

# Subsidiarity: A Principle for Global Trade Governance?

Written by Günter Walzenbach

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GÜNTER WALZENBACH, MAR 20 2021

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One day, evolution in governance might lead to a world state with the ability to develop globally binding norms and rules. Then a world government would stand above individual countries and make the most of an irrevocable transfer of sovereignty. Yet, this power transfer would be partial, if this world republic is organised along federal lines with considerable autonomy remaining in the hands of constituent units of formerly independent nation states. In fact, global governance as a vertical system operating at multiple levels entices large groups of political actors to demand subsidiarity as a tool that effectively constrains the exercise of global authority. In the case of the World Trade Organisation (WTO) and its economic liberalisation policy, for example, this process is already under way and has progressed further than in some other issue areas discussed in this volume. What started out as gradual tariff reduction and the phasing out of import quotas, now targets differences in national health and safety standards as well as social and environmental regulation. As a result, a general preference for domestic or regional decision-making in trade policy is much harder to construct, and the subsidiarity principle has become more than a convenient default rule for global governance or a synonym for decentralisation.

The increasing recognition of subsidiarity in global affairs exercises an important balancing function that acts as a stepping-stone towards further codification. Traditionally, the benefits of trade liberalisation as measured in economic growth rates have consistently offered the 'good reasons' for shifting decision-making upwards, but the neglect of social costs and societal contestation asks for a more considered evaluation (Jachtenfuchs and Krisch 2016, 6). In other words, the same rules, norms and regulations have considerably different costs, benefits and social implications across countries due to diverse conditions and preferences, and this provides some stimulus for non-standardisation. It is in this light that this chapter depicts subsidiarity as a medium- to long-term policy mechanism that serves as a balancing tool in an emerging global system of multi-level governance. In short, it is more than a mere decision-making criterion with prime impact for a scaling down of governance arrangements. International economic organisations and institutions of global economic governance are the prime location for an assessment of this hypothesis. More specifically, highly technical, at times log-jammed and circular arrangements of global trade governance form an ideal testing ground for some of its more far-reaching promises in terms of political legitimacy. The mechanisms analysed in three case-studies of EU-WTO interaction below may appear sporadic and overly selective, but in the current stage of global economic governance they put subsidiarity into practice as the only viable option to settle conflicts between the preferences of domestic political communities and the wider demands of the global market system.

### Subsidiarity and global governance

At the global level, subsidiarity is a principle that gives guidance to reform processes across governance arrangements (Lamy 2012). Quasi-federal mechanisms achieve policy effectiveness by allocating competences to the lowest possible level of authority and by recognising relevant costs and benefits. This ordering activity is applicable to a range of international forms of authority, including international institutions, international organisations, and international courts. Regardless of their specific remit, they recognise and respect degrees of self-governance at various levels and do so in diverse issue areas.

# Subsidiarity: A Principle for Global Trade Governance?

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Within such a global system of multi-level governance, the European Union (EU) takes on a special position as it is a federal system in the making with fragmented constitutional foundations. In contrast to global ambitions, here the high degree of institutionalisation documented in this volume appears 'ripe for the kind of federal legislative self-discipline that subsidiarity implies' (Berman 1994, 455). Yet, the practical implementation of subsidiarity remains challenging and contested at all levels. This follows, for example, from the need to accommodate diverse preferences and interest constellations in the multi-actor setting of international negotiations; or, the constant interplay of subsidiarity concerns with other issue areas of international relations asking for sustainable compromises to resolve trade-offs of an essentially political character.

As the contributions to this volume show, subsidiarity can be a very useful tool to structure the political process across several levels of EU decision-making. While it promises to keep government power and action as closely as possible to citizens, it also takes questions of resource limitations and practicality seriously. For this reason, there is no single answer where to find the 'lowest possible level – closest to the individuals and groups affected by the rules and decisions adopted and enforced' (Slaughter 2004, 30). For subsidiarity to become a more established part of global governance, its dynamic character must be recognised. Gradually, as with other principles of international law, a growing number of international organisations become the hub for the implementation of governance mechanisms as a result of extended cooperation among diverse state and non-state actors.

Most of the time, the burden of proof for whether a scaling-up of power to the global level makes sense rests with representatives of national governments, their ministers and top civil servants. It is up to their judgement when and how specific policy functions require additional institutionalisation, also beyond the EU. Once successful, though, international and supranational organisations themselves need to provide evidence that new governance arrangements and power allocations produce complementary or superior results to traditional forms of inter-state cooperation. In no small measure, therefore, implementation of subsidiarity depends on its skilful application by highly qualified people at adequate levels of governance following fair procedures and general rules of appropriateness (Howse and Nicolaidis 2016).

The management of the global trading system involves a complex set of actors: technocratic insiders of bureaucratic networks with high levels of expertise in economic liberalisation; lawyers and judges with the task of adjudicating and implementing transnational rules; and elected politicians ensuring the accountability of international bargains. Civil society actors enter the equation too, especially when respective reform agendas imply fundamental changes in the allocation of authority. In this constellation, subsidiarity acquires an important discursive, consensus-building quality that helps to moderate 'the balance of authority and legitimacy between different levels of governance' (Broude 2016, 56).

## Trade facilitation

The first case study refers to a WTO working group originally set up during the organisation's 1996 ministerial conference in Singapore. It was the joint EU effort that ultimately opened the way for a recognition of subsidiarity considerations in international trade policy as regards customs arrangements. Despite longstanding disagreements between developed and developing countries, and in contrast to other technical 'Singapore issues' – such as investment, government procurement and competition policy – the EU succeeded to keep trade facilitation in an elevated position on the Doha development agenda. Then, step-by-step, the important reform item of customs and border procedures was addressed with the constant support of the international business community and an unusual alliance among developing countries. In addition to the transaction cost argument in trade relations, the EU position specifically emphasised the need for global regulations to be compatible with the norms of the single market (Woolcock 2012, 79).

Once organised properly, the co-ordination of national, regional, and global trade facilitation initiatives can create welfare gains for all participants. The subsidiarity principle here suggests to formally identify the extent of cross-border spill-overs of trade measures by individual countries and to adjust the administrative management of the exchange of goods to the same level at which most of the trade volume occurs. Complex transit arrangements and border checks for the exchange of goods and products between world regions are a case in point. These involve

# **Subsidiarity: A Principle for Global Trade Governance?**

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significant transnational effects whenever a trade relationship is built around international shipping routes or long-distance follow-on transport. Then region-wide arrangements become vital to realise the benefits of free trade as a national regulatory approach would strongly disadvantage and discriminate landlocked countries (Maur and Shepherd 2017). In this scenario, trade facilitation measures work best when upscaled and managed at macro-regional level.

In fact, the WTO trade facilitation agreement concluded at its ninth ministerial conference in 2013, and coming into force four years later, marked an important step in the practical implementation of the subsidiarity principle. It indicates a breakthrough for multilateral negotiations that in many other issue areas of the global trading system has not been forthcoming. In procedural terms, preference was given to a decentralised, bottom-up approach explicitly recognising the resource and capacity limitations of many developing countries. In terms of substance the new agreement entailed an element of refocusing on the 'hardware issues' of international trade where a lack of adequate infrastructure is regularly causing frictions and delays in economic exchanges across borders (Neufeld 2014, 3).

Negotiators faced the dilemma to find a common framework, while at the same time giving special and preferential treatment to developing and least-developed countries noting a potential North-South stand-off. Previous WTO deals had merely granted transition periods for certain groups of countries and created long delays before actual policy change was put into practice. The trade facilitation agreement, however, broke new ground. Although country-specific reforms and time-lags are an aspect of the regime, it contains a new, comprehensive 'flexibilities package' that establishes a crucial link between the commitment to trade facilitation and the actual implementation capacity on the ground. More precisely, if the necessary financial and logistical support for anticipated infrastructure projects at national border crossings is not made available, the involved developing country is under no formal obligation to honour relevant parts of WTO agreements on trade liberalisation.

In this way, subsidiarity concerns establish a workable mechanism that ensures consultation and transparency between two different sets of regime actors operating at domestic and international level. The available implementation capacity, and therefore the practical feasibility of the principle, is assessed on a country-by-country and measure-by-measure basis. In other words, the traditional one-size-fits-all approach of global trade agreements is given up. The trade facilitation model terminates an increasing number of general exceptions for developing countries and favours a tailor-made approach paying tribute to the development needs of individual countries.

Importantly, the deliberations around this governance arrangement were embedded in a subsidiarity discourse reflecting long-standing demands from least developed countries. Previously, their ambition to have more policy space through the ownership of economic reform efforts failed by signing up to international commitments they were unable to fulfil. Paragraph two of the trade facilitation agreement now explicitly states that its members 'would not be obliged to undertake investments in infrastructure projects beyond their means'. It continues by clarifying the remit for least developed countries in so far as these 'will only be required to undertake commitments to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities'.

This wording is indicative of the changing narrative surrounding the subsidiarity-inspired components of the WTO trade facilitation agreement. Initially, its conceptual bearings were formulated by country groupings of the developing world in the negative sense of policy exemptions from general obligations. Yet, learning from past experiences, multilateral negotiations over the last decade finally succeeded in search for positive mechanisms that simultaneously strengthen implementation capacity, make room for issue-specific trade facilitation and respect for individual country needs.

## **Inter-regional trade agreements**

For many, given the institutional gridlock in the WTO, major inter-regional deals appeared as a more promising alternative to generate global economic growth. In this second case of the analysis of applied subsidiarity, trade negotiations between the EU and the United States entailed stronger engagement with members of parliament, non-governmental organisations, trade unions, and business groups. However, apparent shortcomings, such as selective access of civil society actors and numerous veto points at different stages of the negotiation cycle, undermined the

## Subsidiarity: A Principle for Global Trade Governance?

Written by Günter Walzenbach

search for a workable solution. Ultimately, changes in trade-offs during the bargaining process and the changing position of a variety of domestic actors led to the failure of the intended mega-deal between two major players in the global trading system.

Thus, subsidiarity raises specific questions about overlapping jurisdictions and the appropriate level of civil society activism in inter-regional negotiations. On the one hand, consultation processes add value through the maintenance of escape clauses and clarification of exceptions in controversial areas of international trade. On the other hand, legitimacy and efficiency gains through public debate and improved compliance also require a clear focus and location of parliamentary and public deliberation within a multi-level system. Despite an intended compatibility of inter-regional with global arrangements, the WTO only reluctantly accepted legal mechanisms negotiated among sub-groupings of its membership to enhance its own legitimacy base.

Indeed, legitimacy considerations ranked high in the negotiation phase of inter-regional trade regimes. In the prominent example of the Transatlantic Trade and Investment Partnership (TTIP), the envisaged liberalisation drive generated unprecedented levels of mobilisation by civil society organisations operating either locally, nationally or regionally in the extended EU setting. Yet, a consensus on the substance of regulatory convergence across the Atlantic was mainly found in the business community and less so among other civil society actors. The latter could not rally under a unifying banner comparable to the structural imperatives of global value chains and capital investments.

In the EU, setting the TTIP agenda inspired domestic politics as it invigorated societal activism in sectors such as public health and local government; previously untouched by free trade agreements and related negotiations. Consumer organisations and trade unions with a long-term interest in agenda-shaping intensified their engagement and provided critical assessments during the negotiation process. In short, 'the breadth and depth of TTIP's ambition has raised the stakes for civic interest groups beyond those narrowly opposed to globalization' (Young 2016, 364). Two features of the proposed transatlantic regime explain best unprecedented levels of mobilisation and lasting tensions due to subsidiarity concerns: enhanced regulatory cooperation and global lock-in of investment arbitration.

Subsidiarity in trade relations has appeal because it comes with procedural safeguards to protect societal preferences, but the de- and re-regulatory content of TTIP sparked worries about a further dis-embedding of European market economies. In the health care sector, for example, cost escalation would offer opportunities for US American service providers to crowd out traditional public sector agencies (Inman 2016, 36). More generally, a finalised TTIP deal would challenge the European policy mix between the state and the market, upsetting a careful balance in vital areas of social security. Similarly, opponents doubted the alleged benefits from regulatory cooperation at the transatlantic level: how, if at all, could the equivalence of EU and US standards be ensured without further guarantees for shared authority to deliver high levels of consumer protection? Neither party to the negotiations found previous experiences with scandals in the processed food market or the handling of genetically modified organisms particularly reassuring.

Furthermore, TTIP's investment arbitration system would shift authority away from the state by giving foreign investors the right to initiate proceedings against government actors if public policy measures harm their revenue expectation. As respective court tribunals and arbitration panels depend on a small circle of highly trained lawyers, the risk of organisational capture is particularly high. Due to resource limitations, the same type of expertise would simply move between public and corporate clients.

With the failure of TTIP negotiations, many grey areas in operational aspects of the proposed partnership remain. Whenever substantive issues suggest a formal deference to national decision-makers, subsidiarity considerations rank high. Comparative analysis, for example, can show that existing investment treaties at bilateral level have already in place a more elaborate investor-state dispute settlement mechanism than proposed in TTIP (Von Staden 2012, 1047). Interestingly, in times of economic crisis, these reserve the right to initiate rescue efforts to national governments regardless of any detrimental effects for international business. After all, it appears reasonable to prioritise the restoration of public order (or peace and security) over the profit motive, and to do so by relying on democratic procedure and public accountability.

# Subsidiarity: A Principle for Global Trade Governance?

Written by Günter Walzenbach

Ironically, the ultimate failure of viable subsidiarity mechanisms in TTIP had more to do with the influence of representative bodies controlling government than irreconcilable differences in specific issue areas. In the US, a final deal requires a congressional-executive agreement and as such could only come into effect after approval by both houses of Congress. In the EU, the Commission decision to designate TTIP as a mixed agreement triggered the need for ratification by national legislatures, in addition to endorsement by the EU Council and the European Parliament. Eventually, the large number of policy objectives set by government against numerous veto-players determined an overall negative outcome. The task to assess correctly the overlap between parliamentary and governmental majorities at different levels of decision-making proved to be an insurmountable obstacle (Jančić 2017, 216). Ultimately, it was not possible to replicate the relative success of the EU-Canada Economic and Trade Agreement (CETA) originally meant as a blueprint for more advanced forms of global trade governance. In the case of the latter, competing subsidiarity claims on both sides of the Atlantic were settled by accepting significant compromises in international regulatory cooperation.

## WTO dispute resolution

Despite its mixed record, much of the subsidiarity debate in the WTO has focused on the dispute settlement mechanism (DSM). Sophisticated procedural arrangements, including arbitration panels and an appellate body, protect extensive jurisdiction to assess national and European trade policies. The third case study of a subsidiarity mechanism underlines the legitimacy of government discretion for the sake of human health, food safety, environmental protection and animal welfare.

Traditionally, critics of the DSM have challenged its judgements highlighting structural deficiencies due to the disproportionate influence of a small group of powerful Western states. With new and emerging trading states in the global system, WTO members still rely on a community of private trade lawyers to manage their conflicts. Accordingly, internal reform attempts have focused on procedural modifications while maintaining stability and predictability as a major organisational goal. Therefore, the high level of transparency achieved through the DSM allows to shed some further light on the balancing effect of subsidiarity. Three prominent examples of EU encounters with the WTO mechanism confirm the important, yet time-consuming, aspect of arbitration in trade policy. The evidence presented below clearly rejects any quick fix assumption in the application of the subsidiarity principle.

As early as 1998, it became obvious that time is a crucial factor in decision-making. Controversially, a WTO panel concluded that an EU import ban on hormone treated beef was based on inadequate risk assessments (WTO 2009). And although the EU Commission sought to provide better justifications, it was unable to do so within a reasonable period, allowing the US and Canada to impose retaliatory sanctions. Until 2003, a Brussels Directive still upheld trade restrictions for specific growth hormones stressing that more comprehensive scientific evidence on their health risks was not available. The US and Canada remained unconvinced while DSM proceedings continued without conclusive decisions. Only in 2009, the US (and two years later Canada) finally arrived at a bilateral compromise with EU authorities dropping the sanctions regime in return for enhanced market access of hormone-free meat.

In a similar way, it took France three years to defend an import ban on asbestos and other products containing the harmful substance. Eventually, a WTO panel agreed that the decision of the French government aimed to protect human life and health, and that 'no reasonable available alternative measure' did exist (WTO 2001). It was within its power to do so as the ban neither led to arbitrary or unjustifiable discrimination of importers, nor constituted a disguised restriction on international trade.

More recently, the EU justified an import ban on seal products with moral concerns confronting animal cruelty. It explicitly disapproved of the complicity by consumers who inflict suffering by purchasing products derived from seal hunts. In fact, referring to Article XX (a) of the General Agreement on Tariffs and Trade (GATT), the supranational organisation considered restrictive measures 'necessary to protect public morals' (WTO 2014). Subsequently, only specific aspects of the EU ban were challenged as it allowed for two exceptions to the general prohibition: seal products derived from hunts conducted by indigenous communities and for the purpose of marine resource management could still enter legally the internal market. This market access, however, was only granted in an immediate, unconditional way to exporters from Greenland and withheld from Canadian and Norwegian producers.

## **Subsidiarity: A Principle for Global Trade Governance?**

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Accordingly, the WTO found inconsistencies with two of its key working principles on 'most-favoured nation status' and 'national treatment' as laid out in Article I (1) GATT and Article III (4) GATT.

Only in 2015, four years after the initial WTO proceedings, the EU revised internal legislation to comply with the rules of the global trade regime. A modified regulation removed all exceptions that would have accepted seal hunts for resource management purposes. It also amended the exceptions given to the Inuit, an indigenous community inhabiting the Arctic regions of Greenland, Canada and Alaska. The reworked document now ensured that a meaningful exception remains despite the adding of animal welfare considerations. It leaves EU authorities with the power to act in cases of circumvention which may include further prohibitions or limits to the quantity of seal products placed on the market; for example, if hunts are conducted primarily for commercial reasons.

What is more, a follow-up regulation by the EU Commission did add detail to the implementation of the Inuit exception. It required the setting up of an attestation body that ensures compliance with the conditions of the EU seal regime and introduces a certification scheme specifying the type of products that are permitted to enter the EU market. At the time of the WTO ruling, only Greenlandic Inuit (citizens of Denmark, but not the EU) were effectively using the exception for indigenous communities. Subsequently, the Commission continued to engage with third countries and formally recognised the sub-national government of Nunavut (in the northern territories of Canada) as an attestation body for the certification scheme thereby taking subsidiarity in trade matters seriously and spreading the benefits of the seal regime further.

No doubt, for many proponents of global subsidiarity these three examples of compromise in the day-to-day running of the DSM will not go far enough. From a system perspective, other principles than pure subsidiarity concerns frequently rank higher in global trade governance. A complaint system, as operated through the DSM, will always struggle to address macro-considerations of power distribution, economic inequality and sustainability head on. Indeed, the presence of power politics in the form of an EU-US compromise to establish this WTO mechanism in the first place was able to trigger positive policy change in the medium- to long-term.

### **Re-balancing the global trading system**

The three case-studies presented above do not provide an exhaustive list of mechanisms helping to avoid gridlock in global trade governance. From the subsidiarity angle, the widely respected consensus requirement of the WTO should not be forgotten. It necessitates an approach to negotiation by which 'nothing is agreed until everything is agreed'. The so-called 'single undertaking' allows the participants to engage in detailed cost-benefit calculations before making any new commitments in terms of issue-linkages or demanding package deals (Hoekman 2014, 557). Yet, not only is this practice slow and time-consuming, it might also lead to stalemate when it is impossible for negotiators to strike a balance between global regulations and national exceptions. The WTO decision-making process in this respect leaves important power resources with national delegates of trade ministries. They form relevant access points at the national level to facilitate policy formation and to address information deficits on part of the general public as regards the intricacies of the global trade agenda.

The EU as a supranational organisation with formal compliance arrangements holds clear advantages when it comes to the operation of global subsidiarity mechanisms. The pattern derived from the case studies shows how the anticipated EU compliance itself became part of a deliberative process within the WTO acting as a significant constraint on the implementation of global trade regulations (Young and Peterson 2014, 146). Internally, of course, WTO compatibility is but one element in a complex and cumbersome policy making process in Brussels; and a crisis-ridden global environment does not make it easier to follow through with the Union's liberal trade policy orientation. Nevertheless, with exclusive competences in place, an open mind towards mixed agreements and the ability to take, if need be, unilateral defensive measures, EU actorness in trade policy was never in question. In the issue areas discussed here, only post-Brexit policy options of the United Kingdom stand in the way of a largely untarnished success story.

For the time being, and closer to the WTO's internal policy cycle, the use of waiver power granted to the Ministerial Conference and the General Council constitutes one of the strongest organisational statements on global

## **Subsidiarity: A Principle for Global Trade Governance?**

Written by Günter Walzenbach

subsidiarity. In principle, at least, the suspension from any obligation under its legal framework is possible, if requested by one of its 164 member states. While ultimate approval depends on 'strong collective preferences' and adherence to detailed political procedures, it enables key executive actors to carve out international policy space and to delineate more precisely the division of competences between a global authority and its constituting members (Feichtner 2016, 97).

Will a combination of some – or all – subsidiarity-inspired mechanisms be enough to outweigh opportunity and transaction costs in the reform of the global trading system? Rodrik (2011, 253), for one, demands a more fundamental re-balancing of global governance by advocating a radical overhaul of WTO rules on safeguards. Currently, these allow higher import tariffs whenever domestic firms experience severe competitive pressures from foreign firms. In his view, turning them into a catch-all category for general country opt-outs from liberalisation would be a promising way forward. Thus, an element of choice would be handed back to national governments allowing for a more thorough review of distributional issues, social regulations, labour and environmental standards, or development priorities. Most importantly, an extended safeguard system would have to satisfy the highest standards in line with the democratic credentials of domestic institutionalisation and decision-making.

In sum, the political interpretation of a global subsidiarity principle suggests a stringent conduct of good governance tests – with assessment criteria ranging from evidence-based deliberation to heightened transparency levels, and from executive accountability to civil society inclusiveness – preceding actual implementation. In fact, a prerequisite for successful balancing is to reset trade liberalisation on a more equal footing with social goals at the global level. This is much easier said than done, as key policy actors in different world regions do not always share the political preferences of their constituencies. Trade ministers, civil servants and legal experts among the diverse WTO leadership would need to see social ambitions to reduce inequality and economic growth strategies as much more interconnected, if they were to instigate true system reform.

### **Conclusion**

This chapter has explored the subsidiarity principle in the context of case studies on global trade governance with strong EU involvement. The emerging WTO agenda shows several challenging trajectories away from the earlier focus on tariff reductions facing new challenges and thus requiring new balancing mechanisms. With more attention now paid to beyond the border issues, such as health and safety requirements or social and environmental standards, to non-tariff barriers as well as regulatory divergence among countries, multilateral negotiations risk severe and lasting gridlock. Politically, there appears to be less appetite to introduce regulatory change that would even out diverse social preferences and historically grown economic structures. Consequently, the WTO is under pressure to find a better balance between common disciplines and country specific competences under the control of governments. Therefore, the time is right to think about a more systematic recognition of subsidiarity in the global rulebook in order to strike a new balance between achieving globally universal rules while permitting, at the same time, greater diversity to meet specific local conditions.

A more explicit acknowledgement promises to resolve the recurrent tensions between diverging societal preferences and the continuing drive towards international market integration. As has been realised at the national and regional levels, global economic governance cannot neatly separate political deliberation from market decision-making, and neo-liberalism is not the model around which a global consensus can be constructed, let alone with ease. Instead, more research is needed to map the global reach of subsidiarity – or subsidiarity like mechanisms – and to verify its impact as a decentralising or centralising, vertical or horizontal force. Arguably, many trade policy actors drawing on individual country experiences and familiarity with federalised political cultures now consider a more nuanced approach towards the interplay of national, regional, and multilateral levels as most appropriate. From the perspective of the subsidiarity debate elaborated in this volume, global economic governance needs a specific type of reform to prevent ultimately destructive unilateralism while at the same time leaving a dynamic policy space for states to accommodate changing societal preferences. In this balancing exercise the precise nature of implementation mechanisms matter, as does the time that is needed to make them work efficiently. Yet, if global governance is to be more than a proxy for a bargain between powerful states, the calibration and fine-tuning associated with further codification seems inevitable.

# Subsidiarity: A Principle for Global Trade Governance?

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## **Subsidiarity: A Principle for Global Trade Governance?**

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