

The Implementation of Subsidies for Micro, Small, and Medium Enterprises A Framework in Achieving Development for the WTO Member States

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Abstract

This paper analyses the legality of subsidies for Micro, Small, and Medium Enterprises, the mechanisms for how such measures and frameworks are applicable, and the urgencies on why this framework shall be applied. This paper consists of three main objectives. The first objective is to discuss the legality of subsidies for MSMEs according to the Subsidies and Countervailing Measures Agreement in Annex 1A WTO Agreement. The second objective discusses Indonesia's Municipal Law which provides subsidies for MSMEs and how can the WTO Member States can learn to apply this measure. And the third objective seeks to explain the urgencies of this framework which are economic recovery from the Covid-19 Pandemic, and achieving the Sustainable Development Goals. By applying the Utilitarianism Theory, and the Absolute Advantage Theory, the writer may understand that WTO Member States shall apply non-actionable subsidies to act according to the SCM Agreement, Furthermore, the writer may also understand that Indonesia's Law herein may acquire its status as customary international law if it is persistently applied. Lastly, subsidies for MSMEs shall be applied by each WTO Member State to recover from the pandemic's effect and in achieving SDGs.

Keywords

Subsidies, Micro, Small, and, Medium Enterprises, World Trade Organization, Framework, Development

1. Introduction

Due to its development, international trade law has grown not only as an instrument in settling trade disputes between states but also as an instrument for states' economic development. Since its emergence as one of the branches of international law, states have been conducting international trade due to economic reasons in a form of various natural resources causing states they specialize in goods production and political reasons in the form of national security and national industries protection (Subedi 2012). In explaining the purposes of international trade, Aprita and Adhitya (2020) expressed that international trade has several purposes. These purposes consist of *inter alia* increasing the world's trade volume, establishing trade in favor of the state's economic development, increasing living standards, and providing opportunities for decent work (Aprita and Adhitya 2020).

As part of the public international law jurisprudence (Adolf, 2014), the writer opined that a state can only be bound to an international trade law regime base on its consent. This premise is compatible with the notion of states' common will (*Vereinbarungstheorie*) expressed by Triepel. In explaining this doctrine, Triepel addressed that international law will only have its binding effect as long as states have consented to be bound by that international law norm (Diantha and Putra 2017). It is indeed can be understood that this theory has relevance in the practice of international trade law because the World Trade Organization (WTO), as an international organization concerning international trade has been established under the common will of states in achieving free trade.

As the writer emphasizes earlier, international trade law has been applied and interpreted as a language in settling international trade disputes. Such premise is compatible with Marceau's View (2002) expressing WTO Law as a specific legal subsystem consisting of a specific claim, specific breach of international obligation, and specific compensation in repairing the wrongful act. That settlement is conventionally conducted between traders with the respondent state due to its measure. In explaining Annex 2 WTO Agreement, Putra, and Dharmawan (2017) explained in detail that the DSB can be operated through a claim addressed by a complainant state representing its private entities towards the respondent state as a state invoking a measure contrary to the WTO Agreement. Meanwhile, from a respondent state's point of view, the writer expresses that a state may justify its action toward claims under justifications based on public interests.

This paradoxical nature of this international trade law has of course made public in large viewed international trade law as a threatful regime to state democracy. In explaining scholars' point of view, the writer opined that the scope of public legitimacy towards international trade has always been viewed as the collision between protectionism and free trade. Also known as mercantilism, protectionism can be viewed as thoughts in favor of isolationist policy protecting domestic interest in a form of budgetary expense from state's natural resources, public funds, and other measures glorifying national identity, infant industry development, and local culture conservation (Suherman 2014). Meanwhile, the notion of free trade can be solely defined as ideological criticism of mercantilism and a policy in favor of the market, in a form of tariff trade barriers and non-tariff trade barrier abolishment (Wijatno and Gunadi 2014).

Despite the existence of such discourse, these ideological debates shall not be transposed into a general premise viewing international trade law as a threatful regime. The writer also reflects this prejudice as a trojan horse for states' chilling effects on their regulatory power in determining their macroeconomic policies. In this paper, the writer addresses the instrument as evidence of why this perception is not always true. The paper herein addresses the notion that rules of international trade law may apply along with state municipal law in a harmonic nature. Such harmony may be achieved by the WTO Member States by applying subsidies for Micro, Small, and Medium Enterprises (MSMEs) as one of the subjects of international trade law in a form of individual entities. This framework has an urgency in the practice of international trade law in achieving states' development due to the urgencies described herein.

Since the outbreak in Wuhan, Hubei Province, China on November 17th and internationally announced in December 2019 (Davidson, 2020), the spread of Corona Virus Disease 2019 (Covid-19) has been qualified as a multisectoral issue. In early 2020, WTO feared that a trade crisis might occur due to the spread of Covid-19 (Zaki 2021). Furthermore while explaining the Statistics on this trade crisis, Zaki (2021) addressed this prediction did not come true since trade in goods degradation only occurred in the amount of 5,3% in 2021, compared to the percentage according to WTO Prediction which was 9,2%. Non-protection policies have been invoked by the WTO Member States in a form of non-quantitative restriction export and import measures (Zaki 2021). These measures are compatible with international trade law principles in a form of State Refrain Principles in Article III GATT as one of the international trade law principles (Adolf and Suryawinata 2018). However, in viewing these statistics, the writer opined that those measures are not enough in recovering from this crisis.

Furthermore, the second urgencies of this paper are addressed based on notions introduced in the 1960s, which is Sustainable Development. In viewing this notion, the writer expresses that this notion is both an intergenerational and interdimensional agenda. In 2015, this notion was elaborated by the United Nations as the SDGs or the Global Goals (UNDP, 2022). Furthermore, these goals consist of 17 Goals that recognize that action in one area will affect outcomes in others and that development must balance social, economic, and environmental sustainability (UNDP 2022). This paper, however, will not cover the whole 17 SDGs, instead, it will mainly focus on Goals Number 8, Economic Growth and Decent Work, and several related goals triggered by it.

From these urgencies in a form of economic recovery from the Covid-19 Pandemic, the emergence of Society 5.0 as urgency in developing human capital, and the necessity of achieving the SDGs, the writer presents the objectives of this paper. The first objective of this paper will discuss the legality of subsidies for MSMEs according to WTO Agreement since subsidies are generally prohibited. Furthermore, the second objective of this paper will explain measures according to Indonesia Municipal Law which provides subsidies for MSMEs, and how this notion is applicable in international trade practice. Last but not least, this paper's third objective will explain how these measures might be relevant to economic recovery post the pandemic, and achieving the SDGs.

2. Literature Review

To distinguish this paper from previous papers and literature discussing the same topic and for a novel purpose, the writer addresses previous research herein as this paper "*state of art*". These researches are: **First**, Huala Adolf and Rabiansyah Pratama Suyawinata with the title Prinsip Hukum Perdagangan International: Kebijakan Subsidi dan UMKM (Refika Aditama 2018).; **Second**, Putu George Matthew Simbolon with the title Penerapan Kebijakan Subsidi bagi Usaha Mikro Kecil Menengah sebagai Wujud dari Pembangunan Ekonomi dan Penerapan Pancasila dalam Memajukan Kesejahteraan Umum dan Mencerdaskan Kehidupan Bangsa di Era Society 5.0 (Indonesia National Law Debate Community 2021).; **Third**, Gary N. Horlick and Peggy A. Clarke with the title WTO Subsidies Discipline During and After the Crisis (Oxford University 2010).

Furthermore, this paper is also applying legal theories and macroeconomics theory to achieve the objectives above. **The first theory** is the Utilitarianism Theory by Bentham. In explaining this theory, Bentham addressed that the greatest happiness in the greatest number is a measure of right or wrong (Philosophy 2015). Furthermore, he also explained that utility is an object of all objects willing to produce utility itself, kindness, and happiness (Philosophy 2015). In explaining this theory background, Cunduk (2020) expresses that nature has placed mankind into two matters constituting human life. Those matters are suffering and happiness, where both elements have determined us in doing what we ought to do, good standard and constituting us in the act, talk and think confirmed by two elements therein (Cunduk, 2020). Lastly, in expressing the synthesis of this theory, Rosen (2005) explained that this theory mainly addressed that the greatest happiness shall be formulated into a public policy.

The second theory is the Absolute Advantage Theory by Smith. In explaining this theory, Smith divided this theory into two main thoughts, the first thought emphasizes the division of labor necessity, meanwhile, the second thought emphasizes the international specialization and production efficiency (Aprita and Adhitya 2020). The first thought can be easily explained in an illustration in a form of a state that may produce cheaper goods compared to others due to the application of division of labor (Aprita and Adhitya 2020). Meanwhile, the second thought can be explained in the form of an absolute advantage that may be achieved by a state, if it specialized in the production of its goods (Aprita and Adhitya, 2020). Despite major scholar opinions stating that this theory is debatable (Hata 2006), the writer applies this theory since it is significantly relevant in explaining subsidies for MSMEs. Therefore, this paper does not explain the antithesis to this theory, such as The Comparative Advantage by Ricardo (Suherman 2014).

By understanding the state of art explained by the writer above, it can be understood that this paper provides its result and discussions based on those three previous research. This function however shall be viewed as a complementary function to the novelty function as it is mentioned in the first paragraph of this literature review. Furthermore, this paper also provides results and discussions based on the two theories mentioned above. The Utilitarianism Theory will explain how subsidies measures for MSMEs might provide the greatest happiness for each WTO Member State in conducting their trade to achieve state development. Meanwhile, the Absolute Advantage Theory will explain how this measure may contribute to the division of labor, about the three urgencies mentioned above.

3. Methods

This paper is applying a normative method that consists of a statutory approach and a conceptual approach. Amiruddin and Asikin (2004) stated that this type of research method is often understood as what's written in a statute or treaty (law in books) or law conceived as a measure of how humanity shall be conducted. A normative method is also a method that only uses secondary data in answering its formulated issues (Amiruddin and Asikin 2004).

Furthermore, the writer also applies the statute approach as the sub-method of this paper. This sub-method can be applied by studying the ratio legis and ontology of laws to expose the philosophic matter beneath those laws (Amiruddin and Asikin 2004). In explaining the concept of ratio legis, Fellmeth and Horwitz (2009) stated that ratio legis can be translated as a reason for the law or the purpose of the specific norm such as regulations and treaties. Meanwhile, Webster (2022) explained that ontology is a particular theory about the nature or character of a being or the kind of things that have an existence.

Lastly, the writer also applies the conceptual approach as the second sub-method of this paper. This approach is applied by analyzing legal issues based on developing legal doctrines in jurisprudence (Amiruddin and Asikin 2004). In applying this approach, writers will apply the legal theories explained in the literature review section of this paper.

To elaborate on the method intuitively explained above, it is important for the writer to explain this method by describing the steps herein: **Step 1:** The writer collected information regarding MSMEs, economic recovery, and SDGs from relevant sources in a form of media and previous research as **the minor premise** of this paper; **Step 2:** The writer gathers **the major premise** in the form international treaties and Indonesia's Regulations gathered from government repository called JDIH BPK and the lawyer's repository which is the hukumonline.com;

Step 3: The writer analyzes the minor premise of this paper based on the major premise. Furthermore, the writer also adhered to his opinion based on the analysis explained herein.

4. Data Collection

In explaining how the writer gathers his data, the writer will explain Soemitro and Soekanto's notion herein, as it is explained by Amiruddin and Asikin. Amiruddin and Asikin (2018) expressed normative method data collection can be conducted by gathering primary legal sources, secondary legal sources, and tertiary legal sources. Primary legal sources or binding legal sources that can be collected from official government or legislative's repositories. Meanwhile, secondary legal sources are expert commentaries explained in textbooks, scientific articles, and opinions in the media. Lastly, tertiary legal sources which explain both primary legal sources and secondary legal sources such as dictionaries and encyclopedias.

5. Results and Discussions

The Legality of Subsidies for MSMEs according to WTO Agreement and General International Law

As measures qualified under WTO Agreement, subsidies are generally regulated under one of the Annex 1 WTO Agreement titled Agreement on Subsidies and Countervailing Measures (SCM Agreement) ([hukumonline](http://hukumonline.com) 2022). Subsidies can generally be defined as measures in favor of domestic producers in increasing their production to fulfill a domestic market need (Aprita and Adhitya 2020). Meanwhile, according to Article 1 paragraph 1. SCM Agreement, Measures that can be qualified as subsidies consists of financial contribution by a government or any public body within the territory of a WTO Member State in a form of transfer of funds, foregone or uncollected government important revenue, goods, and services providing activities and funding mechanism mentioned in paragraph i.iv. of this article ([hukumonline](http://hukumonline.com) 2022).

Furthermore, paragraph 2. of Article 1 SCM Agreement expressed those subsidies mentioned in paragraph 1. shall be qualified as prohibited subsidies as is mentioned in Part II of the SCM Agreement or shall be mentioned as actionable subsidies as is mentioned in Part III of the SCM Agreement, if those subsidies are specific as it is mentioned in Article

2 SCM Agreement (hukumonline 2022). By understanding Article 1 paragraph 2. SCM Agreement, the writer may adhere to the conclusion by stating that not all subsidies are prohibited. SCM Agreement classifies subsidies into three types, those subsidies are **Prohibited Subsidies**, **Actionable Subsidies**, and **Non-Actionable Subsidies**. To understand these classifications further, the writer explains them herein based on the SCM Agreement.

In explaining **the first** type of these subsidies, Adolf and Suryawinata (2018) express that these types of subsidies can be also mentioned as the red-light subsidies. By reading Article 3 paragraph 1. SCM Agreement, one may understand that these subsidies come in two forms, there are export performance and import substitution (hukumonline 2022). **The second** type of subsidy can be understood as non-prohibited measures. In commenting on these measures, Jackson stated that these subsidies might be qualified as a distortion across the border (Adolf and Suryawinata 2018). Article 5 SCM Agreement which regulates actionable subsidies, addresses that the WTO Member States shall not use any subsidies referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interest of other members if it injures the domestic industry of another member; it nullifies or impairs the benefits of other members under GATT 1994; it creates a serious prejudice to the interests of another Member (hukumonline 2022). **Third**, regarding the non-actionable subsidies or green subsidies, it can be inferred that these subsidies are needed for development program and has been recognized as a significant development in the multilateral treaty regarding subsidies (Adolf and Suryawinata 2018). Article 8 paragraph 1. SCM Agreement furthermore expresses those actionable subsidies consist of unspecified subsidies mentioned in Article 2 or specific subsidies mentioned in paragraphs 2a., 2b. and 2c. of this agreement (hukumonline. 2022).

From these treaty-based explanations, the writer expresses those subsidies for a specific industry are prohibitive under the agreement herein. Before elaborating this discussion further according to the general rules of international law, it can be understood that the “specific industries” phrase under the SCM Agreement means that WTO Member State is prohibited to provide subsidies to a particular goods-producing industrial sector (e.g.: fisheries industry, wood industries, etc.). The writer expresses that this interpretative mean is reasonable since the SCM Agreement addressed those subsidies for the agricultural product are regulated under one of the Annex 1 WTO Agreements regarding the Agreement on Agriculture (hukumonline 2022).

In discussing international treaty implementation, it is important to relate a specific treaty, such as the SCM Agreement with the law of the treaty itself. Therefore, this paper also discusses the legality of subsidies for MSMEs according to the Vienna Convention on the Law of Treaties Year 1969 (VCLT 1969). To provide a precise explanation, the writer needs to note that this paper only examines stipulations under VCLT 1969 which constitute how the treaty shall be interpreted. These stipulations are mentioned under Article 31 VCLT 1969.

Since this article covers several methods of interpretation, the writer needs to note that this paper is applying the external contextual interpretative method. This method can be applied by conducting an interpretation while taking into account any subsequent agreement between the parties, any subsequent practice in the application of the treaty, and any relevant rules of international law applicable in the relation between the parties (Article 31 paragraph 3c. VCLT 1969) (Argent 2021). Therefore, in this paper, the writer will apply this method by applying other Annex 1A WTO Agreements which bind the whole WTO Member States.

As the writer mentioned above, the phrase “specific industries” under the SCM Agreement holds an important role to determine which subsidies are prohibited or permitted under the SCM Agreement. From the explanations regarding treaty implementation and rules of interpretation under VCLT 1969, one may bear in mind that the SCM Agreement can comprehensively be understood by implementing the interpretation methods herein. Furthermore, from stipulations under Article 3, Article 5, and Article 6, it can be understood that subsidies for agriculture sector goods are regulated separately under the Agreement on Agriculture (hukumonline 2022). Therefore, the writer arrives at a premise where one may understand that the specificity of industries mentioned SCM Agreement is based on the type of goods subsidized by a WTO Member State *vis-à-vis* its national industries.

The analysis mentioned in the previous paragraph can be understood by applying the external contextual interpretation based on Article 31 paragraph 3. VCLT 1969. Therefore, the writer needs to emphasize that only from this interpretation method, readers of the SCM Agreement may understand that Article 3, Article 5, and Article 6 SCM Agreement shall be read together along with Article 3, Article 6, and Article 9 Agreement on Agriculture regarding export subsidies commitment (hukumonline 2022). Furthermore, knowing the fact that the Agreement on Agriculture is part of Annex 1A WTO Agreement titled Multilateral Agreements on Trade in Goods (hukumonline 2022), one can simply understand that “specific industries” referred to in the SCM Agreement are indeed referring to classifications of goods producer industries. With the respect to this interpretation method, it can be concluded that a treaty does not always can be simply understood by only reading that document without connecting it with another international law related to that treaty.

Besides explaining subsidies for MSMEs in the goods sector, the writer also needs to explain how this measure can be applied to MSMEs operating in the service sector. Regarding service sectors, Horlick and Clarke (2010) explain that there are no WTO Agreement Stipulations that constituted how subsidies for service sectors shall be applied by each WTO Member State. However, despite the vacuum of law under the WTO Agreement, it can be inferred from the Appellate Body of the US – Foreign Sales Corporation Tax, that the Appellate Body concluded that a government program that conditioned receipt of benefits on the use of domestic value-added, even if the value-added included services as well as goods, was prohibited under Article III: 4 GATT, as long as it created an incentive to use domestic over imported goods (Horlick and Clarke 2010). Despite this Appellate Body Decision, a circumstance in the form of political agendas in favor of subsidies for service sectors that entail a discriminative measure does occur in the international trade practice (Horlick and Clarke 2010). In responding to these notions, the writer would like to address the fact that WTO Member States may of course still apply unspecific subsidies for MSMEs in the service sector. However, such action is not justifiable if it constituted injuries to the other WTO Member States.

Based on the normative framework explained in this section, the writer states that a WTO Member State may of course invoke subsidies for its MSMEs operating in the goods-producing sector and service-producing sector. Such measure may only be corrected if it provides utility not only to its national industries in a form of incentives and/or other advantages but also if it may provide utilities to the other WTO Member States in a form of mutual advantage in conducting their trade relations. This notion is expressed by the writer by applying the Utilitarianism Theory by Bentham stating that a law or policy shall be formulated to provide utilities to achieve the greatest happiness for the greatest number (Panjaitan 2021). Furthermore, the greatest happiness explained in this theory shall also be viewed as utilities that may lead mankind to be free from the suffering which threatens their lives (Panjaitan 2021).

Besides providing advantages for MSMEs as one of the miserable international trade law subjects, subsidies may also help the international community *in concreto* WTO Member States to achieve the absolute advantage. By conducting the division of labor in each state supporting each of their MSMEs, an absolute advantage might be achieved by the WTO Member States in conducting their trade activities. This notion is compatible with the Absolute Advantage Theory by Smith explaining that each state may produce cheaper goods if it conducts a specialization according to advantages owned by that state (Aprita and Adhitya 2020). This theory application, along with Bentham’s Theory will be explained in advance by the writer in the third analysis or result and discussions of this paper. To wrap up the first discussion of this paper, the writer will present a brief explanation of subsidies classification under the SCM Agreement, and why it is permitted or prohibited under this agreement, based on this table.

Table 1. Classification of Subsidies under the SCM Agreement

Type of Subsidies	Prohibited	Subjectively Prohibited	Permitted	Explanations
Prohibited Subsidies (Article 3 -4 SCM Agreement)	✓			Due to their absolute nature in constituting injuries to the other WTO Member States. These subsidies can be invoked in a form of export performance or import substitutions in specific industries.
Actionable Subsidies (Article 5 - 7 SCM Agreement)		✓		Can only be claimed by a complainant state based on the injury of the domestic industry of that complainant state, it is considered as nullification or impairment of benefits under Article II GATT and it constituted a serious prejudice to the interests of another WTO member state.
Non-Actionable Subsidies (Article 8 – 9 SCM Agreement) (Non-Specific Sector)			✓	Has unspecific nature and since they are invoked under measures in a form of assistance for research activities, assistance to disadvantaged regions, and assistance to promote the adaptation of existing facilities to new environmental requirements.

Measures according to Indonesia Municipal Law regarding Subsidies for MSMEs and the Reflection of These Measures for International Trade Practice

Unlike the specific industries classification, the writer needs to note that the MSMEs distinction to another type of enterprise is not the same as this classification. The writer can present such a premise since industries' classification under SCM Agreement is conducted based on their type of goods. Meanwhile, MSMEs distinction is internationally conducted under classifications based on a particular enterprise's revenues, assets, or several employees below a certain threshold determined by each state (Liberto 2020). In addressing the notion of MSMEs, Liberto (2020) furthermore explained that SMEs as terminology for an enterprise with revenues and several employees below the determined threshold have been universally recognized based on standards in the United States, The European Union, recognized the United Nations and most importantly, recognized by the WTO. By understanding this classification and terminology, the writer believes that this paper is generally relevant in providing a mechanism that will be explained further in this paper.

Since this paper explains the subsidies for MSMEs according to Indonesian Law, the writer will also present the definition of MSMEs based on Indonesia MSMEs Law. Article 1 of Indonesia MSMEs Law stated that enterprises are classified into Micro Enterprises, Small Enterprises, Medium Enterprises, and Big Enterprises (BPK 2022). Furthermore, Article 6 of this law expressed those criteria regarding Micro Enterprises, Small Enterprises, Medium Enterprises, and Big Enterprises are regulated under a government regulation (BPK 2022). Article 35 Indonesia Government Regulation Number 7 Year 2021 explained that this classification is formulated based on its asset criteria and yearly income criteria (BPK 2022). This classification will be explained by the writer under the table herein:

Table 2. Enterprises Classification based on Its Amount of Assets and Yearly Income

Type of Enterprises	Amount of Assets	Yearly Income
Micro Enterprises	Maximum Rp. 1.000.000.000, - (One Billion Rupiah)	Maximum Rp. 2.000.000.000, - (Two Billion Rupiah)
Small Enterprises	Rp. 1.000.000.000, - to 5.000.000.000, - (One Billion Rupiah to Five Billion Rupiah)	Rp. 2.000.000.000, - to 15.000.000.000, - (Two Billion Rupiah to Fifteen Billion Rupiah)
Medium Enterprises	Rp. 5.000.000.000, - to 10.000.000.000, - (Five Billion Rupiah to Ten Billion Rupiah)	Rp. 15.000.000.000, - to 50.000.000.000, - (Fifteen Billion Rupiah to Fifty Billion Rupiah)

Before mentioning Indonesia Municipal Law regarding subsidies for MSMEs, the writer needs to emphasize the fact that Indonesia has both framework law and operational act regarding how its subsidies can be injected into its MSMEs. In explaining this analysis, the writer will apply the Hierarchy of Legal Norms Doctrine by Kelsen which will be connected to the Indonesian Constitution. Furthermore, this analysis will also cover how this legal framework or practice can be recognized as an international trade practice. And last but not least, this analysis will also include pieces of evidence regarding the number of complaints by the other WTO Member States successfully responded to by Indonesia regarding subsidies for MSMEs.

In explaining national law related to subsidies for MSMEs, Simbolon (2021) expresses that Indonesia's regulations have provided economic frameworks regarding how its government shall provide subsidies for MSMEs, including subsidies for international trade. These frameworks will be explained in the following passage herein. Article 92 paragraph (3) Indonesia SME's Law amended under Indonesia Job Creation Law *inter alia* stated that customs incentives can be given to MSMEs with an export orientation following regulations related to customs activities (BPK 2022). Concerning this article, Article 73 of Indonesia Trade Law stated that the government may provide discretion in providing incentive facilities, technical guidance, access, and/or financial aid, promotion assistance, and marketing assistance (hukumonline 2022). Finally, Article 74 paragraph (2) Indonesia Trade Law amended under Indonesia Job Creation Law *inter alia* expresses that the central government may conduct training for corporations including MSMEs in export development through incentives, facilities, information, market opportunities, technical guidance, and promotion assistance (BPK 2022).

In viewing these framework laws, it is important to emphasize the notion that these frameworks are following Article 33 paragraph (4) Indonesian Constitution. The following article stated that "The organization of the national economy shall be conducted based on economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy." (BPK 2022). Such validity may be viewed under Kelsen's Doctrine stating that every legal norm shall earn its validity from a higher norm above it (Adolf and Chandrawulan 2019). Furthermore, in explaining the formal hierarchy of legal norms, Asshiddiqie (2020) stated that in the context of regulation, a norm with a higher position as the constitution, and a norm with a lower position such as law and province government regulation shall have a general and abstract nature. This theory's relevancies will be explained further during the international customary law explanation.

Besides provided under the frameworks mentioned above, the Indonesia Government under the Ministry of Finance has invoked subsidies for MSMEs funding in the form of interest subsidies/margin subsidies (Perbendaharaan 2020). These subsidies were invoked by the government in responding to the spread of Covid-19 and its economic impact on MSMEs (Perbendaharaan 2020). Furthermore, these subsidies were given for a period of six months according to that

MSMEs scale based on Indonesia Ministry of Finance Regulation Number 65/PMK.05/Year 2020 (Perbendaharaan, 2020). Article 2 of this regulation stated that these subsidies are given to MSMEs in a form of credit under the maximum amount of Rp. 10.000.000.000, - (Ten Billion Rupiah) (Perbendaharaan 2020). These subsidies are given to protect, sustain and increase the MSMEs economy in conducting business as a part of supporting the national economic recovery (Article 3 Indonesia Ministry of Finance Regulation Number 65/PMK.05/Year 2020) (Perbendaharaan 2020).

From the example of this framework, the writer may well explain the relevancies of this framework under customary international law. Therefore, the writer will describe the source of international law based on Article 38 paragraph (1) International Court of Justice Statute. This article *inter alia* stated that international custom, as evidence of a general practice accepted as the law is applied by ICJ Judges in determining the source of international law applicable in settling disputes between states (Argent 2021). Even though this article is generally used by the ICJ Judges in determining a source of law in settling disputes between states, many international law textbooks use this article in determining the source of international law, including international trade law as one of the branches of public international law.

Due to its status as a general international law (Argent 2021), international customary law has been recognized as the oldest source of international law (Sefriani 2018). As a legal source, a distinction between international customary law or customs with the usage of the international community (Sefriani 2018). This distinction can be identified by knowing the two elements of international customary law, there are factual elements known as the general practice and physiological elements known as “*opinio juris*” (Simanjuntak 2018). The first element of international customary law can be recognized based on general practice conducted by states or international organizations, which is persistently repeated in the practice of international law. Meanwhile, the second element which is also called *opinio juris sive necessitatis* can be recognized based on the acceptance of the international community to determine whether such practice contains a sense to comply with such legal obligation or not (Sefriani 2018). By understanding these two elements, the writer may conclude that, unlike customs, international community usage only contains the first element, due to the absence of *opinio juris* of the international community.

By knowing the notion that state practice is qualified as customary international law, if it is persistently conducted, the writer opined that subsidy for MSMEs also has an opportunity to be recognized as international trade customary law. Furthermore, this practice can be conducted not only by providing financial aid as what Indonesia currently practices, but also by applying provisions under Article 8 SCM Agreement regarding permitted subsidies under the agreement therein. Even though international customary law is often created by powerful states or states with a strong influence (Argent 2021), WTO Member States may still follow Indonesia’s practice to support each of their state’s development. This opinion is addressed by the writer due to the nature of this paper, which is for academic purposes.

The opinion addressed by the writer in the previous paragraph is of course related to the Absolute Advantage Theory and this relevancy will be explained further in these discussions. By knowing the fact that various natural resources and human capital in each state, states shall waive their protectionism policy to support the wealth of their nations (Putra and Dharmawan 2017). This notion is addressed by Smith in explaining his Absolute Advantage Theory. Furthermore, Smith also addressed the notion which stated that protectionism policy has slowed down a state’s development, injured consumer rights to earn goods with better quality and cheaper prices, and most importantly, barred their ability in providing wealth for their nations (Putra and Dharmawan 2017).

Backgrounds explained in the previous paragraph have been one of the reasoning behind the Absolute Advantage Theory as is explained in the literature review of this paper. Due to these relevancies, the writer will explain how this theory is related to subsidies for MSMEs’ role in supporting each state’s development. By understanding that MSMEs are a result of classification based on an enterprise’s number of labors and amount of income, it can be inferred that these subsidies are permitted under the SCM Agreement as long as the WTO Member State did not invoke it contrary

to Articles 3 and 5 of this agreement. And then, since this matter is legal and supported that each WTO Member State has its unique economic potential, WTO Member States shall support their state development and enhance the free trade regime at the same time due to their subsidies for their MSMEs.

In explaining such measures invoked by Indonesia and elaborating the “specific industries” and the absolute advantage theory mentioned above, the writers would like to address the fact that Indonesia's populations have conducted various types of goods and services produced under the MSMEs regime. The types of goods and services currently trending in Indonesia are Culinary MSMEs, Digital MSMEs, and Agrobusiness MSMEs (Berdesa 2020). Furthermore, it is important for the writer to also promote the fact that there are 64,2 Million MSMEs registered in Indonesia in 2018 and while conducting research in updating this number, the Indonesian Government also predicts that these quantities are increasing each year (Chirsty 2021). By understanding these facts, the writer opined that these types of goods and services can be considered as great potential to enhance the international trade practice. In showing the general illustration of these economic activities, the writer describes them under the relevant pictured herein (figure 1).



Figure 1. Micro, Small, and Medium Enterprises in Indonesia

Besides related to the Absolute Advantage Theory, subsidies for MSMEs have also had their relevancies in applying the Utilitarianism Theory by Bentham in this discussion. This premise is reasonable since these subsidies can also be viewed as a notion compatible with Rosen’s explanation of Bentham’s theory. Therefore, if this measure is persistently applied to MSMEs, the greatest happiness of MSMEs owners and employees may of course be formulated into a public policy (Rosen 2005). Since this policy may provide utilities in achieving happiness as one of the purposes of the law (Junaidi, 2018), the writer encourages the WTO Member States in adopting this measure. Since this policy has a general and abstract nature (Ridwan 2018), due to its nature in providing utility for MSMEs in each WTO Member State in general, this general practice may have its chances to be entitled to international customary law if the *opinio juris* entail it.

Besides providing discussions according to theories and rules, it is important to also explain this drive this discussion into the factual aspects that may support the explanation herein. Therefore, the writer will also provide facts regarding the notion where Subsidies for MSMEs are fully permitted under the international trade regime. In their research regarding subsidies for MSMEs, Adolf and Suryawinata (2018) address the fact that Indonesia's measure coffered in these discussions has been complained about and hence successfully defended by Indonesia. In their research, Adolf and Pratama (2018) explain that Indonesia has been accused of conducting dumping, safeguarding, prohibited subsidies, actionable subsidies, and scope ruling by India, Turkey, and the United States of America.

Despite these complaints, the writer needs to explain that Indonesia has successfully responded to these complaints which cause the complainant state not to address this issue with the WTO DSB (Adolf and Suryawinata 2018). Furthermore, it is also important to note that these responses were addressed before the Covid-19 Pandemic *in concreto* in 2015, and these complaints were caused by the applicability of Law Number 17 Year 2006 which provides subsidies

for MSMEs (Adolf and Suryawinata, 2018). In explaining this complaint further, the writer will present the table herein, as it is cited from Adolf and Suryawinata's research.

Table 3. Complains about Indonesia’s Measure Providing Subsidies for MSMEs

No.	Complainant States	Type of Complaints	Number of Complains
1.	India	Dumping	5
		Safeguard	3
		Prohibited or Actionable Subsidies	-
2.	Turkey	Dumping	6
		Safeguard	3
		Prohibited or Actionable Subsidies	-
3.	United States of America	Dumping	3
		Safeguard	-
		Prohibited or Actionable Subsidies	2
		Scope Ruling	1

To wrap up the second discussion of this paper, the writer needs to emphasize the fact that Indonesia's national law mentioned above can be recognized as an example of how subsidies for MSMEs may be applied. Furthermore, the writer also addressed the fact that Indonesia populations have established MSMEs through various types of industries permitted under the WTO Agreement. To provide a clear or bright summary, the writer will describe his explanations under the figure 2 herein.

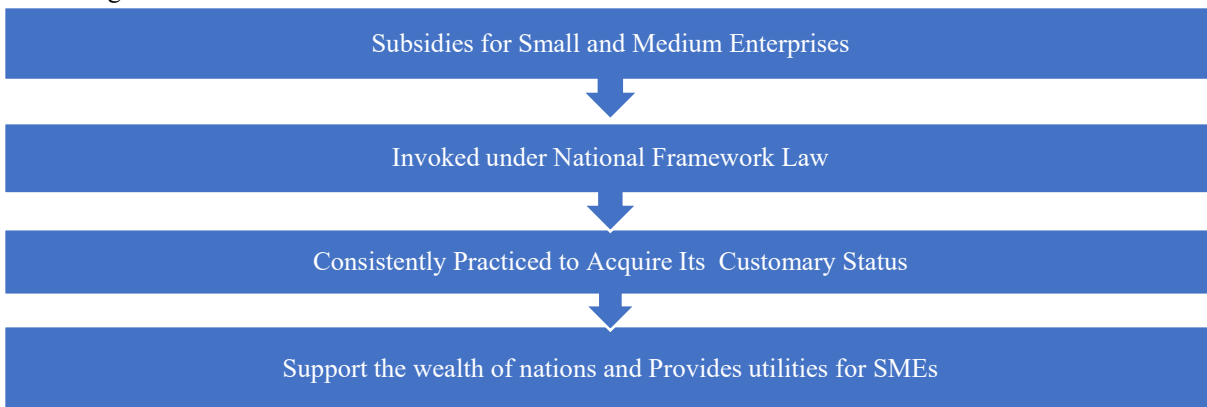


Figure 2. Result and Discussion Number 2. Summary

Subsidies for MSMEs Relevancies in achieving Economic Recovery Post Covid-19 Pandemic, Developing Human Capital in Society 5.0 Era and Achieving Sustainable Development Goals

Now that this paper has been filled with explanations regarding the legality of subsidies for MSMEs and how they can be applied to enhance international trade practice, this paper is left with questions in a form of “why subsidies for MSMEs is important?” or “why such practice is needed under the regime of international trade law?”. Therefore, in this section, the writer will explain why this framework is important for MSMEs in specific and the international community in general. This paper will explain how subsidies for MSMEs will support the economic recovery from the Covid-19 Pandemic. Furthermore, the writer will also explain why such a measure is important to help each WTO Member State to achieve SDGs Number 8 or the Decent Work and Economic Growth Goal with other SDGs.

In the introduction of this paper, the writer has explained the percentage of trade degradation due to the Covid-19 Pandemic based on Zaki's research. In 2020, the WTO provided permission for its member states to determine each of their measures in protecting their public health (Zaki 2020). These types of measures consist of import and export prohibition, quantitative restriction on import and export, and non-automatic import license that shall be applied non-discriminatively (Zaki 2020). Furthermore, WTO also instructs its members to invoke these measures according to Annex 1A WTO Agreement consisting of The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and The Agreement on Technical Barrier to Trade (TBT Agreement) (Zaki 2020).

In discussing the notions regarding post-Covid-19 economic recovery, it is difficult to separate it from the G-20 Forum. This premise shall also apply to the fact that the WTO voluntarily provides facilitations steps that the G-20 Forum needs to apply and the entire WTO Member States in general based on trade report that shall be conducted every two years (Zaki 2020). Before continuing explanations about the G-20 Forum, the writer needs to note that the following explanations will not only have relevancies for G-20 members. Furthermore, these explanations also have their relevancies in post-Covid-19 Pandemic Recovery that may be applied by the entire WTO Member States as the international trade law communities.

As the president of the G-20, Indonesia under President Joko Widodo Administration has put "Recover Together, Recover Stronger" as the core theme of the G-20 Agenda in 2022 (Arshad 2021). This core theme is put by Indonesia due to the urgency to recover from the Covid-19 Pandemic (Arshad 2021). As an international forum that aligns with ASEAN, the Pacific, and developing countries' interests, the G-20 Forum has three main priorities (Hermawan 2022). One of those three agendas is an agenda that will focus on digital economic value to accelerate economic recovery, particularly to support the development and financial inclusion of MSMEs.

In understanding this agenda, the writer needs to express the fact that the entire G20 Members have agreed to promote state measures that may support MSMEs' existences. Besides addressing this notion by explaining the substance of the agenda explained above, this notion is also explained by the writer since all the G20 Member States are also WTO Member States. Lastly, the writer also expresses this notion by addressing the fact that the G20 States have a strong commitment to combat prohibitive subsidies and support MSMEs based on reports issued by WTO, IMF, OECS, and the World Bank (regfollower 2022).

By noticing the fact that the financial and technical supports for MSMEs adhere to one of the G-20 Forum Agenda, the notion of subsidies for MSMEs may become one of the caliber ideas on how economic recovery from the pandemic shall be conducted. Since this paper is written before the G-20 Forum in Bali - Indonesia is conducted, the writer opined that the idea of subsidy for MSMEs may help the G-20 Member States, the entire WTO Member States, and the international communities as a whole to recover from damages caused by the pandemic. In this paragraph, the writer would also like to objectively address that Indonesia shall bring up its framework law as it is explained in this paper, so that the second agenda of this forum may help not only the G-20 Member States but also the entire WTO Member States in recovering together from this pandemic.

In analyzing these urgencies, the writer opined those subsidies for MSMEs also have an important role due to their ability to contribute to achieving SDGs Number 8 and other SDGs that will be explained herein. As one of the 17 Global Goals, SDGs Number 8 was mainly meant to promote sustained, inclusive, and sustainable economic growth, full and productive employment, and decent work for all (UNDP 2022). Furthermore, since the emergence of the Covid-19 Pandemic, this goal mainly focuses on issues concerning large unemployment (255.000.000 People losing their full-time jobs), informal economic workers' issues, youth unemployment, the fall of international tourist arrival, and the fall of global real GDP per capita (UNDP 2022). In fulfilling this commitment, The United Nations Development Program (2022) conducted a workshop in Kenya on April 27th, 2022 and this workshop was titled "National Launching Workshop for the project Strengthening National Capacities for Enhancing Micro, Small and

Medium-sized Enterprise (MSME) Resilience and Building Forward Better to Accelerate the Implementation of the 2030 Agenda in Kenya.

From the explanations above, one can simply understand that subsidies for MSMEs have an important role in achieving SDGs Number 8. This premise will also be compatible with other SDGs consisting of Industry, Innovation, and Infrastructure (SDGs Number 9), Reduced Inequalities (Goals Number 10), Peace, Justice, and Strong Institutions (SDGs Number 16), and Partnership for the Goals (SDGs Number 17). These relations will be explained herein: **First**, to SDGs 9, it can be explained that the economic growth caused by subsidies for MSMEs in a form of technical guidance and other assistance mentioned above may also promote inclusive and sustainable industrialization and foster innovation for MSMEs in particular and that the society in general (UNDP 2022).; **Second**, SDGs Number 10 have a relation to SDGs Number 8 since this goal was meant to reduce inequalities within and among countries (UNDP 2022).; **Third**, as an international law scholar, the writer views that this framework may also qualify as an obligation of means for each WTO Member State' Government to achieve effective, accountable, and inclusive institutions as one of the matters of SDGs Number 16 (UNDP 2022).; **Fourth**, since international law has been recognized as a language in conducting international cooperation (Argent 2021), Goals Number 17 may be achieved by the entire WTO Member States if they solidly implement this framework.

To sum up this discussion, the writer needs to note that subsidies for MSMEs may help the WTO Member States in recovering their economy. In discussing this economic urgency, the writer also suggests that Indonesia as the G-20 President shall present its framework law regarding subsidies for MSMEs to promote this economic recovery method. Furthermore, this legal and economic framework may also help each WTO Member State to enhance its human capital in facing the Society 5.0. Lastly, this framework may help the WTO Member States which are also the United Nations Member States to achieve decent work and economic growth (SDGs Number 8) in the industry, innovation, and infrastructure goals (SDGs Number 9), reduced inequalities goals (SDGs Number 10), peace, justice, and strong institution goals (SDGs Number 16), and partnership for the goals (SDGs Number 17).

Closing

In concluding this paper, the writer needs to note that subsidies for MSMEs have an important role in helping states to achieve their development. Furthermore, this framework may be viewed as one example of how international trade law and national law are compatible in certain circumstances. According to the SCM Agreement as part of Annex 1A WTO Agreement, non-actionable subsidies are the only type of subsidies permitted. And by interpreting this agreement according to methods provided by VCLT 1969, it can be concluded that subsidies for MSMEs are not prohibited since it doesn't qualify based on the classification of industry types under this agreement.

As an example, Indonesia can be considered as one of the WTO Member States which applied non-actionable subsidies for its SMEs. This state practice can be adopted into international customary law if it is persistently practiced by every WTO Member State. Finally, it is important to note that this framework is urgent to be adopted to recover from the economic crisis post the Covid-19 Pandemic, to enhance human capital development in this Society 5.0, and to achieve the SDGs *in concreto* SDGs Number 8 in relation with SDGs Number 9, 10, 16 and 17. To close this paper, the writer would also like to suggest that the Indonesia Government shall bring this framework to the G-20 Forum, so that the international communities may acknowledge the benefit of this framework.

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