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How "safe" is the WTO "safe haven"? A need to modernise disciplines for officially supported export credits

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Abstract

Purpose – This paper aims to draw attention to an urgent need for reform of the regulatory framework of the broader export credit system to ensure a new and comprehensive "safe haven" for officially supported export credits. The purpose is to analyse the complex debate on disciplines of the World Trade Organization (WTO) and the Organisation for Economic Co-operation and Development (OECD), creating a point of reference for future analysis of and debates around the "carve-out clause" of the Agreement on Subsidies and Countervailing Measures (ASCM) and a "safe haven" in a broader sense.

Design/methodology/approach – This paper takes inspiration from legal, economic and political science literature on subsidies and officially supported export credits, as well as on legal documents related to the WTO and the OECD. It examines the WTO subsidy and the OECD export credits framework, focusing on main legal and economic governance aspects. Then, it gives a critical analysis how "safe" a "safe haven" in a broader sense might be, assessing frictions of and solutions for the fundamentally different set of disciplines, limitations, financial instruments not covered by OECD regulations, as well as new challenges related to climate finance.

Findings – After assessing the challenges regarding the "carve-out clause" of the WTO subsidy framework and two tracks aiming to create a new "safe haven", requirements for comprehensive disciplines for officially supported export credits are pointed out. Furthermore, several misunderstandings and mistakes appearing in the debate are clarified.

Research limitations/implications – Desktop research rather than empirical field work.

Practical implications – This paper creates awareness for governments and exporters how to deal with a complex system of interrelated disciplines. The question, how "safe" a "safe haven" in a broader sense can be, has not been resolved yet. Some authors focus on the WTO disciplines not taking into account the need for an effective matching procedure of the Arrangement on Officially Supported Export Credits (the Arrangement). Furthermore, the introduction of several new pre-export financing programmes and the growing significance of climate finance-related instruments for export credit agencies creates both opportunities and challenges. This paper can serve as a reference point for the academic debate and further research. This paper also offers newcomers to the topic a comprehensive overview.

Originality/value – Although the "carve-out clause" and the Arrangement have been much discussed, there is limited literature review structuring both existing and new aspects of the debate, assessing (dis) advantages of arguments and interpretations. This paper both adds to the corpus of literature about the ASCM, as well as the Arrangement, and takes this corpus as the object of its analysis.

Keywords World Trade Organization, ASCM, Subsidies, OECD, Arrangement, ECA, Export credits

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Introduction

The global economy in the 21st century would not exist but for a complex framework of institutions, rules and regulations, which international organisations, governments and the private sector have created over the past 70 years. Signed in 1947, the creation of the General Agreement on Tariffs and Trade (GATT) was one of the major achievements after the Second World War. Numerous multilateral bodies have adopted a rule-based approach since the 1950s that have given states increasing confidence to liberalise their economies and diminish subsidies or reduce tariffs, quotas and other trade barriers, thus levelling the playing field by providing a strong framework seeking to discipline subsidies and provide clarity and predictability to the international trade regime (Mukherjee *et al.*, 2014). Growing out of the GATT in 1995, it is the aim of the World Trade Organization (WTO) to support manufacturers, services providers and thus exporters and importers to conduct their business. In providing legal rules for international commerce, the overall purpose is to support cross-border trade flow by removing obstacles and ensuring transparent and predictable rules of global trade. The international trade regime today has a strong legal basis, a sustainable organisational structure, and an effective dispute settlement process (Klasen, 2017; Hoekman and Mavroidis, 2016; Delimatsis, 2014; Hale *et al.*, 2013; Capling and Higgott, 2009).

Furthermore, the Organisation for Economic Co-operation and Development (OECD) plays a crucial role for the broader trade regime. It has both political and technical elements, acting by soft law and peer pressure, mostly with non-binding instruments producing standards and models (Erkkilä and Piironen, 2014; Tyler, 2011; Ruffing, 2010; Buffone, 1984; Frenkel and Fontheim, 1981). In particular, the Arrangement on Officially Supported Export Credits (the Arrangement) provides a regulatory framework for the orderly use of officially supported export credits. It first came into existence in 1978 and has been regularly modified and updated to reflect the needs of Participants as well as market developments. Three main aspects made standards for trade and export finance governed by the Arrangement successful: Comprehensive rules, real-time transparency and an ongoing evolution of rules to meet the needs of both governments and markets (Drysdale, 2015; Cotter, 2012; Moravcsik, 1989). The role of the Arrangement as a key text in international public finance law is discussed by Jennekens (2022). This paper serves not so much as to repeat an argument about the three main aspects of the Arrangement, but more to show how a "safe harbour" acts.

Both frameworks have to deal with significant challenges particularly because of a USA–Europe–China triangle in an increasingly multipolar world, institutional inertia of the WTO and the OECD including asymmetric deals, as well as a rising interdependence between trade policy and climate action (van Asselt, 2021; Lewis, 2014; Reyes, Wooster and Shirrell, 2014; Wilkinson *et al.*, 2014; Narlikar, 2010; Albin, 2008). From a trade law perspective, as well as from a global economic governance perspective, the unsettled relationship and unclear reciprocity between the Agreement on Subsidies and Countervailing Measures (ASCM) and the Arrangement play a crucial role, circling around the "safe haven". In addition, challenges are closely connected to the inability of the OECD to include emerging economies such as China and India, and the intense discussion about the modernisation of the regulatory framework of the broader export credit system. This research analyses the complex debate on officially supported export credit regulations and discusses an urgent need for alignment. The aim is to create a point of reference for future analysis of and debates around a broader understanding of a "safe haven".

The article proceeds as follows: to allow a broader view and answer the question how "safe" a comprehensive WTO "safe haven" is, we will first examine the WTO subsidy

framework. Then, we assess the Arrangement background and setting. The following section examines the main legal aspects of the ASCM with regard to different forms of official export credit support. Then, we give a critical analysis how "safe" a "safe haven" in a broader sense might be, discussing frictions due to the fundamentally different set of disciplines, limitations, new financial instruments not covered by the Arrangement, as well as new challenges related to climate finance. The final section concludes, discussing how a comprehensive "safer haven" could be developed by any future modification of global trade governance with a new framework or an Arrangement modernisation.

The World Trade Organization subsidy framework

The ASCM of the WTO addresses multilateral disciplines regulating the provision of subsidies (as well as countervailing measures). Unlike the Tokyo Round Subsidies Code, Articles 1 and 2 of the ASCM define the concept of subsidy and specificity "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures" (US-Countervailing Duty Investigation on DRAMs [Appellate Body], paragraph 115, citing US-Softwood Lumber IV [Appellate Body], paragraph 64). The definition includes three elements, i.e. a financial contribution, by a government or any public body within the territory of a member of the WTO and which confers a benefit. For a subsidy to exist, all three elements must be satisfied.

A financial contribution can be a direct transfer of funds such as grants, equity or loans. The ASCM also includes potential direct transfers of funds or liabilities such as financial guarantees and insurance. In addition, fiscal incentives, the provision of goods or services other than general infrastructure, as well as the purchase of goods can be defined as a financial contribution. Furthermore, the financial contribution must be attributed to a government or a public body such as a public development bank or government agency. The ASCM also includes measures of sub-national governments as well as state-owned companies (Van den Bossche and Prévost, 2021; Matsushita *et al.*, 2015; Rubini, 2009). In short, all possible incarnations of the state are covered. Unless there is a "benefit conferred" by the financial contribution, it is not a subsidy. If and when financial contributions have made recipients "better off" than they would otherwise have been, for example, in a case of a subsidised loan, this benefit exists.

> "Specificity" of a financial contribution by a government or any other public body is a condition both for unilateral and multilateral actions against subsidies. Four types of "specificity" exist within the meaning of the ASCM: subsidies can be enterprise-specific (i.e., targeting a particular company), industry-specific (i.e., targeting a particular sector), regional-specific (i.e., targeting companies in specific regions) or prohibited subsidies (i.e., targeting goods exports or domestic inputs) (Hoekman and Mavroidis, 2016; Matsushita *et al.*, 2015; Rubini, 2009). With regard to prohibited subsidies (Article 3 ASCM), this consists of subsidies contingent, in law or in fact, on export performance (i.e., "export subsidies"); or subsidies contingent upon the use of domestic over imported goods (i.e., "local content subsidies").

The ASCM also regulates actions countries can take to counter the effects of subsidies provided by others (Chorev, 2005). One possibility is to use the dispute settlement procedures of the WTO to withdraw the subsidy or remove the adverse effects. Another possibility is to launch independent investigations and apply countervailing duties on subsidised imports which are hurting a producer in the respective home country.

The arrangement on officially supported export credits

The main purpose of the Arrangement is to provide a regulatory framework for the orderly use of officially supported export credits. Art. 1(2) mentions that the Arrangement

(current version January 2022) seeks to foster a level playing field, preventing a race to the bottom by taking away the possibility to provide officially supported export credits below a minimum level set by the Arrangement. It is a gentlemen's agreement among Australia, Canada, the European Union (EU), Japan, Korea, New Zealand, Norway, Switzerland, Turkey, the UK and the USA (Art. 3 Arrangement). Despite missing formal treaty status, research shows that Participants comply with Arrangement terms (Cotter, 2012; Coppens, 2009; Levit, 2004). Since 1978, the Arrangement has been regularly modified and updated to reflect needs of Participants as well as market developments. According to Art. 5, it governs:

> [. . .] all official support [. . .] for export of goods and/or services [. . .] which have a repayment term of two years or more.

The scope of application is official support provided by or on behalf of a government, for example, via export credit guarantees or insurance ("pure cover"), as well as direct credit/financing, refinancing or interest rate support. Looking at first steps towards the Arrangement in the 1970s and the establishment in 1978, it was intended to bring minimum interest rates for subsidised parts of export credit and maximum repayment periods into being (Coppens, 2009; Geberth, 1998; Buffone, 1984). Art. 5 contains financing support not only facilitated by export credit agencies (ECAs) but also made by or at the direction of a government or any public body of a Participant. Official support includes, in particular, supplier credits, buyer credits and more complex offerings such as project finance, aircraft finance or ship finance (Auboin, 2020; Alexopoulos and Stratis, 2016; Grath, 2016; Cowan, 1986).

The Arrangement contains interest rate provisions, relevant for the "safe haven", but also contains, for example, rules on down payments (Art. 11), maximum repayment terms (Art. 12), minimum premium rates (MPRs) for credit risk (Art. 22) and inter-Participant transparency (Part 4). Furthermore, there are articles that regulate actions Participants can take if countries do not abide by the Arrangement rules. In particular, there is a matching process included in Art. 19 and Art. 40 of the Arrangement with procedures described in Art. 43. Matching allows Participants to measure up to the terms of officially supported export credits from another participant or a non-Participant outside of the terms of the Arrangement (Dawar, 2020; Levit, 2004). The Arrangement, however, has no dispute settlement mechanism comparable to the WTO. The core around which the Arrangement arguably revolves is transparency. By allowing fellow Participants to know what kind of support they are providing, the Participants in essence lock minimum standards in place.

Export credits, the Agreement on Subsidies and Countervailing Measures and the arrangement

Many governments focus on internationalisation and export-led growth policies. The first export credit agency was established in the UK in 1919, followed by other industrialised countries such as Spain, Denmark, Germany and Italy. In recent decades, because of limited private offerings and export-related policy goals, many emerging economies have also started to provide public export credit and insurance facilities (Liao, 2021; Oramah, 2020; Wright, 2011; Gianturco, 2001). Today, there are three main forms of government credit insurance operations: ECAs can be in a form of a government department, act as an independent government agency or be embedded in a commercial organisation, acting on behalf and for the state (Kim, 2020; Klasen, 2020; Coppens, 2009). They have the mandate to finance and insure or guarantee exports, fostering trade and helping to secure jobs in the domestic economy (Felbermayr and Yalcin, 2013; Klasen, 2011). The standard principle is that the agency is not competing with commercial institutions in the provision of financing or insurance and guarantees (Bischoff and Klasen, 2012; Gianturco, 2001). However, there

can be a benefit because the financial contribution of an ECA might make the exporter "better off" as shown by the Appellate Body in Canada-Aircraft when developing the "private investor test": The Appellate Body ruled that:

> [. . .] there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market. (Canada-Aircraft [Appellate Body], paragraph 157)

As discussed above, a subsidy is *per se* prohibited if it is conditional upon export performance according to Article 3 of the ASCM. Annex I of the ASCM offers an illustrative list of export subsidies subject to the disciplines of the ASCM. "Pure cover" support, i.e. guarantees or insurance, is mentioned in Annex I item (j) of the ASCM:

> The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

As discussed by Kim (2020), export credit guarantee or insurance programmes by official ECAs (ECAs in a form of government departments or public bodies) thus might constitute prohibited subsidies under Annex I item (j) of the ASCM which can be countervailable. Item (k) indicates officially supported export credits, i.e. direct credit/financing or refinancing, or interest rate support, as a type of illegitimate state aid conduct being inherently trade distorting:

> The grant by governments [. . .] of export credits at rates below those which they actually have to pay for the funds so employed [. . .], or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

However, Annex I item (k) of the ASCM also includes a rare exemption, saving export credits when they are compliant with the relevant interest rate provisions of the Arrangement. It allows WTO members to pursue an export credit practice which would otherwise be prohibited or bound to strict rules. This is the only exception mechanism applicable to export credits and has often been labelled in the past as the "safe harbour" (Ahmad, 2021; Kim, 2020; Coppens, 2009). It is also referred to as the "safe haven", or the "carve-out clause". Item (k) states:

> Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

This carveout for an undertaking to which at least 12 original members to this agreement were parties in 1979, or its successor, or for a practice done by another member (a non-Participant) applying the interest rate provisions from this undertaking, is written in such a way that only the Arrangement (or its successor adopted by the original at least 12 members to the ASCM) can trigger it. The exception was included by the Tokyo Round negotiators (Kim, 2020; Nedumpara, 2013; Nedumpara and Sharma, 2013; Coppens, 2009).

How safe is a "safe haven" in a broader sense?

Governments and exporters as a whole face significant challenges in the 21st century. Although there would be a need for state-of-the-art frameworks of trade institutions, export rules and export credit disciplines for governments and the private sector, the reality is a gridlock due to multipolarity, fragmentation, harder problems and institutional inertia. As discussed by Klasen (2017), a growing number of countries use their political influence for export promotion while representing a diverse range of opposed interests. There is a fragmented policymaking landscape, where export credit policy interventions are now frequently uncoordinated, or can conflict. Institutional inertia regarding the WTO and the OECD is a major area of concern. In addition, harder transborder problems such as climate change and complex supply chains emerged.

A new and comprehensive "safe haven" regarding officially supported export credits in a broader sense cannot solve all these problems discussed above. However, it can at least help governments to ensure that official export credit support is consistent with international rules and regulations. Such a safeguarding must not only include official export credit support under Annex I item (k) of the ASCM, in particular export loans, but also a clarification regarding other important topics such as "pure cover" mentioned in Annex I item (j) of the ASM, the WTO compliance of the Arrangement's matching procedures, the compliance of government pre-export financing, as well as the conformity of new financial instruments for export-related climate finance.

The key question now is how "safe" a comprehensive and broader "safe haven" is. To answer the question, five main legal and economic governance areas must be analysed: the "carve-out clause", the application for "pure cover", the relationship between matching under the Arrangement and WTO compliance, the treatment of pre-export ECA support, as well as subsidies and climate action.

Carve-out clause, long-term performance and matching

Looking at the application of the "carve-out clause", there is a common understanding that Annex I item (k) of the ASCM has to be interpreted narrowly in fact and law. It only deals with direct credits and interest rate support. As mentioned by Coppens and Friedbacher (2015), the "safe haven" in a narrow sense and the exception it provides is available only for export credit support to which interest rates provisions of the Arrangement are applicable. However, the exception extends beyond the mere Participants to the Arrangement – it is relevant for any WTO member. It can be invoked in dispute settlements not only by Participants but also by non-Participants such as Brazil, China or India. In Brazil-Aircraft (Article 21.5-Second Recourse), the Panel decided that the Arrangement of 1998 was binding on the WTO membership.

The most relevant form of officially support export credits is not direct credits but insurance and guarantees [covered in Annex I item (j) of the ASCM]. The prevailing opinion is that there is no relief from the "safe haven" in a narrow sense for pure cover support when ECAs offer abstract undertakings to pay to exporters on terms better than could be secured at market, as Annex I item (k) does not include export credit guarantee or insurance programmes. Long-term operating costs and losses of pure cover support programmes thus must be covered by adequate insurance or guarantee premiums, applying a "net cost-to-government standard" rather than a "benefit-to-recipient standard" as developed under Article 1.1(b) of the ASCM as decided show in the Panel Report, EC – Countervailing Measures on DRAM Chips (para 7.191). This is in line with the spirit of the Arrangement, which advocates additionality to the market and operates on MPRs (Mah and Milner, 2005). However, a breach of the ASCM can be established by evaluating the long-term performance

of the programme in its entirety with respective evidence. Export credit support thus might not be WTO-consistent, even where it conforms to MPRs of the Arrangement due to a lack of a legally binding benchmark under Annex I item (j).

Matching ensures the compliance with the provisions of the Arrangement. This can be an effective instrument for Participants for a level-playing-field. However, it is only possible for non-Participants to receive information from Participants regarding specific export credit transactions on a reciprocal basis. An evaluation of the final terms and conditions of a matched offer, or the extent to which this applies to both Participants and non-Participants of the Arrangement is not possible (Dawar, 2020). The Arrangement also offers no true "enforcement" mechanism outside of matching. Even if Hopewell's (2021) view is correct that the WTO is not the right place to enforce Arrangement terms for export credits due to time, expense and the difficulty in getting a "meaningful victory", the Arrangement currently does not create a "safe haven" in a broader sense as matching as defined in the Arrangement is not allowed under the WTO system, to which Participants are bound as members. It is thus no defence to export subsidy claims in a WTO dispute from a legal perspective.

Pre-export support and the Arrangement

It is a challenge that term loans, mezzanine financing, equity and working capital guarantees granted by or on behalf of a government to exporters or their banks fall outside the Arrangement's scope. In corporate borrowing, term loans are defined as debt issued by a financial institution to a corporate borrower for real estate, machinery and equipment or working capital (Corelli, 2018; Volkart and Wagner, 2018). Equity and mezzanine financing fulfil similar functions allowing exporters, for example, to invest in research, development and innovation (R&D&I) or capital expenditure (CAPEX). Loan guarantees and, in particular, working capital guarantees cover repayment claims of banks under loan agreements concluded with businesses for the purpose of financing production (Ferretti, 2016; Panetta, 2012).

Although these instruments are now provided to exporters by many ECAs, term loans, mezzanine financing or equity are not export credits in terms of the Arrangement. The same applies for working capital guarantees covering the exporter's default. There is no need that a concrete export transaction exists when providing the respective instrument to the exporter or the exporter's bank. Furthermore, there is no contractual relationship between the lender or guarantor and the foreign buyer. This interpretation is in line with, for example, WTO panel interpretations of the rationale of the OECD Arrangement in Korea – Measures Affecting Trade in Commercial Vessels, mentioning that:

> [. . .] loans to exporters do not constitute export credits (Korea – Measures Affecting Trade in Commercial Vessels, paragraph 7.215 and footnote 132).

However, most ECAs only support exporters with the financing solutions described above, thus providing loans, guarantees or insurance contingent, in law or in fact, on export performance. As a consequence, there is no "safe haven" for this support because the Arrangement does not create a defence to export subsidy claims in a WTO dispute.

Subsidies and climate goals

The global pathway to net zero emissions by 2050 requires governments to implement and strengthen climate policies. This requirement led to a broad range of policy approaches, strategic directions and concrete government actions in recent years. Climate finance plays a crucial role in the net zero transition. ECAs are highly influential actors for climate action because official export credits including financing and insurance stimulate international

trade in climate-related technologies. Climate action–related matters are priority themes for governments and official export finance instrument at least in most OECD countries. This includes scaling down support not consistent with the Paris Agreement, a contribution to climate resilient development and low-carbon financing, and the support of low-carbon transformation related transactions (Klasen *et al.*, 2022; Hale *et al.*, 2021; Liao, 2021; Caldecott, 2020; Hopewell, 2019). ECAs are only at the beginning stages of this seismic transformation. The net zero transition creates a significant opportunity to refocus support to help countries and trade partners meet their climate targets. Several economies such as Canada, Denmark, South Korea, Sweden and the UK have an overarching policy or strategy which systematically links climate action and trade policy.

Based on climate finance-related mandates, many ECAs introduced ambitious climate strategies in recent years. Several institutions pledged commitments to net zero. Export Development Canada (EDC) was the first agency to announce its commitment by 2050. The strategy of South Korea's export–import bank also includes a net zero commitment, as well as ambitious quantitative climate targets. UK Export Finance committed to net zero by 2050 across its portfolio and operations. The most common form of raising additional financing for supporting green technology exporters is by issuing green bonds (Qian, 2022; Hodgson, 2021). For example, EDC was the first Canadian financial institution to issue a green bond in 2014. ECAs also created new or significantly amended existing products for climate finance: For example, EDC's new "Sustainable Financing Guarantee" is a risk-sharing solution with the aim to increase commercial banks' capacity to provide loans and financing that support companies' carbon reduction initiatives. Sweden created a new credit guarantee to facilitate financing of green exports and green transition projects within Swedish exporting companies. South Korea implemented three new financing programmes related to climate action: The "Sustainable Growth Facilitation Program", a "Global Net-Zero Facilitation Program", as well as a "Green Growth Facilitation Program".

However, public climate finance such as support for renewable energy is a challenge from a trade law perspective. As discussed by Howse (2021), WTO law has no specific dispensations or does not provide a special code for green industrial policy. Although the Appellate Body was, for example, unable to determine challenged measures conferred a benefit in Canada – Certain Measures Affecting the Renewable Energy Generation Sector, green industrial policies containing explicit domestic content requirements were found to be inconsistent with non-discrimination obligations under TRIMS Art. 2.1 and GATT Art. III:4 both in Canada – Renewable Energy and in the India – Certain Measures Relating to Solar Cells and Solar Modules case. In the dispute United States – Certain Measures Relating to the Renewable Energy Sector, it was also found that the use of local content requirements violated the GATT and TRIMS Agreement (see, for example, van Asselt, 2021).

New export-related financing for climate change mitigation or adaptation currently developed by Participants outside the Arrangement such as green innovation guarantees for exporters can create significant risks of new WTO trade disputes, again without any "safe haven". This is because of the fact that new programmes might be contingent, in law or in fact, on export performance, or include local content requirements. Ahmad (2021) thus proposes, for instance, that minimum interest rates under the Arrangement could be relaxed for specific policy objectives. This can lead to a desirable downward competition among OECD ECAs with regard to financing or insuring and guaranteeing climate-related technologies.

Creating a new and comprehensive "safe haven"

Limitations of the application of the "safe haven" only for financing, refinancing and interest rate provisions, ongoing uncertainty concerning the interplay between WTO regulations

and Arrangement provisions with regard to “pure cover”, the challenge of two fundamentally different set of disciplines with a binding dispute settlement subsidies and a “notice and match” principle without formal enforceability, growing pre-export ECA being outside of the Arrangement scope, as well as growing activities combining officially support export credits with climate action goals lead to an urgent need for a new and comprehensive “safe haven”. This is also due to the fact that the Arrangement was written at a time when the Participants were – by far –the largest providers of officially supported export credits in the world. With new global players such as China and India taking up an increasing share of officially supported exports, this urgent need resulted in two parallel tracks of Arrangement modernisation or succession, the “IWG Track” and the “Modernisation Track”.

The IWG Track

The “IWG Track” is, at its core, an expansion of the Arrangement by including new partners such as Brazil, China, India and South Africa into the regulatory umbrella. It is named after the International Working Group on Export Credits (IWG) initiated by former US President Obama and China’s President Xi Jinping. As an initiative launched in 2012 to build new global standards outside the institutional framework of the OECD, representatives from the EU and the USA as well as other OECD countries, but also important economies such as Brazil, India and South Africa participate. The aim of the IWG is to agree on new set of international disciplines among the main global providers of government export credit support concerning financial terms and conditions for export credits (Rotblatt, 2018; Klasen, 2017). Given the fact that countries such as China and India were not included in the founding negotiations of the Arrangement and have made no public bid to join the Participants, the IWG offers the possibility of including other members than the Participants into an undertaking, benefitting of a new “safe haven”, with the possibility of bringing their own terms to a fully newly formed agreement. In 2020, however, Australia, Brazil, Canada, the EU, Japan, Korea, New Zealand, Norway, Switzerland, Turkey and the USA released a statement suspending technical negotiations, particularly mentioning a lack of commitment to transparency.

The modernisation track

In parallel, both Participants and interest groups have taken it on themselves to review the Arrangement to preserve its relevancy. In addition to increased local cost provisions implemented in 2021 [Art. 12(d)(1)], there are ongoing discussions regarding relaxed repayment profiles, increased maximum repayment terms and more flexibility regarding down payments. To create a “safer haven” regarding just and equitable government support, the discussion around the implementation of a strong matching tool is most relevant. It is related to an ongoing criticism as regards the requirement that “the matching Participant shall make every effort to verify such terms and conditions” is very difficult for exporters to support in practice. Terms and conditions of a transaction are usually confidential. It is the aim of several interest groups and, in particular exporters and commercial banks, to give more “teeth” to the Arrangement’s matching procedure in Art. 19 *juncto* Art. 43 (and for tied aid Art. 40 *juncto* Art. 43). This would allow swifter retaliation in case of non-Participants “undercutting” the level playing field (from the point of view of the Participants).

Concluding remarks

After assessing the most present questions regarding WTO subsidy rules and the Arrangement, as well as the two tracks aiming two create a new and broader “safe haven”,

there is evidence for an urgent need for reform of the regulatory framework for officially supported export credits.

The most important (and ongoing) challenge is the existence of two interconnected but very different set of disciplines. Although the ASCM is a concise multilateral framework regulating the provision of subsidies and the application of countervailing measures to offset injuries with a binding dispute settlement mechanism, the "safe haven" provisions of Annex I item (k) only cover a relatively small part of officially supported export credits, i.e. direct credits and interest rate support. There is no explicit link to the Arrangement in Annex I item (j) of the ASCM, requiring interpretation regarding the objective and purpose of the Arrangement, which advocates additionality to the market and operates on MPR. This might be insufficient under WTO law, requiring a defence that the offering of such products covers an ECA's costs of operation. Merging export credit disciplines in one forum under a larger umbrella would resolve this issue.

The WTO could be the right umbrella for these merged export credit disciplines following the arguments above, but the OECD also has its significant advantages. Transparency is one of the cores of the current Arrangement system, and without it, the Arrangement would function in a very different way. A system that would lack this characteristic might not be able to benefit from the WTO carveout, not benefit from the "protective shield" against infringements of other disciplines such as Art. 107 of the Treaty of the Functioning of the European Union, and not credibly stop a race to the bottom. Comprehensive disciplines thus might be located at the WTO with a broad membership but with significant OECD input and Arrangement characteristics.

We see an urgent requirement to create a common ground located at the WTO. IWG negotiations at the technical level are halted, making it difficult to expect a successor agreement at IWG level within a short timeframe. If the IWG talks were to be resumed, the current "safe harbour" provision would require that the Participants officially disband the Arrangement and allow the result of the IWG to succeed it – or they would have to adopt the full text of the resultant agreement into the Arrangement after each negotiation round. It might not be a realistic scenario in the current political and economic environment, but a long-term objective should be to create a new and broad "safe haven" under a WTO umbrella.

As an interim solution, a more efficient matching clause would allow Arrangement Participants to enforce disciplines within their own system. This would leave the WTO for any cases outside the "safe harbour" which are determined to be litigious under WTO procedural timeframes. It is important to mention that export credit transactions operate on a significantly faster timescale than WTO proceedings. Furthermore, WTO disputes require more detailed information on a given transaction in which a violation is presumed. The goal of the dispute settlement system is not necessarily adjudication – there is no time limit on consultations although the complaining member can request a panel formation after 60 days of inconclusive negotiations. On average, WTO proceedings last about 16 months which would in many export credit cases defeat the purpose. Such a timeframe would not allow for a swift enough redress before the transaction becomes a *fait accompli*. Proceedings at the WTO also require substantial evidence, which can be hard to come by in export credit transactions.

Looking at financing provided by government in a pre-export phase, these instruments are not covered by the Arrangement. The objective and purpose of the Arrangement were to create a level playing field for financing instruments serving foreign buyers, i.e. disciplining financing instruments involving importers and not loans to exporters. The practice since the existence of the Arrangement shows that governments and ECAs now offer exporters a

large amount of financing instruments such as working capital guarantees or term loans. Equity, debt or loan guarantee programmes do not follow Arrangement regulations. Although some programmes only provide working capital guarantees for less than two years and thus relatively short periods, others have much longer maturities. This creates a significant risk under ASCM disciplines. Although it might be difficult to distinguish if R&D&I loans or CAPEX guarantees are related to an exporter's domestic activities, an exporters international business, or both, this support is export-related and thus can be a prohibited subsidy. Policymakers thus should include provisions under a new umbrella in an "IWG Track", in the Arrangement under the "Modernisation Track", or in disciplines under a new and comprehensive "safe haven" WTO umbrella, as this would resolve this issue.

Finally, climate-related activities are a key challenge to solve under an extended "safe haven". Effective ECA climate finance requires a consistent policy framework and effective multilateral regulations including incentives under the Arrangement such as lower minimum pricing. However, creating new instruments for climate change mitigation and adaption contingent on export can run into conflict with the WTO disciplines. It thus must be discussed how officially supported exports can be used in an appropriate way to fight climate change. ECAs need to carefully apply innovative instruments that might be contrary to current WTO law. Again, a reformed ASCM or a new and comprehensive set of consolidated multilateral and multidisciplinary rules would solve this issue. However, the most realistic approach might be to amend the Renewable Energy, Climate Change Mitigation and Adaptation and Water Projects Sector Understanding of the Arrangement to allow climate finance activities. Altering the Arrangement to make it more compatible with climate objectives would not put into question the fundamental principles of the multilateral trading system.

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