate macroeconomic costs. When reforming WTO subsidy rules, countries should consider whether and under what conditions rules on actionable subsidies apply to OFDI subsidies, and if so, how transparency should be enhanced to monitor OFDI subsidies at both national and sub-national levels. Also, other forums (like the OECD) could promote inter-governmental discussions of OFDI subsidy regulation.

Bilateral and plurilateral agreements can also promote international regulatory coordination. So far, only few international economic agreements have rules governing subsidization policies of home countries,<sup>7</sup> which can be improved in the future. For instance, transparency rules could be strengthened, and consultation proceedings on OFDI subsidies undermining fair competition could be introduced. Meanwhile, attention should be paid to enhancing consistency between host countries’ countervailing policies and the existing IIA network. For instance, subsidy exemptions should be granted for foreign investments on a non-discrimination basis under the OFDI subsidy rules. Also, the involvement of amicus curiae in ISDS cases may help determine whether countervailing measures achieve public policy objectives under broadly worded clauses, for the determination of OFDI subsidies’ effects requires technical expertise.

From trade subsidies to OFDI subsidies, the area of global subsidy regulation is now experiencing new developments as well as challenges. To achieve a better regulation of OFDI subsidies, regulation itself needs to be regulated.

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<sup>1</sup> Article 1, [GATS](#).

<sup>2</sup> E.g., Article 17.6.2, [CPTPP](#).

<sup>3</sup> E.g., Article 2, [EU Foreign Subsidies Regulation](#).

<sup>4</sup> Article 369.1, [EU-UK TCA](#).

<sup>5</sup> Article 21, [EU Foreign Subsidies Regulation](#).

<sup>6</sup> Article 11, [EU Foreign Subsidies Regulation](#).

<sup>7</sup> E.g., Article 8(2), Section III, [Draft Comprehensive Agreement on Investment between the EU and China](#); Article 2.1.3, [U.S.–China Phase One Trade Deal](#); Chapter 3, [EU-UK TCA](#).

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