STEEL OVERCAPACITY AND THE GLOBAL TRADING SYSTEM

Sherzod Shadikhodjaev*

ABSTRACT

The steel sector is strategically important for supplying necessary inputs to many manufacturing industries in both domestic and overseas markets. Since the global financial crisis of 2008, steelmaking companies have been facing formidable challenges associated with "overcapacity" or "excess capacity," that is underutilization of their productive capacity. Overcapacity in steel—created and maintained by certain government interventions and low demand—have downward pricing effects across international markets, which has given rise to trade frictions. The persistent sluggish demand worldwide and the current extent and lasting repercussions of steel overcapacity make it urgent for the world community to find long-term policy solutions. As a result, the Global Forum on Steel Excess Capacity, established by the Group of Twenty in 2016, and the World Trade Organization have been discussing this matter in the context of state interference. This article examines recent trends in steel overcapacity as a global problem and related developments in China as the world's largest steelmaking country, as well as international policy agendas and the ways forward in addressing trade-related aspects of this issue.

* Professor, KDI School of Public Policy and Management, Republic of Korea. The author can be reached at: sherzod1@kdischool.ac.kr. Many thanks go to Ramon Torrent for his very useful comments on an earlier draft of this article.

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KEYWORDS: *steel overcapacity, excess capacity, China, G20, GFSEC, WTO, transparency, subsidies, SCM Agreement, SOEs, trade remedies, WTO reform, CPTPP*

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I. INTRODUCTION

Steel tops the list of sectors most affected by harmful government interventions that have been implemented worldwide since 2008.[1] In March 2018, the United States (hereinafter "U.S.") imposed a 25% tariff on foreign steel under national security grounds, which triggered tit-for-tat import restrictions by other countries and a series of disputes within the World Trade Organization (hereinafter "WTO").[2] These recent and telling examples show the considerable importance that many nations attach to steel as an indispensable input that is used by most manufacturing industries across global value chains. Because of such importance, there is a tension between the desire of states to sustain steel industries, on the one hand, and the need to minimize market-distorting government interventions, on the other.

In a capital-intensive industry like steelmaking, excessive investment in productive facilities irresponsive to economic realities may cause undesirable consequences on both domestic and international planes. Since the global financial crisis of 2008, steel plants in many countries have been struggling with the problem of "overcapacity" (also known as "excess capacity"). According to one definition suggested in the literature and approved of by the WTO Appellate Body, overcapacity occurs when productive capacity remains underutilized, constituting the difference between firms' potential and actual output levels.[3] When firms produce less than what their capacity allows, their profits drop due to growing fixed costs. If this persists over time, they have to undertake structural adjustments or go bankrupt. But if government support keeps them afloat contrary to market principles, they can supply even at low prices, wiping out many competitors and distorting trade. Because of the current and projected long-term low demand, today's excess capacity in steel requires concrete policy solutions.

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[1] *Global Dynamics*, GLOBAL TRADE ALERT, https://www.globaltradealert.org/global_dynamics (last visited Aug. 15, 2021).

[2] Chad P. Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PIIE (May 17, 2021), https://www.piie.com/sites/default/files/documents/trump-trade-war-timeline.pdf.

[3] LUKAS BRUN, OVERCAPACITY IN STEEL: CHINA'S ROLE IN A GLOBAL PROBLEM 7 (2016); Zhiyao (Lucy) Lu, *China's Excess Capacity in Steel: A Fresh Look*, PIIE (June 29, 2017, 4:45 PM), https://piie.com/blogs/china-economic-watch/chinas-excess-capacity-steel-fresh-look. The Appellate Body also interpreted "overcapacity" to mean "unused capacity" (i.e., capacity minus production). *See* Appellate Body Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, ¶¶ 6.142-.143, 6.145, WTO Doc. WT/DS473/AB/R (adopted Oct. 26, 2016) [hereinafter *EU — Biodiesel (Argentina)* Appellate Body Report]. For a further discussion on this concept, *see also* Sections II.A and IV.A.2 of this article. Alternatively, overcapacity in the steel sector can also be defined as steelmaking capacity minus demand for steel. While defining and measuring steel overcapacity in either way is quite controversial (*see* SIMON J. EVENETT & JOHANNES FRITZ, GOING SPARE: STEEL, EXCESS CAPACITY, AND PROTECTIONISM: THE 22ND GLOBAL TRADE ALERT REPORT 43-45 (2018)), our calculations concerning overcapacity in this article are based on the definition of steel overcapacity (or excess capacity) as the difference between steelmaking capacity and steel production.

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This article aims to discuss recent trends and international responses to steel overcapacity as related to trade. Specifically, Section II examines the status quo in steel overcapacity as a global problem. Section III assesses the work of a special forum founded by the Group of Twenty (hereinafter "G20") to address this issue. Section IV looks into the applicable multilateral trade rules and explores potential improvements in the WTO that would contribute to better regulation of the governmental behaviour concerned. Section V concludes this analysis by highlighting complementarity between the G20-created forum and the WTO in addressing steel overcapacity.

II. EXCESS STEEL CAPACITY AS A GLOBAL PROBLEM

This section shows that during the last decade or so, the situation surrounding steel overcapacity in many parts of the world has deteriorated due to cyclical and structural factors. It also discusses developments in the Chinese steel industry that have impacted overcapacity within China and beyond.

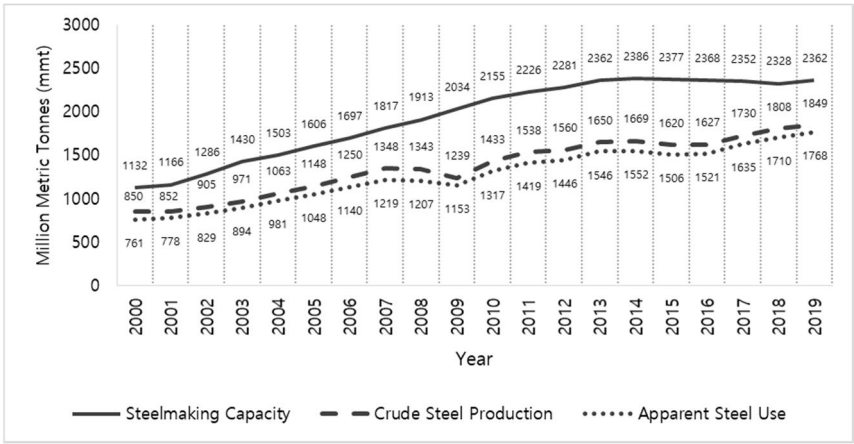
A. Global Trends and Causes

The data in Figure 1 suggest that, compared to 2000-2008, the average of the global capacity-production gap (or overcapacity) for steel nearly doubled over the following eleven years after the global financial crisis. The term "steelmaking capacity" here means "nominal crude steelmaking capacity," i.e., "maximum theoretical equipment capacity."[4]

FIGURE 1: Global Trends in the Steel Sector

[4] ORG. FOR ECON. CO-OPERATION & DEV. [hereinafter OECD], LATEST DEVELOPMENTS IN STEELMAKING CAPACITY 44 (2020).

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SOURCE: Drawn by the author from data on steelmaking capacity and crude steel production in: ORG. FOR ECON. CO-OPERATION & DEV. (hereinafter "OECD"), LATEST DEVELOPMENTS IN STEELMAKING CAPACITY 37 (2020); data on apparent steel use regarding finished steel products in: WORLD STEEL ASS'N (hereinafter "WORLDSTEEL"), STEEL STATISTICAL YEARBOOK 2009 (2010); WORLDSTEEL, STEEL STATISTICAL YEARBOOK 2019: CONCISE VERSION (2019); WORLDSTEEL, 2020 WORLD STEEL IN FIGURES (2020).

The literature suggests that the extent of *worrisome* overcapacity is actually below the level of nominal capacity's underutilization. The reason is that, even in normal conditions, steel plants cannot operate at full capacity due to some seasonal factors and periodic needs to close plants for refurbishment and the addition of new facilities. Also, they may reserve part of such "spare" capacity for times of extra need.[5] Therefore, an appropriate baseline for more realistic assessments is the notion of "effective capacity," that is nominal capacity minus reasonably unutilized capacity.[6] As effective capacity utilization at a minimum of 80% is generally considered to be sufficient for steel plants to remain profitable, a rate less than that would indicate the existence of an alarming extent of overcapacity.[7] In 2009-2019, the vast majority of top-20 steel-producing countries showed a decline in capacity utilization, with many recording a drop from 80(plus)% in the pre-crisis period (2000-2008) to below 80% in the following years (Table 1).

[5] Lu, *supra* note 3.

[6] FELIX SCHULER ET AL., COPING WITH OVERCAPACITY: NAVIGATING STEEL'S CAPACITY CONUNDRUM 4-5 (2014).

[7] BRUN, *supra* note 3, at 16. For example, Lu, *supra* note 3, calculated the extent of Chinese steel overcapacity in 2015 by comparing the levels of capacity and production and taking into account this 80% threshold.

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This suggests that current overcapacity—even if relative to effective capacity—cannot be ignored.

TABLE 1: Steel Capacity Utilization in Top-20 Steel-Producing Countries

Production Rank (2019)	Country	Average Per Year (mmt)			Average Capacity Utilization (%)		Capacity Utilization (%) in Last Five Years				
			2000-2008	2009-2019	2000-2008	2009-2019 (↑/↓ vs 2000-2008)	2015	2016	2017	2018	2019
1	China	capacity	546.5	1146.0	56	69 (↑)	66	68	75	82	86
		production	303.4	790.9							
2	India	capacity	48.4	106.2	81	82 (↑)	78	78	81	85	86
		production	39.0	87.1							
3	Japan	capacity	133.0	132.0	84	79 (↓)	79	80	80	80	76
		production	112.0	104.7							
4	US	capacity	117.9	114.8	81	72 (↓)	70	70	72	77	80
		production	95.5	82.1							
5	Russia	capacity	70.7	83.1	92	83 (↓)	83	82	83	84	83
		production	64.8	69.4							
6	Korea	capacity	56.2	78.9	85	85	85	83	86	89	88
		production	47.5	66.9							
7	Germany	capacity	51.4	51.9	89	80 (↓)	82	81	83	82	76
		production	45.9	41.7							

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Production Rank (2019)	Country	Average Per Year (mmt)			Average Capacity Utilization (%)		Capacity Utilization (%) in Last Five Years				
			2000-2008	2009-2019	2000-2008	2009-2019 (↑/↓ vs 2000-2008)	2015	2016	2017	2018	2019
8	Turkey	capacity	25.3	47.1	80	71 (↓)	66	70	77	76	68
		production	20.2	33.3							
9	Brazil	capacity	35.8	48.1	86	69 (↓)	69	62	68	70	63
		production	30.9	33.1							
10	Iran	capacity	11.4	25.9	75	66 (↓)	57	63	69	74	71
		production	8.5	17.1							
11	Italy	capacity	35.7	37.1	80	65 (↓)	58	63	70	71	68
		production	28.7	24.2							
12	Chinese Taipei	capacity	21.4	28.1	89	75 (↓)	73	74	76	79	75
		production	18.9	21.2							
13	Ukraine	capacity	43.7	41.9	85	66 (↓)	59	62	55	54	54
		production	37.1	27.5							
14	Viet Nam	capacity	2.4	12.4	44	65 (↑)	44	59	57	76	86
		production	1.0	8.1							
15	Mexico	capacity	19.4	24.7	82	74 (↓)	68	69	74	73	67
		production	15.8	18.2							
16	France	capacity	23.5	20.4	84	74 (↓)	77	74	81	81	75
		production	19.8	15.1							

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Production Rank (2019)	Country	Average Per Year (mmt)			Average Capacity Utilization (%)		Capacity Utilization (%) in Last Five Years				
			2000-2008	2009-2019	2000-2008	2009-2019 (↑/↓ vs 2000-2008)	2015	2016	2017	2018	2019
17	Spain	capacity	20.7	22.3	84	65 (↓)	66	63	66	66	63
		production	17.4	14.5							
18	Canada	capacity	17.7	15.7	88	80 (↓)	80	81	84	86	84
		production	15.7	12.6							
19	Poland	capacity	12.0	12.0	79	73 (↓)	77	75	86	85	75
		production	9.6	8.8							
20	Saudi Arabia	capacity	4.4	8.8	89	63 (↓)	54	57	50	54	85
		production	3.9	5.5							

SOURCE: Author's calculation from data on nominal crude steelmaking capacity in: OECD Steelmaking Capacity Database, Version: 2020, https://stats.oecd.org/ (data retrieved Aug. 29, 2020); data on crude steel production in: WORLDSTEEL, STEEL STATISTICAL YEARBOOK 2009 (2010); WORLDSTEEL, STEEL STATISTICAL YEARBOOK 2019: CONCISE VERSION (2019); WORLDSTEEL, 2020 WORLD STEEL IN FIGURES (2020).

NOTE: Production ranks refer to the countries' ranks in global crude steel production in 2019 as shown in WORLDSTEEL, 2020 WORLD STEEL IN FIGURES (2020). Unless specified otherwise, the data on steelmaking capacity used for the author's calculations in Table 1 and elsewhere in this article are the data that appeared in the OECD's database on August 29, 2020, without prejudice to any possible revisions in this OECD database in the future.[8]

[8] The author's calculations in this article take into account the 2020 revisions of some countries' steelmaking capacity data for 2019 and the previous years as reflected in the OECD's database (version: 2020). *See* OECD, *supra* note 4, at 9.

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Steel overcapacity can be created and maintained by certain demand- and supply-side factors. "Cyclical overcapacity" is caused by low demand in the market due to economic recession or changes in consumption patterns.[9] With constant capacity and expected long-term global growth in steel demand being in the range of 1% per annum, it may take more than thirty years to fully absorb the current gap between capacity and demand.[10] Therefore, steelmaking economies have acknowledged at the international level that the adjustment process in this sphere will be "very lengthy" absent any concrete actions to reduce capacity.[11]

In addition to cyclical overcapacity, it is also important to look at "structural overcapacity" and associated government interventions. Structural overcapacity can be triggered and maintained by (i) excessive investment in capacity and (ii) high exit barriers. With respect to the first cause, firms may install more steelmaking equipment than necessary due to overly optimistic projections or assumptions about future market improvements when making long-term investment decisions. When governments provide subsidies, this incentivizes installing new, or maintaining old, capacity.[12] As for the second cause, steel plants are reluctant to exit the market or reduce capacity due to prohibitive costs of mill dismantling, clean-up and environmental adjustments, layoffs, and the servicing of debts. Exit barriers can also be exacerbated by governments' anti-closure policies and bailouts.[13]

In conclusion, the current steel overcapacity problem has both cyclical and structural elements.[14] Regardless of which of them apply, overcapacity leads to a waste of resources and loss of profit. With shrinking profits, companies are inclined to cut their costs by downgrading their environmental, health, safety, and labour standards and investing less in innovation.[15] When loss-making steel plants are supported by government, they are able to produce without reducing capacity and sell to already saturated markets—both at home and abroad—at low prices. This drives competitors out of business and causes trade distortions.

B. The Chinese Factor

[9] BRUN, *supra* note 3, at 20-21.
[10] GLOB. FORUM ON STEEL EXCESS CAPACITY [hereinafter GFSEC], MINISTERIAL REPORT: G20 GLOBAL FORUM ON STEEL EXCESS CAPACITY MINISTERIAL MEETING ¶ 38 (2018), https://g20.argentina.gob.ar/sites/default/files/gfsec_ministerial_report_2018_1.pdf [hereinafter GFSEC MINISTERIAL REPORT 2018].
[11] *Id.* ¶ 8.
[12] BRUN, *supra* note 3, at 22.
[13] *Id.* at 22-23.
[14] *See, e.g.*, Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 25 April 2017*, ¶¶ 199-219, WTO Doc. G/SCM/M/101 (Aug. 4, 2017).
[15] Jörg Wuttke, *The Dark Side of China's Economic Rise*, 8 GLOBAL POL'Y 62, 64 (2017).

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China is often considered as a key contributor to the present global steel overcapacity,[16] with the Chinese steel market conditions acknowledged as playing an "important global role" today.[17] China's industrial overcapacity in the 1990s[18] largely went unnoticed abroad because of the country's relatively shallow integration into the global economy.[19] But after its accession to the WTO in December 2001, China's substantial share (55% on average) in global steel overcapacity in 2002-2019 cannot be neglected any longer.[20]

Table 1 above suggests that China's annual steel capacity and production in 2009-2019 *vis-à-vis* the pre-crisis period (2000-2008) increased, on average, by 2.1 and 2.6 times respectively. China's capacity and production levels in both the pre- and post-crisis periods were by far the highest. Given China's significant share in world steel production (53%) and consumption (51%) today,[21] these developments in China cannot be overlooked when addressing global steel overcapacity.

China's steel overcapacity is driven by such factors as the desire of its regions to be self-sufficient and the resultant countrywide capacity duplication, overly optimistic demand predictions, production inefficiency of state-owned enterprises (hereinafter "SOEs"), as well as government stimuli like land and energy subsidies.[22] Recently, the Chinese authorities have taken supply-side measures to reduce capacity under specified targets, facilitate the removal of inadequate capacities, and prohibit illegal capacity investment.[23] Despite the acknowledged contribution of these steps to "significant" improvements in China's market conditions,[24] some remain sceptical about the effectiveness of the actions taken and the accuracy of Chinese statistics regarding capacity reductions.[25] Furthermore, China's

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[16] *See* BRUN, *supra* note 3, at 23-24; EUROPEAN UNION CHAMBER OF COMMERCE IN CHINA [hereinafter EUROPEAN CHAMBER], OVERCAPACITY IN CHINA: CAUSES, IMPACTS AND RECOMMENDATIONS 20-23 (2009); General Council, *China's Trade-disruptive Economic Model: Communication from the United States*, ¶¶ 3.4-.7, WTO Doc. WT/GC/W/745 (July 16, 2018).

[17] GFSEC MINISTERIAL REPORT 2018, *supra* note 10, ¶ 10.

[18] According to EUROPEAN CHAMBER (*supra* note 16, at 6), capacity utilization rates in many Chinese industrial sectors in the 1990s ranged between 35% and 45%.

[19] Wuttke, *supra* note 15, at 63.

[20] On the basis of the steelmaking capacity and steel production data used in this article, China's share in global steel overcapacity was, on average, 57% in 2000-2008 and 52% in 2009-2019.

[21] WORLD STEEL ASS'N, 2020 WORLD STEEL IN FIGURES 15 (2020).

[22] BRUN, *supra* note 3, at 23-24; EUROPEAN CHAMBER, *supra* note 16, at 22-23.

[23] GFSEC, REPORT ¶ 125 (2017), https://www.bmwi.de/Redaktion/EN/Downloads/global-forum-on-steel-excess-capacity-report.pdf?__blob=publicationFile [hereinafter GFSEC REPORT 2017].

[24] GFSEC MINISTERIAL REPORT 2018, *supra* note 10, ¶ 10.

[25] *See* GFSEC, 2020 GFSEC MINISTERIAL REPORT ¶¶ 62-70 (2020), https://www.steelforum.org/events/gfsec-ministerial-report-2020.pdf [hereinafter GFSEC MINISTERIAL REPORT 2020]; BRUN, *supra* note 3, at 36-44; Lu, *supra* note 3; Lingling Wei & Bob Davis, *In China, Beijing Fights Losing Battle to Rein in Factory Production: Some Chinese Localities Stymie Efforts to Curb Industrial Overcapacity and Pollution*, WALL STREET J. (July 16, 2014, 2:01 PM), https://www.wsj.com/articles/in-china-beijing-fights-losing-battle-to-rein-in-factory-production-1405477804.

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attempts to increase global demand for steel through its Belt and Road Initiative have been assessed by some authors as less fruitful than anticipated.[26]

While China's contribution to overcapacity is widely acknowledged, one study downplays associated international risks. In particular, it finds that, over 2005-2016, China's exports in steel and other manufacturing sectors experiencing overcapacity never exceeded 18% of total Chinese exports, and no more than 21% of world merchandise trade was in these sectors.[27] China itself dismisses concerns about cross-border damage by saying that it exports less than 10% of steel it produces as opposed to the two-digit numbers of some countries.[28] But given the sheer size of China's steel industry, one cannot rule out that even a small fraction of Chinese steel being exported may actually affect international steel markets significantly. Moreover, as most of the steel produced in China is used in this country, many steel producers abroad can lose their opportunities to sell in China—the world's biggest steel consumer [29] —because they may be outcompeted by government-backed Chinese producers that have overcapacity issues.

Despite the sizeable extent of Chinese steel overcapacity over the last two decades, in 2018 and 2019 China was able to increase capacity utilization to above 80% (Table 1).[30] It is noteworthy that this happened during the period of China's participation in a global forum discussed in Section III.

III. G20 RESPONSE TO STEEL OVERCAPACITY

At the Hangzhou summit in 2016, the G20 leaders recognized that current excess capacity of steel producers, "exacerbated by a weak global economic recovery and depressed market demand," was a global issue requiring collective action and that subsidies and other types of government support "can cause market distortions and contribute to global excess

[26] *See* Wuttke, *supra* note 15, at 65; David Dollar, *The AIIB and the "One Belt, One Road"*, BROOKINGS (2015), https://www.brookings.edu/opinions/the-aiib-and-the-one-belt-one-road/ (last visited Aug. 15, 2021).

[27] EVENETT & FRITZ, *supra* note 3, at 50-51.

[28] Trade Policy Review Body, *Trade Policy Review: China: Minutes of Meeting*, ¶ 5.16, WTO Doc. WT/TPR/M/375 (Nov. 21, 2018); Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 19 November 2019*, ¶ 95, WTO Doc. G/SCM/M/111 (Feb. 17, 2020) [hereinafter Minutes Doc. G/SCM/M/111].

[29] Nearly half of world steel consumption (apparent steel use for finished steel products) is concentrated in China. WORLD STEEL ASS'N, *supra* note 21.

[30] On the basis of the capacity and production data used in this article, capacity utilization rates of China's steel industry between 2000 and 2019 were as follows: 58% (2000), 60% (2001), 51% (2002), 45% (2003), 51% (2004), 55% (2005), 58% (2006), 61% (2007), 57% (2008), 59% (2009), 60% (2010), 63% (2011), 63% (2012), 68% (2013), 67% (2014), 66% (2015), 68% (2016), 75% (2017), 82% (2018), and 86% (2019).

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capacity and therefore require attention."[31] At the next summit in Hamburg in 2017, G20 members insisted on removing such market-distorting support measures and committed to "take the necessary actions to deliver the collective solutions that foster a truly level playing field."[32]

Importantly, the G20 summit in Hangzhou called for "increased information sharing and cooperation" through the formation of a new specialized global forum.[33] As a result, in December 2016, thirty-three economies—the G20 members and interested OECD members—representing over 90% of world steel production and capacity established a Global Forum on Steel Excess Capacity (hereinafter "GFSEC") with an extendable three-year mandate.[34] In October 2019, thirty-one member economies agreed to continue the GFSEC's work beyond 2019, but China and Saudi Arabia left the GFSEC.[35]

The GFSEC is an international platform for communication and adopting anti-overcapacity policies. It reports its work progress annually to the G20.[36] The OECD provides technical, analytical, and meeting facilitation to the GFSEC.[37] As the GFSEC's 2019 Chair puts it, the GFSEC is "neither an international negotiation body setting new rules nor a dispute settlement mechanism," rather it "aims at increasing transparency among members through the sharing of information, frank and informative discussion and exchange of views, which is expected to inform the choice of members to provide commitments on a voluntary basis."[38] The GFSEC transparency mechanisms include information exchanges on industrial developments and domestic policies affecting steelmaking capacity, as well as peer reviews of identified support measures and their contribution to

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[31] *G20 Leaders' Communiqué: Hangzhou Summit*, G20 RES. GROUP (Sept. 5, 2016), http://www.g20.utoronto.ca/2016/160905-communique.html [hereinafter *G20 Hangzhou Summit*].

[32] G20, G20 LEADERS' DECLARATION: SHAPING AN INTERCONNECTED WORLD 4 (2017), http://www.g20.utoronto.ca/2017/2017-G20-leaders-declaration.pdf (last visited Aug. 15, 2021).

[33] *G20 Hangzhou Summit*, *supra* note 31, ¶ 31.

[34] GFSEC REPORT 2017, *supra* note 23, ¶ 6, annex 4 ("Terms of Reference" of the GFSEC).

[35] GFSEC, *Ministerial Statement: Joint Call to G20 Leaders* (2020), https://steelforum.org/events/gfsec-ministerial-statement-october-2020.pdf. In China's view, the GFSEC completed its mission and should have terminated in 2019. In support of its stance, China highlighted several factors, such as the largest capacity reduction of China among the GFSEC participants, significant improvements in the Chinese steel market including the recent increase in capacity utilization to over 80%, predominantly inward-orientated nature of domestic steel production, the global financial crisis and its consequences as causes of steel overcapacity, and WTO-consistency of Chinese subsidies. *See Global Forum on Steel Excess Capacity 3rd Ministerial Meeting Held in Tokyo*, MINISTRY COM., PEOPLE'S REPUBLIC CHINA (Oct. 27, 2019, 1:52 PM), http://english.mofcom.gov.cn/article/newsrelease/significantnews/201911/20191102909884.shtml [hereinafter *Global Forum on Steel Excess Capacity 3rd Ministerial Meeting*].

[36] GFSEC REPORT 2017, *supra* note 23, annex 4.

[37] *Id.*

[38] GFSEC, CHAIR'S REPORT ¶ 11 (2019), https://www.meti.go.jp/english/press/2019/pdf/191026_001-2.pdf.

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overcapacity. Steel industry representatives are regularly invited to participate in the GFSEC's work and share their experiences and insights.[39]

Admitting that excess capacity creating "significant difficulties" for steel producers worldwide is "no longer simply a cyclical issue to be tackled as 'business as usual,'"[40] the GFSEC introduced a number of non-binding principles and policy recommendations aimed at internationalizing concerns and responses, enhancing market principles and industry reforms, and strengthening transparency. Six principles guiding the development of policy solutions can be summarized as (i) recognition of steel excess capacity as a global issue that requires a collective response; (ii) refraining from providing market-distorting subsidies and government support; (iii) fostering a level playing field via non-subsidizing and applying the same economic regulations and bankruptcy procedures to all enterprises regardless of ownership types; (iv) ensuring market-based outcomes through enhancement of open and competitive markets and market-driven resource allocation; (v) encouraging overcapacity-reducing industry adjustments; and (vi) ensuring greater transparency.[41] As for some key policy recommendations, first, governments should check if their framework conditions and institutional settings are adequate to secure proper market functioning consistent with the need for reducing excess capacity.[42] Second, they should remove, and refrain from adopting, market-distorting subsidies and other forms of support of capacity-expanding and loss-making steel plants, as well as improper export credits contributing to excess capacity. Specifically, they should remove relevant subsidies and other state stimuli, irrespective of whether these measures "are or are not subject to WTO agreements," potentially including even government interventions that are not covered by WTO rules.[43] Third, members' labour policies should aim to increase the employability of workers disadvantaged by industry restructuring.[44] Fourth, any state measure seeking to encourage mergers and acquisitions of enterprises should comply with effective competition law and market principles while not contributing to overcapacity.[45] Fifth, members should periodically provide updates on sectoral trends and policy actions. The GFSEC should regularly review, assess, and discuss how this information aligns with the defined principles.[46]

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[39] GFSEC MINISTERIAL REPORT 2020, *supra* note 25, ¶¶ 3, 7-9.
[40] GFSEC REPORT 2017, *supra* note 23, ¶¶ 2, 4; GFSEC MINISTERIAL REPORT 2018, *supra* note 10, ¶¶ 2, 4.
[41] GFSEC REPORT 2017, *supra* note 23, ¶¶ 34-48.
[42] *Id.* ¶¶ 49-53.
[43] *Id.* ¶¶ 54-58, 64-68, 72-73.
[44] *Id.* ¶¶ 61-63.
[45] *Id.* ¶¶ 69-71.
[46] *Id.* ¶¶ 74-75.

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It is important to note that the GFSEC's principles and policy recommendations were developed and adopted when China and Saudi Arabia were GFSEC members and thus shared the common concern about steel subsidies and the associated market distortions.

To sum up, the GFSEC provides an institutional "soft law" approach to addressing the overcapacity issue within the group of major steelmaking economies. It raises the world's awareness of the worrisome status quo in the steel sector, monitors related trends and policies, and develops policy guidelines. The GFSEC is confident in its review process which sheds light upon government practices and has led to member-specific/collective voluntary commitments to eliminate overcapacity and related enabling measures.[47] Direct participation of industrial stakeholders in the GFSEC's work ensures that their voices are heard, and policy responses are adopted accordingly. The involvement of the G20 and the OECD bolsters the reputation of the GFSEC process. During the first three-year tenure of the GFSEC (2017-2019), the global capacity utilization rates in the steel sector increased, on average, to 76% from 69% in the preceding three years.[48]

Because of the non-binding nature of GFSEC outcomes,[49] coordination with the WTO as a norm-setting and norm-enforcing organization on global trade is very important. Indeed, notwithstanding the specific subject matter, the GFSEC's agenda against distortive subsidies is arguably inspired by the WTO's "anti-distortionism" approach to trade regulation and can be linked to the multilateral subsidy regime. However, China has so far opposed bringing the issue of overcapacity subsidies to the WTO on the grounds that it is already covered by the GFSEC[50] and that overcapacity cannot be attributed to subsidies alone.[51] Nevertheless, when leaving the GFSEC in 2019, China declared that it was still "willing to conduct communication and cooperation with relevant parties in an open-minded way," and that "the relevant issues on steel industry and trade can be discussed through existing channels."[52] Thus, one cannot rule out the possibility that China eventually

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[47] GFSEC MINISTERIAL REPORT 2018, *supra* note 10, ¶¶ 43-48.
[48] Based on data in Figure 1 in this article.
[49] GFSEC MINISTERIAL REPORT 2018, *supra* note 10, ¶ 47.
[50] Council for Trade in Goods, *Minutes of the Meeting of the Council of Trade in Goods 30 June 2017*, ¶ 13.16, WTO Doc. G/C/M/129 (Nov. 8, 2017); Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 24 October 2017*, ¶ 2, WTO Doc. G/SCM/M/103 (Jan. 23, 2018) [hereinafter Minutes Doc. G/SCM/M/103]; Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 24 April 2018*, ¶ 159, WTO Doc. G/SCM/M/105 (Aug. 7, 2018) [hereinafter Minutes Doc. G/SCM/M/105]; Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 23 October 2018*, ¶¶ 114, 116, WTO Doc. G/SCM/M/107 (Feb. 6, 2019) [hereinafter Minutes Doc. G/SCM/M/107].
[51] Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 30 April 2019*, ¶ 64, WTO Doc. G/SCM/M/109 (Sept. 11, 2019) [hereinafter Minutes Doc. G/SCM/M/109].
[52] *Global Forum on Steel Excess Capacity 3rd Ministerial Meeting*, *supra* note 35.

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becomes more open to future in-depth WTO discussions that address overcapacity.

IV. THE WTO'S ROLE IN ADDRESSING STEEL OVERCAPACITY

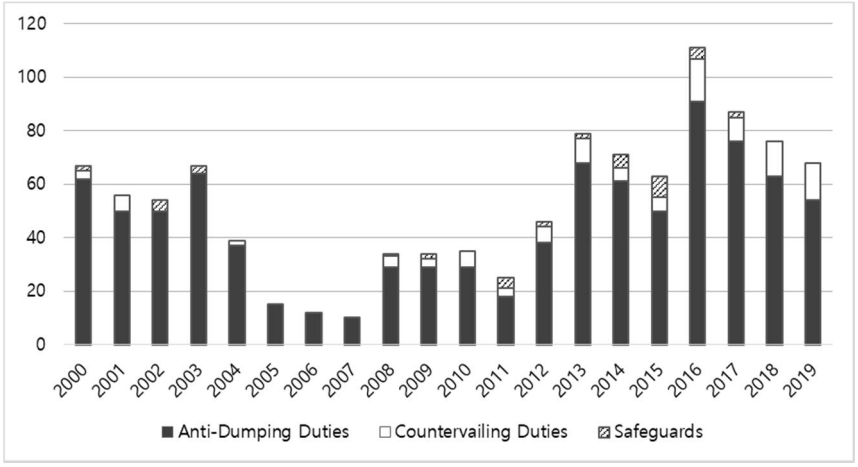
WTO law does not regulate overcapacity per se. Indeed, the WTO cannot "instruct" companies and industries not to sustain overcapacity. Rather, its rules on anti-dumping, countervailing, and safeguard measures (collectively "trade remedies") and subsidies apply to certain government interventions that counter or boost overcapacity affecting trade, as discussed in this section.

A. Trade Remedies and Overcapacity

Anti-dumping, countervailing, and safeguard measures can be adopted on the basis of national investigation results in order to protect domestic industries from injurious impacts of dumped, subsidized, and suddenly increased imports respectively.

WTO members imposed, on average, thirty-nine trade remedies on steel products per year between 2000 and 2008 and sixty-three between 2009 and 2019 (Figure 2). This upward trend occurred in the post-crisis period that is characterized by worldwide steel overcapacity and protectionist sentiments.

FIGURE 2: The Number of Trade Remedies Imposed on Steel Worldwide



SOURCE: Drawn by the author from data for HS72 (iron and steel) and HS73 (articles of iron or steel) in *I-TIP Goods: Integrated Analysis and Retrieval*

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of Notified Non-Tariff Measures, WTO, http://i-tip.wto.org/goods/default.aspx?language=en (data retrieved Aug. 29, 2020).

NOTE: Anti-dumping duties, countervailing duties, and safeguards account for 86%, 10%, and 4% of total 1049 measures (in 2000-2019) respectively.

In addition, trade protectionism involving steel is exacerbated by recent unilateral actions taken by the U.S. government. Since 2018, the U.S. has been levying increased duties on steel imports under Section 232 of the U.S. Trade Expansion Act officially to protect national security. The underlying domestic investigation took into account global steel overcapacity as addressed by the G20 and the GFSEC and found that imports should be restricted to enable U.S. steel mills to operate at 80% or more of their capacity. [53] However, several pending WTO disputes are currently challenging the legality of the U.S. steel tariff under the Agreement on Safeguards.[54]

In the WTO, China and Russia have argued that trade protectionism is a factor contributing to overcapacity today,[55] with trade protectionism in this context said to include "large numbers of trade remedy measures which negatively affected trade flows and hampered competition."[56] In this regard, one may think of at least two hypothetical scenarios. On the external side, firms could presumably be forced to produce below their capacity when their exports are subject to extensive trade remedies abroad and cannot find alternative markets. On the internal side, excessive trade remedies effectively protect domestic firms from import competition, which may make such firms reluctant to address their overcapacity. These and other relevant hypotheses require an in-depth empirical analysis that is beyond the scope of this article and can be left for future research.

1. Reaction of Trade Remedy Investigations to Overcapacity Abroad — In dumping determinations, investigating authorities of some jurisdictions replace values of distorted production costs of imported products with market-based ones, which eventually inflates dumping margins and the

[53] *See* U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED 4-5, 51-61, App. L (2018).

[54] As of August 15, 2021, there were nine WTO complaints in *U.S. — Certain Measures on Steel and Aluminium Products*, with a panel composed in DS564, DS556, DS554, DS552, DS548, DS547, and DS544 and a mutually agreed solution reached in DS551 and DS550. *See Chronological List of Disputes Cases*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Aug. 15, 2021).

[55] *See* Minutes Doc. G/SCM/M/111, *supra* note 28, ¶¶ 94, 97; Minutes Doc. G/SCM/M/109, *supra* note 51, ¶¶ 64, 73; Minutes Doc. G/SCM/M/107, *supra* note 50, ¶¶ 117, 119.

[56] Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 27 October 2020*, ¶ 155, WTO Doc. G/SCM/M/113 (Feb. 25, 2021) [hereinafter Minutes Doc. G/SCM/M/113].

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corresponding anti-dumping duties.[57] For example, the U.S. authority found in 2017 that certain oil country tubular goods from Korea were produced with steel inputs that were unusually cheap because of "significant overcapacity in Chinese steel production" which resulted in cheap steel exports to Korea.[58] The U.S. authority made upward dumping calculations taking into account this and other market distortions that together had allegedly created a "particular market situation" in Korea.[59]

A foreign country's government support that leads to industrial overcapacity—as discussed in the sections below—can be examined by investigators to determine the existence and amount of a countervailable subsidy in relation to affected imports from that country.

Finally, before applying a safeguard measure, an importing country's authority must demonstrate the existence of "unforeseen developments" that justify the use of such a measure.[60] In the 2019 decision imposing definitive safeguards on steel products, the European Union (hereinafter "EU") found that steel overcapacity was an "unforeseen development" because "excess production capacity increased at a time when it was economically expected to decrease," and an "unprecedented steelmaking overcapacity persist[ed] despite the important number of measures adopted worldwide to reduce it."[61] Some interested parties in that investigation contended that "overcapacity [was] well-known to the [European] Commission and could not be considered as an unforeseen development."[62] However, according to the WTO jurisprudence, a development must be unforeseen or unexpected at the time when members incurred the relevant obligations including tariff concessions as a result of trade negotiations,[63] rather than the time when the investigation took place. It is noteworthy that the panel in *India — Iron and*

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[57] *See, e.g.*, Sherzod Shadikhodjaev, *Russia and Energy Issues under the WTO System*, 50(4) J. WORLD TRADE 705, 716-22 (2016); Sherzod Shadikhodjaev, *Input Cost Adjustments and WTO Anti-Dumping Law: A Closer Look at the EU Practice*, 18(1) WORLD TRADE REV. 81, 82-90 (2019); Sherzod Shadikhodjaev, *Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment*, 21(4) J. INT'L ECON. L. 885, 889-901 (2018).

[58] Memorandum from James Maeder, Senior Dir., Office I, Antidumping & Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Sec'y, Enf't & Compliance 41 (Apr. 10, 2017) (on file with the United States Department of Commerce International Trade Administration) (regarding the Final Results of the 2014-2015 Administrative Review of Antidumping Duty on Certain Oil Country Tubular Goods from the Republic of Korea).

[59] *See id.* at 6, 40-44.

[60] Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶¶ 71-72, WTO Doc. WT/DS177/AB/R, WT/DS178/AB/R (adopted May 16, 2001).

[61] Commission Implementing Regulation (EU) 2019/159 of 31 January 2019: Imposing Definitive Safeguard Measures Against Imports of Certain Steel Products, 2019 O.J. (L 31) 27, ¶¶ 49, 52.

[62] *Id.* ¶ 51.

[63] Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 86, WTO Doc. WT/DS98/AB/R (adopted Jan. 12, 2000); Appellate Body Report, *Argentina — Safeguard Measures on Imports of Footwear*, ¶ 93, WTO Doc. WT/DS121/AB/R (adopted Jan. 12, 2000).

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Steel Products, in its "unforeseen developments" analysis, found that the Uruguay Round negotiators could not reasonably have expected a sharp increase in global steelmaking capacity in the 2010s and some other new developments in steel markets.[64]

2. Reaction of Trade Remedy Investigations to Overcapacity at Home — Overcapacity can be considered in injury determinations. Article 3 of the Anti-Dumping Agreement, Article 15 of the Subsidies and Countervailing Measures (hereinafter "SCM") Agreement, and Article 4 of the Safeguards Agreement stipulate that an investigating authority must examine various indices of injury, including the impact of imports on the *capacity utilization* of domestic producers, and establish a causal link between the investigated imports and injury. A decline in capacity utilization corresponds to an increase in overcapacity. The Appellate Body in *EU — Biodiesel (Argentina)* found that the concepts of "capacity utilization" and "overcapacity" were "logically related" in that "the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms."[65] In particular:

> [B]oth terms were used in a complementary manner to refer to the same phenomenon, namely, a situation in which production capacity exceeds production volume, resulting in excess or unused capacity. While "overcapacity" describes, in absolute terms, the production capacity that the EU domestic industry *had not* used, "capacity utilization" describes, in relative terms, the production capacity that the EU domestic industry *had* used.[66]

As explained in *China — Broiler Products (Article 21.5 — US)*, "[a] capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry)."[67] The panel in *EU — Biodiesel (Argentina)* admitted that productive assets "genuinely not available for use" could be excluded from the scope of valid capacity unless such unavailability of capacity is caused by the dumped imports themselves.[68] This and the following findings of the panel indirectly buttress the above idea about using effective (rather than nominal) capacity as the proper yardstick for calculating the disturbing extent of overcapacity:

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[64] Panel Report, *India — Certain Measures on Imports of Iron and Steel Products*, ¶¶ 7.95-.97, WTO Doc. WT/DS518/R (circulated Nov. 6, 2018).
[65] *EU — Biodiesel (Argentina)* Appellate Body Report, *supra* note 3, ¶ 6.143.
[66] *Id.* (emphasis in original).
[67] Panel Report, *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States: Recourse to Article 21.5 of the DSU by the United States*, ¶ 7.139, WTO Doc. WT/DS427/RW (adopted Feb. 28, 2018).
[68] Panel Report, *European Union — Anti-Dumping Measures on Biodiesel from Argentina*, ¶ 7.419, WTO Doc. WT/DS473/R (adopted Oct. 26, 2016).

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> It is not clear whether "idle capacity", as that term was used by the EBB and the EU authorities, corresponds to plants that entirely stopped producing on a permanent basis or plants that were temporarily shut down but could be put back into use once the necessity arose, or both of them, or any other types of plants. Of particular concern is the reference by the EU authorities in the Definitive Regulation to capacity which was "not immediately available for use". In principle, one would expect that the fact that certain capacity is momentarily unavailable is not sufficient to exclude it from the production capacity of a producer or of the overall industry. Where an investigating authority decides to exclude such production capacity from its evaluation, we would expect a plausible explanation of its reasons for doing so.[69]

Finally, if deterioration in the domestic industry was caused by pre-existing overcapacity, this should not be attributed to the targeted imports. The panel in *EC — Countervailing Measures on DRAM Chips* criticized the European Communities (hereinafter "EC") for its failure to separate the injurious effects of overcapacity that had already existed in the EC and worldwide from the injurious effects of subsidized imports.[70] Further, in *U.S. — Steel Safeguards*, the panel noticed that the U.S. authority had dismissed domestic industry overcapacity in its non-attribution analysis on the grounds that this factor contributed to injury in no "more than a minor way."[71] The panel held that the investigating authority should have at least explained what it viewed as the "minor" contribution of overcapacity to causing injury to the domestic industry.[72]

B. Subsidy and Overcapacity

Some WTO members argue that steel subsidies, often given in pursuit of strategic industry objectives, become a "dominant contributor" to overcapacity when the relevance of market forces diminishes due to the prevailing role of government as a leading economic player.[73] A

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[69] *Id.* ¶ 7.421 (footnote omitted).

[70] Panel Report, *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, ¶¶ 7.418-.422, WTO Doc. WT/DS299/R (adopted Aug. 3, 2005).

[71] Panel Reports, *United States — Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 10.494, WTO Doc. WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (adopted Dec.10, 2003).

[72] *Id.* ¶¶ 10.492-.496, 10.500.

[73] Committee on Subsidies and Countervailing Measures, *Role of Subsidies in Creating Overcapacity and Options for Addressing This Issue in the Agreement on Subsidies and Countervailing Measures*, WTO Doc. G/SCM/W/572/Rev.1 (Apr. 24, 2017) (Communication from

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government can directly or indirectly provide concessional loans, equity or under-priced raw materials to strategically important industries like steel in their infancy or even post-infancy stages without properly considering market conditions.[74] When such industries (or companies) start to falter due to recession or loan-repayment problems tied to low profitability, the government may wish to aid them further through various schemes of debt forgiveness, roll-over of loans from financial institutions, debt-to-equity swaps, or new equity infusions which leads to the build-up of additional capacity.[75] These and some other government practices causing overcapacity may, in principle, fall within the purview of the SCM Agreement and trigger anti-subsidy actions.

1. The Present State in the WTO Subsidy Regime — The SCM Agreement regulates industrial subsidies provided by the government or a public body in the form of a "financial contribution" or "income or price support" conferring a "benefit." It bans export subsidies and import-substitution subsidies and disciplines other types of harmful, or "actionable," subsidies that are "specific" to a particular enterprise, industry, or region. Members may react to a foreign subsidy through a multilateral track by challenging it using WTO dispute settlement procedures or via a national track by undertaking countervailing duty investigations.

In WTO case law, the SCM Agreement was invoked *vis-à-vis* subsidies that were involved in certain corporate reforms impacting productive capacity. In the case of a steel company's reorganization and related changes in ownership, subsidies given in the past for steelmaking capacity, not affected by later capacity reductions, may be countered even after such reorganization. In the national track, the investigating authority must establish a pass-through of the past subsidy to a reorganized entity in order to accurately calculate the amount of an existing subsidy (including its continuing benefit) for that entity to countervail.[76] By contrast, in the multilateral track where no precise quantification of subsidies is needed,[77] a complainant may successfully charge a pre-reorganization actionable subsidy of continuously causing an adverse effect to its interests even when

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Canada, the European Union, Japan, and the United States) [hereinafter WTO Doc. G/SCM/W/572/Rev.1].

[74] *Id.* Committee on Subsidies and Countervailing Measures, *Subsidies and Overcapacity: The Role of Below-Market Financing*, WTO Doc. G/SCM/W/575 (Apr. 13, 2018) (Communication from Canada, the EU, Japan, Mexico, and the U.S.) [hereinafter WTO Doc. G/SCM/W/575].

[75] WTO Doc. G/SCM/W/572/Rev.1, *supra* note 73; WTO Doc. G/SCM/W/575, *supra* note 74.

[76] Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, ¶ 724, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011) [hereinafter *EC and Certain Member States — Large Civil Aircraft* Appellate Body Report]. For subsidies' pass-through, *see* Sherzod Shadikhodjaev, *How to Pass a Pass-Through Test: The Case of Input Subsidies*, 15(2) J. INT'L ECON. L. 621 (2012).

[77] *EC and Certain Member States — Large Civil Aircraft* Appellate Body Report, *supra* note 76, ¶ 774, n.1769.

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that past subsidy itself is found to terminate after the reorganization. WTO jurisprudence suggests that an adverse effect analysis under the multilateral track, being distinct from a benefit analysis, checks the presence of the effect, not of the benefit.[78] As one can deduce from Article 7.8 of the SCM Agreement, where a panel or appellate ruling confirms the existence of a subsidy's adverse effects, a responding member can comply with that ruling by taking "appropriate steps to remove the adverse effects" (instead of withdrawing the already-terminated subsidy).

Two WTO cases are noteworthy for addressing countervailing measures on steel produced by privatized enterprises that previously received non-recurring subsidies—typically, one-off subsidies with lasting benefits—when they were under state ownership. In *U.S. — Lead and Bismuth II*, the U.S. authority determined that the British government's past equity infusions provided to the state-owned British Steel Corporation (hereinafter "BSC") continued to benefit the successor companies after the BSC had been privatized. But the Appellate Body found that because those companies had paid a fair market price for the productive assets they acquired from the BSC and subsequently used in manufacturing the product imported into the U.S., a subsidy given to the BSC could not be deemed to confer a "benefit" on the companies in question.[79] In *U.S. — Countervailing Measures on Certain EC Products*, the Appellate Body reversed the panel's conclusion that a privatization at arm's length and for fair market value "must lead" to the conclusion that any benefit from prior financial contributions ceases to exist with respect to the privatized producer. The Appellate Body acknowledged the possibility that the "fair market" price may actually be manipulated by the government—the seller in privatizations—through adopting "economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise." Therefore, there is only a *rebuttable* presumption of "no benefit" here.[80] Without an affirmative determination of any continuing benefit from a pre-privatization subsidy, countervailing that subsidy at the post-privatization stage would violate the WTO provisions that ban the imposition of countervailing duties on imports which are not proven to be directly or indirectly subsidized.[81]

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[78] *Id.* ¶¶ 709, 711-15.

[79] Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 68, WTO Doc. WT/DS138/AB/R (adopted June 7, 2000).

[80] Appellate Body Report, *United States — Countervailing Measures Concerning Certain Products from the European Communities*, ¶¶ 120-27, WTO Doc. WT/DS212/AB/R (adopted Jan. 8, 2003).

[81] These provisions include Articles 10, 19.1, 19.4, and 21.2 of the Agreement on Subsidies and Countervailing Measures (Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14) [hereinafter SCM Agreement] and Article VI:3 of the General Agreement on Tariffs and Trade 1994 (Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187) [hereinafter GATT] as stated in Panel Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and*

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The rebuttable presumption in the national track was confirmed *vis-à-vis* full, market-based privatizations.[82] *EC and Certain Member States — Large Civil Aircraft* dealt with multilateral track challenges against certain actionable subsidies. The EU argued that the rebuttable presumption should equally apply to partial privatizations and private-to-private sales of shares in a subsidized enterprise that are arm's length transactions for fair market value.[83] The Appellate Body agreed that the transactions in question were "intervening events" occurring after the grant of the subsidy that could indeed be "relevant" to an adverse effects analysis and have an impact on the link between the past subsidy and its alleged effects.[84] But because of differing opinions between its members, the Appellate Body failed to conclude whether the rebuttable presumption under the earlier jurisprudence could be applied to the transactions in question.[85] Nevertheless, it reversed the panel's finding that such transactions did not "extinguish" past subsidies because the panel had fallen short of sufficiently examining the surrounding circumstances, such as the prices paid and the fact that ownership/control was transferred to new owners.[86]

Finally, the WTO subsidy regime concerning state enterprises is also worth discussing as they contribute to over 30% of global crude steel production and employ about twice as many people in the steel sector as private enterprises.[87] When state banks finance steel production on non-commercial terms, or when state enterprises provide inputs to steel mills below market prices or supply under-priced steel to downstream industries, they may qualify as a subsidizing "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. The Appellate Body found that a public body "must be an entity that possesses, exercises or is vested with governmental authority."[88] The mere existence of a government's control, ownership, or majority shareholding in an entity does not necessarily show that that entity has been bestowed with governmental authority so as to qualify as a "public body."[89] This interpretation poses practical difficulties

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Bismuth Carbon Steel Products Originating in the United Kingdom, ¶ 6.86, WTO Doc. WT/DS138/R (adopted June 7, 2000). *See also* Sherzod Shadikhodjaev, *Indirect Subsidization Under WTO Disciplines: Financial Contribution to One Entity, Benefit to Another* 27-40 (Korea Inst. for Int'l Econ. Policy, Working Paper No. 11-04, 2011).

[82] Panel Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 7.226-.227, 7.248, WTO Doc. WT/DS316/R (adopted June 1, 2011).

[83] *EC and Certain Member States — Large Civil Aircraft* Appellate Body Report, *supra* note 76, ¶¶ 716, 718, 720.

[84] *Id.* ¶¶ 709, 716, 724.

[85] *Id.* ¶ 726.

[86] *Id.* ¶¶ 733, 736.

[87] OECD, *State Enterprises in the Steel Sector*, at 5, 18, OECD Doc. DSTI/SC(2017)10/FINAL (Dec. 20, 2018).

[88] Appellate Body Report, *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 317, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011).

[89] *Id.* ¶ 318.

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for countering "subsidies" granted by many state-owned/controlled enterprises. Interestingly, one Appellate Body member, in a separate opinion in *U.S. — Countervailing Measures (China) (Article 21.5 — China)*, disagreed with the past case law practice of focusing on the possession/exercise of governmental authority as "*the* essential criterion in every case" of verifying a public body.[90] Instead, that member suggested that "[a]n entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to convey financial value."[91]

2. The Ways Forward — As mentioned before, the GFSEC introduced some principles and recommendations for countering subsidies and other government support to tackle the problem of excess steel capacity. Even empirically, it is suggested that the GFSEC should focus on addressing distortive subsidies as a priority task given the scale of trade affected.[92] However, the GFSEC has a time-limited (albeit extendable) mandate, its policy guidelines are unbinding, and China as the world's biggest steelmaking country does not participate in the GFSEC process any longer. Therefore, the endorsement by the WTO is very important.

Although the GFSEC guidelines have some similarities to the WTO policy against market-distorting subsidies, the WTO subsidy regime is still not powerful enough to curtail state interference causing overcapacity in steel and other sectors. With this in mind, it is not surprising that the GFSEC intends to capture even WTO-uncovered government support as noted above.

Since the 2016 Hangzhou summit and the GFSEC's establishment, the EU, the U.S., Canada, Mexico, and Japan have made several joint submissions to explore the WTO's role in providing "multifaceted and long-term solutions" to the overcapacity problem.[93] They have suggested that the SCM Committee discuss the extent of subsidies' contribution to the creation of overcapacity, specific practices generating and maintaining overcapacity, as well as the gaps in the WTO legal system.[94] As a result, the issue of overcapacity subsidies remains included in the SCM Committee's agenda.[95] Moreover, during the trilateral meeting in Paris in 2018, the U.S., Japan, and

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[90] Appellate Body Report, *United States — Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China*, ¶ 5.247, WTO Doc. WT/DS437/AB/RW (adopted Aug. 15, 2019) (emphasis in original).

[91] *Id.* ¶ 5.248.

[92] *See* EVENETT & FRITZ, *supra* note 3, at 35-36.

[93] Committee on Subsidies and Countervailing Measures, *The Contribution of the WTO to the G20 Call for Action to Address Certain Measures Contributing to Overcapacity*, WTO Doc. G/SCM/W/569 (Oct. 14, 2016) (Proposal of the EU, Japan, Mexico, and the U.S.) [hereinafter WTO Doc. G/SCM/W/569]; WTO Doc. G/SCM/W/575, *supra* note 74.

[94] WTO Doc. G/SCM/W/569, *supra* note 93; WTO Doc. G/SCM/W/575, *supra* note 74.

[95] For recent records, *see, e.g.*, Minutes Doc. G/SCM/M/113, *supra* note 56, ¶¶ 130-62; Minutes Doc. G/SCM/M/111, *supra* note 28, ¶¶ 84-98.

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the EU decided to jointly work on developing stronger WTO rules capturing industrial subsidies. These rules would cover transparency, public bodies, SOEs, and "a targeted remedy to address subsidies related to excess capacity."[96] In the SCM Committee's discussion on overcapacity in 2019, these and other members stressed the need to close loopholes in the WTO subsidy rulebook.[97] In 2020, the U.S., Japan, and the EU issued a joint proposal to amend the existing WTO subsidy rules to better address industrial overcapacity and market distortions in general.[98] In 2021, the Group of Seven trade ministers issued a joint communiqué raising concerns about "harmful industrial subsidies, including those that lead to severe excess capacity, a lack of transparency regarding the state's role in the economy and the role of state enterprises in unfair subsidisation."[99] They also called for "the start of negotiations to develop stronger international rules on market-distorting industrial subsidies and trade-distorting actions by state enterprises," while recognizing "the critical importance of engaging with other WTO Members on these issues."[100]

These dynamics in international discourse can give impetus to revising the current WTO subsidy regime. Members can use at least two routes to achieve this. First, they can reactivate talks aiming to clarify and improve the SCM Agreement under the existing Doha negotiating mandate. Although the WTO Negotiating Group on Rules is currently progressing mainly on issues involving fisheries subsidies, it still has the *operative* authority to upgrade general subsidy rules.[101] Second, since 2018, members have been discussing ways to comprehensively modernize the WTO system across areas such as rulemaking, dispute settlement, monitoring, transparency, and development, with industrial subsidies and SOEs picked as urgent targets for norm-updating.[102] The "Ottawa Group on WTO Reform" consisting of like-

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[96] *Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union*, USTR (May 31, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting.

[97] *See* Minutes Doc. G/SCM/M/109, *supra* note 51, ¶¶ 58 (the U.S.), 60 (the EU), 61 (Japan), 62 (Canada), 69 (Norway), 70 (Chinese Taipei), 71-72 (Australia).

[98] *Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union*, USTR (Jan. 14, 2020), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union [hereinafter USTR Press Release].

[99] *G7 Trade Ministers' Communiqué: The Joint Communiqué Issued by the G7 Countries at the G7 Trade Track on 28 May 2021*, GOV.UK (May 28, 2021), https://www.gov.uk/government/news/g7-trade-ministers-communique.

[100] *Id.*

[101] WTO, Ministerial Declaration of 14 November 2001, ¶ 28, WTO Doc. WT/MIN(01)/DEC/1 (2001); Negotiating Group on Rules, *Report by the Chairman, H.E. Mr Wayne McCook to the Trade Negotiations Committee: 28 November 2017*, ¶¶ 1, 6, WTO Doc. TN/RL/28 (Nov. 29, 2017).

[102] *See, e.g.*, *Concept Paper of the EU on WTO Modernisation* (2018), https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf; *Strengthening and Modernizing the WTO: Discussion Paper*: *Communication from Canada*, WTO Doc. JOB/GC/201 (Sept. 24, 2018).

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minded WTO members and the China–EU joint working group on WTO reform are good examples of continuing cooperation in this direction.[103]

Although the process of consensus-building under either route will admittedly be very difficult, negotiations can succeed if necessary trade-offs are made among all members involved. For example, in its proposal on the WTO overhaul, China warned that "during discussions on subsidy disciplines, no special or discriminatory disciplines should be instituted on SOEs in the name of WTO reform."[104] To secure concessions from China on this and other sensitive issues, other members should try to accommodate China's calls for WTO law improvements in fields related to trade remedies, agricultural subsidies, special and differential treatment of developing countries, and so on.[105]

Alternatively or additionally, members could explore the possibility of negotiating a WTO multilateral or plurilateral agreement on steel with a view to creating tailor-made disciplines targeting overcapacity and subsidies in this particular sector alone. Unlike previous unsuccessful OECD talks regarding a steel subsidy agreement, [106] negotiating such a sectoral agreement in the WTO could have a better chance of success due to the broader extent of potential trade-offs across the entire spectrum of ongoing WTO negotiations on various topics. The proposed agreement itself could also offer enough room for compromise if it is pursued as a package of new subsidy disciplines (like those discussed below), tariff reductions/eliminations, and stricter anti-protectionism rules concerning steel. For greater flexibility, members could also use the scheduling approach—currently applied to agricultural subsidies—in setting member-specific caps (or bindings) on certain trade-distorting subsidies to be reduced over time. The relevant work and outcomes of the GFSEC could be taken into account in the drafting process.

With these movements and possibilities in mind, we will now proceed to weigh the options of improving the WTO rules on transparency, state enterprises, and overcapacity subsidies.

(a) Improvement of Transparency — Unlike in the GFSEC, transparency procedures regarding subsides in the WTO's order seem to work less effectively. Indeed, the "chronic low compliance" by WTO members with

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[103] *See Joint Communiqué of the Ottawa Group on WTO Reform*: *Communication from Canada*, WTO Doc. WT/L/1057 (Jan. 25, 2019); *The First Meeting of China–EU Vice-Ministerial Level Joint Working Group for WTO Reform*, MINISTRY COM., PEOPLE'S REPUBLIC CHINA (Oct. 11, 2018, 9:37 AM), http://english.mofcom.gov.cn/article/newsrelease/significantnews/201810/20181002794775.shtml.

[104] General Council, *China's Proposal on WTO Reform: Communication from China*, ¶ 2.37, WTO Doc. WT/GC/W/773 (May 13, 2019).

[105] *See id. See also infra* note 132 in this article and the related sentence in the main text.

[106] *See* Fabrizio Pagani, *Are Plurilateral Trade Agreements Possible Outside of the World Trade Organization?: On the Margins of the OECD Negotiations of Two Sectoral Subsidy Agreements*, 40(5) J. WORLD TRADE 797, 798-99 (2006).

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their obligation to notify industrial subsidies has become a "serious problem" that inhibits the normal functioning of the SCM Agreement.[107] In response to the information gap, members can, of course, counter-notify their peers' subsidies. They can also share information from non-WTO sources as was the case for an OECD paper (2019) on market distortions in aluminium highlighted in the SCM Committee's discussion on overcapacity subsidies.[108] But this is not enough. The WTO's work on subsidy transparency should improve so that what needs to be addressed becomes clearer.[109]

Since 2015, several members have made proposals on transparency. One suggestion is to allow the WTO Secretariat to prepare subsidy notifications.[110] As proposed in a recent communication, the Secretariat should help a requesting member compile and complete its notification and provide technical assistance to developing country members encountering notification difficulties. Further, it is also suggested that for continued inaction, a non-notifying member should face certain "administrative measures" that would, inter alia, prevent its representatives from being nominated to preside over WTO bodies or subject that member to a special charge to pay.[111] While the notion of punitive action is not popular especially among many developing countries,[112] the option of expanding the Secretariat's role seems more realistic. Indeed, its support to developing countries could help them cope with capacity building constraints. Moreover, the Secretariat would prepare requested notifications, as per the communication above, "in full consultation" with the requesting member.[113] This appears to grant the latter enough discretion when dealing with notification challenges.

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[107] *Subsidies Committee Members Again Cite Concerns on Lack of Transparency*, WTO (Apr. 30, 2019), https://www.wto.org/english/news_e/news19_e/scm_30apr19_e.htm.

[108] *See* Minutes Doc. G/SCM/M/109, *supra* note 51, ¶¶ 51-73.

[109] *See* WTO Doc. G/SCM/W/572/Rev.1, *supra* note 73; Minutes Doc. G/SCM/M/103, *supra* note 50, ¶ 203.

[110] *See, e.g.*, Negotiating Group on Rules, *Rules Negotiations — Transparency: Communication from the European Union*, at 2, WTO Doc. TN/RL/W/260 (July 16, 2015).

[111] General Council & Council for Trade in Goods, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements: Communication from Argentina, Australia, Canada, Costa Rica, the European Union, Israel, Japan, New Zealand, the Separate Customs Territory of Taiwan, Penhu, Kinmen and Matsu, the United Kingdom, and the United States*, WTO Doc. JOB/GC/204/Rev.4, JOB/CTG/14/Rev.4 (Nov. 24, 2020) [hereinafter WTO Doc. JOB/GC/204/Rev.4, JOB/CTG/14/Rev.4].

[112] *See, e.g.*, sceptical reactions of Bolivia, Brazil, South Africa, Egypt, Ecuador, Venezuela, Cuba, Chile, China, Ghana, and India to the U.S. proposal (General Council & Council for Trade in Goods, *Procedures to Enhance Transparency and Strengthen Notification Requirements Under WTO Agreements: Communication from the United States*, WTO Doc. JOB/GC/148, JOB/CTG/10 (Oct. 30, 2017)) on administrative measures for non-notifications. Council for Trade in Goods, *Minutes of the Meeting of the Council for Trade in Goods 10 November 2017*, ¶¶ 7.33-.37, 7.41-.42, 7.51-.53, 7.62, 7.64, 7.71, 7.73, 7.75, 7.77, 7.81, 7.84, WTO Doc. G/C/M/130 (Mar. 22, 2018).

[113] WTO Doc. JOB/GC/204/Rev.4, JOB/CTG/14/Rev.4, *supra* note 111.

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Under the current system, the Secretariat already plays an important role in preparing trade policy review reports. These reports may include some details on steel overcapacity where applicable.[114] Yet, the Secretariat could do more in handling trade information. As the WTO website offers datasets on various non-tariff measures but surprisingly none on industrial subsidies,[115] the Secretariat could create an electronic database on subsidies classified by members, sectors, types, and other pertinent parameters. Just as with other trade data published and updated by the Secretariat, the proposed subsidy database would simply streamline the already-disclosed information without prejudicing the legal status of covered measures. For this purpose, the relevant data could be taken from open WTO sources like members' (counter-)notifications about subsidies and countervailing actions, trade policy reports, and dispute settlement materials.[116] The steel-related information there could be used in evaluating the role of subsidies in the context of overcapacity.

(b) Stricter Disciplines on State Enterprises — Governments distort "competitive neutrality" in markets by granting advantages to state enterprises over private enterprises.[117] Many state steel enterprises benefit from preferential financing and assumption of liabilities, implicit government support, the softening of bankruptcy laws, tax concessions, in-kind support, and entrustment with monopoly or exclusive economic rights.[118] However, compared to private steel enterprises, state steel enterprises tend to have poorer economic performance, higher indebtedness, longer losses, and delayed restructuring.[119] State enterprises' larger investments in new steelmaking capacity and decreased capacity cuts in recent years are mainly attributable to subsidies and the political ramifications of closing plants.[120]

Partly due to the Appellate Body's narrow interpretation of what constitutes a "public body" above, the WTO has recently received

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[114] See, e.g., the Secretariat's Trade Policy Review Report on China, Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat: China*, at 145-48, WTO Doc. WT/TPR/S/375/Rev.1 (Sept. 14, 2018).

[115] *See Integrated Trade Intelligence Portal (I-TIP): Improving the Transparency of Trade Policy Measures*, WTO, https://www.wto.org/english/res_e/statis_e/itip_e.htm (last visited Aug. 15, 2021). The "I-TIP Goods" section provides some information for "export subsidies" under the Agreement on Agriculture, i.e., not the SCM Agreement (*I-TIP Goods: Integrated Analysis and Retrieval of Notified Non-Tariff Measures*, WTO, http://i-tip.wto.org/goods/Forms/Methodology.aspx (last visited Aug. 15, 2021)).

[116] SHERZOD SHADIKHODJAEV, INDUSTRIAL POLICY AND THE WORLD TRADE ORGANIZATION: BETWEEN LEGAL CONSTRAINTS AND FLEXIBILITIES 95 (2018).

[117] *See generally* Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options* (OECD Corp. Governance, Working Papers No. 1, 2011).

[118] OECD, *supra* note 87, at 9-11.

[119] *Id.* at 20-26.

[120] *Id.* at 27-28, 30.

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suggestions calling for an update of the multilateral trade rulebook on state enterprises.[121] Some regional trade agreements (RTAs) may provide food for thought.[122] This is especially true of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (hereinafter "CPTPP")—a mega-RTA representing "a crucial step in SOE rulemaking."[123] Like the WTO, the CPTPP does not prevent a party from establishing or maintaining state enterprises or SOEs,[124] but it imposes stricter limits on their market-distorting activities and could thus provide readily available templates for the WTO to consider.

Chapter 17 of the CPTPP contains several WTO-plus provisions that can be invoked to address steel overcapacity among SOEs. In particular, each contracting party must ensure that its SOE "acts in accordance with commercial considerations in its purchase or sale of a good or service,"[125] i.e., as the agreement explains, on such conditions and terms that privately owned enterprises in the relevant business or industry would normally take into account in their commercial decisions.[126] Unlike the comparable WTO rules, Chapter 17 of the CPTPP *defines* and imposes the "commercial

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[121] *See, e.g.*, Minutes Doc. G/SCM/M/109, *supra* note 51, ¶¶ 58-60, 62, 69, 72; Raj Bhala & Nathan Deuckjoo (D.J.) Kim, *The WTO's Under-Capacity to Deal With Global Over-Capacity*, 14(1) ASIAN J. WTO & INT'L HEALTH L & POL'Y 1, 15-22 (2019).

[122] In the WTO discussion on subsidies and industrial overcapacity, Japan, for example, said that exploring new WTO-plus provisions introduced by regional trade agreements (RTAs) "could be beneficial in addressing and discussing the issue of overcapacity." Minutes Doc. G/SCM/M/103, *supra* note 50, ¶ 208. For the "RTA vs WTO" relationship, *see, e.g.*, MULTILATERAL AND REGIONAL FRAMEWORKS FOR GLOBALIZATION: WTO AND FREE TRADE AGREEMENTS (Wonhyuk Lim & Ramon Torrent eds., 2005), https://www.kdi.re.kr/kdi_eng/pub/9916/Multilateral_and_Regional_Frameworks_for_Globalization:_WTO_and_Free_Trade_Agreements&pg=8&pp=100&mcd=000203 (last visited Aug. 15, 2021); Sherzod Shadikhodjaev, *The "Regionalism vs Multilateralism" Issue in International Trade Law: Revisiting the* Peru—Agricultural Products *Case*, 16(1) CHINESE J. INT'L L. 109 (2017); Sherzod Shadikhodjaev, *Duty Drawback and Regional Trade Agreements: Foes or Friends?*, 16(3) J INT'L ECON. L. 587 (2013); Sherzod Shadikhodjaev, *Checking RTA Compatibility with Global Trade Rules: WTO Litigation Practice and Implications from the Transparency Mechanism for RTAs*, 45(3) J. WORLD TRADE 529 (2011).

[123] Julien Sylvestre Fleury & Jean-Michel Marcoux, *The US Shaping of State-Owned Enterprise Disciplines in the Trans-Pacific Partnership*, 19(2) J. INT'L ECON. L. 445, 451 (2016).

[124] *Consolidated TPP Text – Chapter 17 – State-Owned Enterprises and Designated Monopolies*, GOV'T CAN., https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/17.aspx?lang=eng (last visited Aug. 15, 2021) [hereinafter CPTPP]. The term "state enterprise" means "an enterprise that is owned, or controlled through ownership interests, by a Party" (CPTPP art. 1.3). The term "state-owned enterprise" covers:

> [A]n enterprise that is principally engaged in commercial activities in which a Party: (a) directly owns more than 50 per cent of the share capital; (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

Id. (art. 17.1).

[125] *Id.* (art. 17.4.1(a)).

[126] *Id.* (art. 17.1).

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considerations" requirement upon SOEs *in addition to* (rather than as part of) a non-discrimination requirement.[127] It follows that if SOEs with overcapacity sell steel at such a price and/or in such a quantity that no private steelmaking enterprise in a similar situation could normally afford, they may be acting in an uncommercial way, contrary to the CPTPP.

Furthermore, the CPTPP contains provisions on "non-commercial assistance" to SOEs,[128] which, to some extent, correspond to the SCM Agreement's definition of "financial contribution." But they also capture assistance provided *by* state enterprises or SOEs (in addition to assistance by governments) and *to* SOEs as the only/major recipient, namely when "the Party or any of the Party's state enterprises or state-owned enterprises:

> (i) explicitly limits access to the assistance to the Party's state-owned enterprises;
> (ii) provides assistance which is predominately used by the Party's state-owned enterprises;
> (iii) provides a disproportionately large amount of the assistance to the Party's state-owned enterprises; or
> (iv) otherwise favours the Party's state-owned enterprises through the use of its discretion in the provision of assistance[.][129]

In other words, when targeting non-commercial assistance by state enterprises or SOEs, the CPTPP does not require these entities to be a *public body* as is mandated under the SCM Agreement. Moreover, the CPTPP disciplines non-commercial assistance given *specifically* to SOEs and thus introduces a new concept of SOE-specificity of covered subsidies not contemplated by the SCM Agreement. In a sense, this feature addresses the GFSEC's concern about the possibility of steel SOEs obtaining "undue advantages" because of their close ties with the government.[130] It is also noteworthy that China's WTO Accession Protocol already provides for a similar notion of SOE-specificity of subsidies, so it seems unlikely that China will oppose the introduction of the SOE-specificity concept into the

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[127] Article XVII:1 of the GATT on state trading enterprises provides in subparagraph (a) that a state enterprise must, in its purchases or sales involving imports or exports, comply with "the general principles of non-discriminatory treatment"; and states in subparagraph (b) that subparagraph (a) "shall be understood to require" such enterprise to purchase or sell "solely in accordance with commercial considerations." According to the Appellate Body, subparagraph (b) is "dependent upon the content of subparagraph (a)" and "operates to clarify the scope of the requirement not to discriminate in subparagraph (a)." Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain*, ¶ 89, WTO Doc. WT/DS276/AB/R (adopted Sept. 27, 2004). In contrast, Article 17.4.1 of the CPTPP does not create such a dependence link between commercial considerations and non-discrimination. CPTPP, *supra* note 124 (art. 17.4.1).

[128] CPTPP, *supra* note 124 (art. 17.1).

[129] *Id.*

[130] GFSEC REPORT 2017, *supra* note 23, ¶ 41.

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WTO subsidy rules.[131] On September 16, 2021, China formally applied to join the CPTPP,[132] which may potentially make China amenable to the idea of CPTPP-like amendments to WTO law on state enterprises.

(c) Restricting Overcapacity Subsidies — During its first tenure (2017-2019), the GFSEC adopted an illustrative list of undesirable state measures contributing to excess capacity—cited in the SCM Committee's minutes[133]—including non-market preferential financing (debt forgiveness and so on); non-market equity infusions and conversions including debt-for-equity swaps; grants, awards, and cost refunds; tax benefits; non-market assumptions of liabilities, fees/charges by governments or government-related entities; governments' provision of goods/services and input support inconsistent with market terms; and distortive discretionary policy measures or non-application of market-based policy measures.[134] Introducing additional constraints against overcapacity subsidies, among these measures, into the WTO framework could reinforce this "soft law" blacklist of the GFSEC.[135]

In a recent WTO seminar, it was suggested that the list of prohibited subsidies under the SCM Agreement be extended to certain below market value financing schemes that cover operating losses or debt, subsidies to insolvent or ailing enterprises without a restructuring plan, and input subsidies.[136] Similarly, in the 2020 trilateral meeting, the U.S., Japan, and the EU proposed to unconditionally ban unlimited guarantees, subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan, subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries involving overcapacity, and certain direct forgiveness of debt.[137]

However, putting a complete taboo on additional government actions is too much of a politically sensitive option for all WTO members to accept. At a minimum, members could explore the possibility of placing a temporary, but legally binding, moratorium on subsidizing whenever overcapacity persists at the global level.[138] The moratorium could be multilateral or

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[131] *See* WTO, Accession of the People's Republic of China: Decision of 10 November 2001, § 10.2, WTO Doc. WT/L/432 (Nov. 23, 2001) (China's WTO Accession Protocol).

[132] *China Officially Applies to Join CPTPP*, XINHUANET (Sept. 17, 2021, 12:07 AM), http://www.news.cn/english/2021-09/17/c_1310192180.htm.

[133] Minutes Doc. G/SCM/M/111, *supra* note 28, ¶ 88.

[134] GFSEC REPORT 2017, *supra* note 23, ¶ 57.

[135] Reinforcement of external "soft law" is not new to WTO subsidy law. In particular, Annex I(k) of the SCM Agreement supports the OECD arrangement on export credits.

[136] Minutes Doc. G/SCM/M/103, *supra* note 50, ¶¶ 200-02.

[137] USTR Press Release, *supra* note 98.

[138] The WTO already applies moratoriums to customs duties on electronic transmissions (General Council, *Work Programme on Electronic Commerce: General Council Decision: Adopted on 10 December 2019*, WTO Doc. WT/L/1079 (Dec. 11, 2019)) and to non-violation and situation complaints under the Agreement on Trade-Related Aspects of Intellectual Property Rights (General

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plurilateral, affect all or some types of subsidies, and remain in force until the situation around overcapacity is rectified. The idea is to incorporate the GFSEC's recommendation to "refrain from" market-distorting subsidization.[139] The moratorium would, for example, oblige members to discontinue financial contributions (tax exemptions/reductions, grant and loan payments, and so on) under the existing subsidy schemes[140] and/or avoid granting new financial contributions benefiting specific recipients. Pre-moratorium subsidies—past financial contributions with *continuing* benefits—would remain countervailable and WTO-challengeable as usual. Members could request the WTO Secretariat to prepare analytical reports on market developments affected by overcapacity. Subject to members' authorization, the Secretariat could cooperate with the OECD that has experience in supporting the GFSEC and researching relevant topics. Such Secretariat reports would facilitate members' understanding of the current state of affairs and help them decide whether or not to impose, extend, or end the moratorium. Given global concerns surrounding the current steel overcapacity situation, WTO members could agree to suspend distortive subsidies in this field if complete removal is not feasible.

Finally, Article 6.1 of the SCM Agreement, inoperative since 2000, used to provide a rebuttable presumption relating to the existence of "serious prejudice" *vis-à-vis* some actionable subsidies that, in our context, may cause steel overcapacity: "subsidies to cover operating losses sustained by an industry," certain "subsidies to cover operating losses sustained by an enterprise," and "direct forgiveness of debt." A complainant today can no longer presume, but must prove, the existence of serious prejudice linked to these subsidies. For this reason, it was opined in the WTO that this "exceedingly exacting" standard for determining serious prejudice "especially following the lapse of Article 6.1" has weakened the current subsidy regime's ability to address the overcapacity problem.[141] Therefore, reintroduction of the Article 6.1 presumption—whether in its original or an updated form—would be a worthwhile step indeed. Importantly, this option

Council, *TRIPS Non-Violation and Situation Complaints Moratorium: General Council Decision: Adopted on 10 December 2019*, WTO Doc. WT/L/1080 (Dec. 11, 2019)).

[139] GFSEC REPORT 2017, *supra* note 23, at 12 (Box "Key recommendations (linked to principles I and II, also in part to IV)" after ¶ 53).

[140] Previously, the Appellate Body mentioned "the basic proposition that a subsidy has a life, which may come to an end, either through *the removal of the financial contribution* and/or the expiration of the benefit." *EC and Certain Member States — Large Civil Aircraft* Appellate Body Report, *supra* note 76, ¶ 709 (emphasis added).

[141] Committee on Subsidies and Countervailing Measures, *Minutes of the Regular Meeting Held on 25 October 2016*, ¶ 235, WTO Doc. G/SCM/M/99 (Jan. 16, 2017). *See also* Minutes Doc. G/SCM/M/103, *supra* note 50, ¶ 199; Minutes Doc. G/SCM/M/107, *supra* note 50, ¶ 102.

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would reconcile conflicting interests among members by addressing the listed subsidies in a stricter way without prohibiting them outright.[142]

V. CONCLUSION

Steel overcapacity is a firm-level phenomenon, but it is of concern to international policy-making to the extent that government interventions are involved. Because of its lasting effects and potentially recurring nature, this issue requires sustained solutions. This is recognized at the G20 level and beyond. The GFSEC's "soft law" approach has the merit of explicitly drawing the attention of the world community to this problem and providing a topic-specific platform for state-to-state communication, monitoring, and voluntary commitments. By contrast, the WTO has established binding rules and enforcement mechanisms to address trade-affecting government measures that cover a broad range of economic sectors, including steel.

The GFSEC and the WTO are complementary and supportive[143] in at least three ways. First, the GFSEC operates effective transparency mechanisms through stimulating information sharing among its members, discussions with steel industry stakeholders, and peer reviews of domestic measures. Thus, it may fill some information gaps in the WTO with respect to steel subsidies. Second, China and Saudi Arabia withdrew from the GFSEC, but the WTO provides an additional forum for cooperating with these and other non-GFSEC economies on the overcapacity issue. Third, preceded by the multilateral trading system, the GFSEC's policy against certain market distortions that affect trade is naturally inspired by the WTO's principles and rules. At the same time, the GFSEC process also inspires (some of) its members to discuss overcapacity at WTO meetings and propose updating the subsidy rulebook.

This article has analysed some ways of improving the WTO system with regard to transparency, SOEs, and overcapacity subsidies. The suggested steps could help the WTO regime more effectively curtail state interference, which causes overcapacity in steel (and other) industries, and reinforce the relevant policy guidelines of the GFSEC. It is hoped that these reforms will contribute to the worldwide battle against steel overcapacity, enhance the durability of international solutions in this field, and eventually strengthen the overall relevance of the WTO in global governance.

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[142] *See* Gary Horlick & Peggy A. Clarke, *Rethinking Subsidy Disciplines for the Future: Policy Options for Reform*, 20(3) J. INT'L ECON. L. 673, 686 (2017).

[143] *See, e.g.*, WTO Doc. G/SCM/W/572/Rev.1, *supra* note 73; Minutes Doc. G/SCM/M/105, *supra* note 50, ¶ 134.

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