Csongor István Nagy, *The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?*, 57(6) Journal of World Trade 889-908 (2023).

The numbers in the text refer to the page-numbers in the final publication.

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The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?

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In December 2022, the EU introduced a comprehensive regulatory regime for foreign subsidies, which have so far largely remained under the radar of international trade law. The last couple of decades have seen a considerable increase in the economic import of foreign subsidies. Services and investments have grown from marginal importance to a major field of international trade and have been the subject to massive subsidization by state capitalist countries. The WTO's enlargement to these economies internalized the problem but also undermined the solidity of the pristine paradigm shaped by the societal pattern of western democracies. The EU Regulation on Foreign Subsidies responds to this menace and ushers a paradigm-shift in the field. This paper provides an analysis of the Regulation in the context of its international framework. It identifies the regulatory gap the Regulation reacts to and inquires if it effectively responds to this; it examines if the Regulation complies with international disciplines and if it could serve as a role model to address the increasingly burning question of foreign subsidies.

Keywords: Countervailing Duties, EU Regulation on Foreign Subsidies, Foreign Subsidies, International Trade, State Aid, State Capitalist Countries, Protectionism, Transnational Subsidies, Unfair Trade

1. Introduction

In December 2022, the EU introduced a comprehensive regulatory regime for foreign subsidies (Regulation on Foreign Subsidies),[1] which have so far largely remained under the radar of

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international trade law. The last couple of decades have seen a considerable increase in the economic import of foreign subsidies. Services and investments have grown from marginal importance to a major field of *890** international trade and have been the subject to massive subsidization by state capitalist countries.[2] The WTO's enlargement to these economies[3] internalized the problem but also undermined the solidity of the pristine paradigm shaped by the societal pattern of western democracies.[4] The new EU regime responds to this menace and ushers a paradigm-shift in the field.

This paper provides an analysis of the Regulation on Foreign Subsidies in the context of its international framework. It identifies the regulatory gap it reacts to and inquires if it effectively responds to this regulatory shortcoming; it examines if it complies with international disciplines and if it could serve as a role model to address the increasingly burning question of foreign subsidies. Section 2 gives an overview of the status and treatment of foreign subsidies in WTO law and the gaps and shortcomings that result in the system's failure. Section 3 presents the Regulation on Foreign Subsidies and how it converges with and diverges from anti-subsidy law, EU state aid law and EU competition law. Section 4 analyzes the WTO law framework that governs and confines unilateral actions targeting foreign subsidies and whether the Regulation complies with these international disciplines. Section 5 sets out the paper's proposals and final conclusions.

2. Foreign Subsidies in WTO law

This paper proposes the following typology. In terms of terminology, it distinguishes between "domestic," "foreign" and "transnational" subsidies. Domestic subsidies, the most traditional category, are financial contributions granted to recipients who are located in the territory of the granting state. For foreign and transnational aids, the paper coins the term "extraterritorial subsidy." Foreign subsidies are financial contributions provided to recipients located in a foreign country concerning activities to be pursued in that country. For instance, it is a foreign subsidy, if the Chinese government grants a favorable (non-market-based) loan to a company established in the EU (a subsidiary of a Chinese company) to submit a bid to a European public tender or to carry out an infrastructure project in one of the Member States. The term "transnational subsidy" refers to three-country scenarios where the granting authority, the recipient company and the economic *891** impact are in different states: country "A" grants a financial contribution to a company located in country "B", which, in turn, sells its products or services in country "C."

The author is indebted to János Martonyi for his comments. Of course, all views and any errors remain the author's own. Email: nagycs@juris.u-szeged.hu; Nagy.Csongor.Istvan@tk.hu.

[1] Regulation 2022/2560 on Foreign Subsidies Distorting the Internal Market, [2022] OJ L 330/1 (hereafter: Regulation on Foreign Subsidies or Regulation).

[2] As to the growing concerns over foreign subsidies, *see* Gary Hufbauer, Thomas Moll and Luca Rubini, Investment Subsidies for Cross-Border M&A: Trends and Policy Implications, Occasional Paper No. 2, The United States Council Foundation, New York (2008); Victor Crochet & Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law, 20 World Trade Review 343, 344-346 (2021).

[3] China joined the WTO in 2001, Saudi Arabia in 2005, Viet Nam in 2007 and Russia in 2012.

[4] Chu Yeong Lim, Jiwei Wang, Cheng (Colin) Zeng, China's "Mercantilist" Government Subsidies, the Cost of Debt and Firm Performance, 86 Journal of Banking & Finance 37-52 (2018); Tom Hancock & Yizhen Jia, China paid record $22bn in corporate subsidies in 2018 (Financial Times, May 27, 2019), available at https://www.ft.com/content/e2916586-8048-11e9-b592-5fe435b57a3b.

WTO law encompasses inadequate disciplines when it comes to extraterritorial subsidies.[5]

First, no disciplines are in place concerning services (at least as to the export-oriented aspects of service subsidies, as the national treatment obligation may apply to subsidies and, hence, may require member states to treat foreign and domestic enterprises located in their territory alike).[6] While Article XV GATS contains an inbuilt mandate to negotiate and work out a regime on service subsidies, it establishes no discipline, aside from a duty of consultation. They are, in themselves, not prohibited and member states need to identify a GATS-conform legal basis to impose countervailing measures. It has to be stressed that in WTO law "services" go way beyond the colloquial meaning of the term.[7] In addition to cross-border provision and consumption, they also include the commercial and physical presence of foreign undertakings.[8] This implies that subsidized investments, take-overs, mergers and acquisitions, as well as concession and public procurement bids are not caught in the net of WTO law at all.

Second, although Articles VI and XVI GATT and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contain a comprehensive regime on product subsidies, they seem to apply solely to subsidies provided to manufacturers located in the territory of the granting state (domestic subsidies) and not to apply to extra-territorial subsidies, where the beneficiary is located in the country where the goods are sold or in a third country where the goods are produced and from where they are exported.[9]

The GATT prohibits only export subsidies for non-primary products, in Article XVI(4), and authorizes member states, in Article VI, to impose countervailing duties. Article XVI GATT, although confirming that export subsidies "may have harmful effects for other contracting parties," confines itself to a duty of notification and consultation.[10]
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The general prohibition of trade-distortive product subsidies was introduced by the SCM Agreement. Nonetheless, the Agreement seems not to apply to subsidies provided by a member state to a recipient located in the territory of another member state. The depth of the problem is revealed by a recent European Commission decision, which established countervailing duties on imports from certain Chinese enterprises located in Egypt for their receiving subsidies from the Chinese government. Lead by the desire to ensure a firm legal basis, the Commission argued that the Chinese subsidies granted to Chinese enterprises located in Egypt could, based on

[5] *See* Victor Crochet & Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law, 20 World Trade Rev. 343, 347-351 (2021).
[6] Csongor István Nagy, Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled? 2(1) Central European Journal of Comparative Law 147, 159-161 (2021).
[7] EU law distinguishes between the movement of services, the establishment of undertakings and the movement of capital. Article 57 of the Treaty on the Functioning of the European Union (hereafter: TFEU). Services in the sense of GATS encompass all these three.
[8] Article I(2) GATS & XXVIII GATS.
[9] Marc Benitah, The WTO law of subsidies: a comprehensive approach 605 (Wolters Kluwer, 2019).
[10] Special rules are set out for agricultural subsidies in the Agreement on Agriculture. *See* Lorand Bartels, The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System, 50 Journal of World Trade 7-20 (2016).

general international law, be regarded as subsidies provided by Egypt itself, hence, the regime on countervailing duties applied.[11] This interpretation was confirmed by the General Court.[12]

Article 1 of the SCM Agreement defines "subsidy" as "a financial contribution by a government or any public body *within the territory of a Member* (referred to in this Agreement as 'government')."[13] Furthermore, Article 2.1. of the SCM Agreement makes a similar implicit reference: "[i]n order to determine whether a subsidy (…) is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') *within the jurisdiction of the granting authority*, the following principles shall apply (…)".[14] As to Article 1 one may argue that the phrase "within the territory of a Member" is related to the term "public body" and not the term "financial contribution", that is, this phrase simply confirms that solely subsidies provided by public bodies located "within the territory of a Member" are relevant. This is reinforced by the fact that in the brackets the text provides a shorthand for "a government or any public body." If the phrase "within the territory of a Member" were aimed to provide a territorial confinement for the payment of the subsidy, it would be after the brackets. Less convincingly, but one may still argue in respect to Article 2 that the phrase "within the jurisdiction of the granting authority" may embrace not only territorial but also personal jurisdiction, thus extending the scope of this provision to recipients located outside the territory of the member state concerned. Finally, Article 2.1. *893** inserts the phrase "within the jurisdiction" into the definition of specificity but, at the same time, Article 2.3. provides that *per se* prohibited subsidies (that is, export and local content subsidies) are legally presumed to be specific, hence, they do not come under Article 2.1.[15]

All in all, it can be reasonably argued that transnational export and local content subsidies are caught in the net of the SCM Agreement, in addition to the prohibition of Article XVI(4) GATT on export subsidies for non-primary products. This is, however, a clearly insufficient discipline, as such subsidies are very rare in practice.[16]

3. The EU's response to extra-territorial subsidies

The EU Regulation is the first attempt to address foreign subsidies in a comprehensive manner. It identifies the major gaps in the international disciplines and EU law mechanisms and aims to ensure a level playing field in the EU internal market by neutralizing unfair trade practices. The Regulation does not deal with transnational subsidies. It applies only if the recipient is "engaging in an economic activity in the internal market."[17] This is because the European

[11] Commission Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt, [2020] OJ L 189/1, para 699. Commission Regulation 2020/870 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt. OJ L 201/10, 25.6.2020.
[12] Case T-540/20 *Jushi Egypt for Fiberglass Industry v Commission*, ECLI:EU:T:2023:91.
[13] Article 1.1 of the SCM Agreement (emphasis added).
[14] Victor Crochet & Vineet Hegde, China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement. Leuven Centre for Global Governance Studies Working Paper No 220, February 2020.
[15] Victor Crochet & Vineet Hegde, China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement. Leuven Centre for Global Governance Studies Working Paper No 220, February 2020.
[16] Victor Crochet & Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law, 20 World Trade Rev. 343, 351 (2021).
[17] Article 3 of the Regulation on Foreign Subsidies.

Commission interprets EU (and international) anti-subsidy rules to apply to transnational subsidies (presumably because they are attributable to the state where the recipient enterprise is located). The Regulation applies to services, investments, or other financial flows in relation to the establishment and operation of undertakings in the EU.

The regime introduced by the Regulation features a mixture of the regulatory patterns of EU competition law[18] and makes clear that it has to be applied and interpreted congruently with the EU legislation it draws on.[19] The substantive provisions are, in essence, a WTO-law-translation of EU state aid law. Articles 3-4 of the Regulation use WTO terminology to reproduce Article 107(1) TFEU, which contains the general prohibition of competition-distortive state aids. Article 6 of the Regulation contains a balancing test resembling the exceptions embedded in Article 107(1) TFEU. The procedural provisions, including the rules on *894** sanctions, however, do not coincide with EU state aid procedure but are an eclectic blend of various EU competition law rules (transplanted from stat aid, antitrust and merger control procedure). This divergence is inevitable, given that EU state aid procedure is conducted against a member state, while the procedure under the Regulation, for obvious reasons of sovereign immunity, is conducted again the recipient undertaking.

3.1. The substantive rule: prohibition of distortive foreign subsidies with no counterbalancing virtue

A subsidy is caught in the net of the Regulation, if it distorts competition in the internal market and has no counterbalancing virtue.[20] The term "foreign subsidy" is defined widely to embrace all economic benefits and may be boiled down to the following elements: (1) financial contribution, (2) provided, directly or indirectly, by a non-EU country, (3) that confers a benefit on an undertaking engaging in an economic activity in the internal market and (4) is specific to one or more undertakings or industries.[21] These conceptual elements coincide with those set out in the SCM Agreement, which applies to (1) financial contributions (2) provided by a government or any public body within the territory of a member state and (3) conferring a benefit that are (4) specific to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority.[22] The term "financial contribution" has to be conceived widely. The Regulation provides an illustrative list (transfer of funds or liabilities, foregoing of revenue, provision of goods or services, purchase of goods or services),[23] which essentially reproduces the examples provided by the SCM Agreement.[24]

The Regulation applies to financial contributions provided by the central government and public authorities, as well as any entity whose actions are attributable to the third country.[25] This

[18] Xueji SU, A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?, 50(1) Legal Issues of Economic Integration 1-26 (2023) (Designating the Regulation as "eclectic."). For an overview on the overlaps with and parallels to EU state aid law, *see* Sarah Blazek and Jochen Christoph Hegener, Substantive and Procedural Parallels and Overlaps Between Art. 107, 108 TFEU and the (Draft) Regulation, (3) Zeitschrift für Europarechtliche Studien 453 (2022). For a comparison to the anti-subsidy procedure, see Patricia Trapp, The Procedural Framework of the Proposal for a Regulation on Foreign Subsidies Viewed from a Common Commercial Policy Perspective, (3) Zeitschrift für Europarechtliche Studien 495 (2022).
[19] Recital (9) of the Regulation on Foreign Subsidies.
[20] For an overview of the substantive issues, *see* Morris Schonberg, The EU Foreign Subsidies Regulation: Substantive Assessment Issues and Open Question, (2) European State Aid Law Quarterly 143 (2022).
[21] Article 3 of the Regulation on Foreign Subsidies.
[22] Articles 1-2 of the SCM Agreement.
[23] Article 3(2) of the Regulation on Foreign Subsidies.
[24] Article 1(1.1)(a)(1) of the SCM Agreement.
[25] Article 3(2) of the Regulation on Foreign Subsidies.

implies that subsidies, including non-market-based transactions, provided by state-owned and state-controlled enterprises may come under the scope of the Regulation, if their "actions can be attributed to the third country." This is in line with how the Appellate Body interprets the SCM Agreement in the context of public enterprises.[26]

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The Regulation does not prohibit all foreign subsidies, but only those that have a palpable negative effect on competition (in the Regulation's parlance: "distort competition") in the internal market. "A distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market."[27] In the context of public procurement, the distortion is defined as "enable[ing] an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned."[28] The question of distortion calls for a case-by-case analysis, but the Regulation provides a few indicia and a couple of safe harbors. The competition-analysis extends, in particular, to the amount and nature of the foreign subsidy, the market position of the recipient undertaking, and the purpose and conditions attached to the foreign subsidy, as well as its use in the internal market.[29] The Regulation provides an illustrative list of foreign subsidies that are presumed to distort the internal market. This includes the rescue of failing firms, the provision of unlimited guarantees, export finance not in line with the OECD Arrangement on officially supported export credits, the facilitation of mergers and foreign subsidies that enable an undertaking to obtain a contract by submitting an unduly advantageous tender.[30] The Regulation specifically provides that a subsidy "aimed at making good the damage caused by natural disasters or exceptional occurrences" may be considered not to distort the internal market.[31] The Regulation establishes two safe harbors. First, it erects a rebuttable presumption for subsidies that do not exceed EUR 4 million over any consecutive period of three years. These are unlikely to distort the internal market.[32] Second, the Regulation incorporates EU state aid law's statutory exception for *de minimis* subsidies, which exempts aids not exceeding EUR 200,000 over any consecutive period of three years.[33]

By preconditioning regulatory intervention on the distortion of competition, the Regulation creates a scheme that is more permissive than antidumping law. An *896** antidumping duty may be imposed if there is a dumping margin and there are adverse effects. The latter may exist, however, even if there is no distortion of competition. If the foreign product is cheaper by reason of cost-effectiveness and not subsidization, the mass influx of cheap foreign products may have adverse effects but still not distort competition. There is an important difference between trade law's conception of adverse effects and competition law's conception of distortion. Dumping may be established, if the import price is lower than the normal market price in the country of

[26] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted Mar. 11, 2011), paras 317-318; Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (adopted Dec. 19, 2014), para 4.10.

[27] Article 4(1) of the Regulation on Foreign Subsidies. As to concentrations, see Article 19 of the Regulation.

[28] Article 27 of the Regulation on Foreign Subsidies.

[29] Article 4(1) of the Regulation on Foreign Subsidies.

[30] Article 5 of the Regulation on Foreign Subsidies.

[31] Article 4(4) of the Regulation on Foreign Subsidies.

[32] Article 4(2) of the Regulation on Foreign Subsidies.

[33] Article 4(3) of the Regulation on Foreign Subsidies. The cap is EUR 100 000 for undertakings performing road freight transport for hire or reward and the de minimis aid shall not be used for the acquisition of road freight transport vehicles. Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2013] OJ L 352/1.

exportation, even if the price is not below costs and generates no loss (provided it causes or threatens to cause an injury).[34] On the contrary, under competition law, a price may generally be viewed as predatory only if it is below costs and generates a loss.[35] Accordingly, a price may be dumped but still not distort competition in the market.

Distortive foreign subsidies may have a redeeming virtue and the Regulation authorizes the Commission to exempt them if the benefits counterbalance the negative effects. The Commission may balance the negative effects of distortion against the positive effects on the development of the subsidized economic activity but may also consider broader positive effects.[36] The Regulation defines two types of redeeming virtues. The economic benefits of the subsidy (for instance, the tackling of market failures) are, in principle, relevant only if they occur in the EU.[37] Broader positive effects in relation to relevant policy objectives (e.g. environmental protection, gender equality) may, however, be taken into consideration without territorial limits.

The requirement of distortion and the consideration of the positive effects in the frame of balancing have no explicit counterparts in the SCM Agreement but the two regimes converge in terms of substance. WTO law distinguishes between two categories of subsidies.[38] Export subsidies and import substitution (local content) subsidies are "prohibited."[39] "Actionable subsidies" (such as production aid) are not prohibited but can be challenged, if they injure another member state's domestic industry or have a serious adverse effect on the interests of another member state. Accordingly, the SCM Agreement specifies two types of subsidies *897** that distort competition by nature and entitles member states to object to others, if these provenly impair their interests. While the Regulation applies only if the internal market is distorted, under the SCM Agreement a subsidy that causes no injury to the domestic industry may still be actionable if it seriously prejudices the interests of another member state.

It is important to stress that the Regulation is "color-blind." It makes no distinction on the basis of the recipient undertaking's nationality and equally applies to EU-owned and multinational companies, provided they are subsidized by a third country. The Regulation merely requires that the subsidy be provided by a non-EU country and target the EU internal market. It applies if the subsidy is granted to an undertaking that is engaging in an economic activity in the EU and distorts the internal market.

Although the substantive rules of the Regulation employ WTO law terminology, they coincide with Article 107 TFEU in terms of substance.[40] In EU law, subsidies are referred to as "state aids," while the requirement of "specificity" as "selectivity." The conferral of a benefit is

[34] Article VI(1) GATT.
[35] As for EU competition law, see e.g. C-62/86 *AKZO*, ECLI:EU:C:1991:286, paras 71-72; As for EU competition law, see e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).
[36] Article 6(1) of the Regulation on Foreign Subsidies.
[37] Recital (21) of the Regulation on Foreign Subsidies provides, however, that „[o]ther positive effects should be taken into account, where appropriate, in order to avoid that the balancing gives rise to unjustified discrimination."
[38] Initially, Article 8 of the SCM Agreement also set out non-actionable subsidies (that is, per se lawful subsidies). This category was in force for five years, until 31 December 1999, and, according to Article 31, could be extended by consensus of the SCM Committee. No such consensus had, however, been reached.
[39] Article 3 of the SCM Agreement.
[40] *Contra* Lena Hornkohl, Protecting the Internal Market From Subsidisation With the EU State Aid Regime and the Foreign Subsidies Regulation: Two Sides of the Same Coin?, 14(3) Journal of European Competition Law & Practice 137 (2023) (Arguing that "the Foreign Subsidies Regulation largely departs from the concepts of State aid law, particularly regarding the legal test of distortions on the internal market, the balancing test, the procedures, and remedies.")

referred to as "favoring certain undertakings." In terms of substance, Article 107 TFEU may be boiled down to the same conceptual elements but does not require the occurrence of a financial contribution. It defines state aid (using the numbering applied in the context of the Regulation above) as a (3) benefit (2) granted by a member state or through state resources (state origin) that favors (4) certain undertakings or the production of certain goods (selectivity). Article 107(1) TFEU applies only if inter-state commerce is affected. This is, however, a jurisdictional requirement and not an evaluative element.[41] The Regulation on Foreign Subsidies does not reproduce this element, but it is implicit that it applies only if the measure affects extra-EU trade, which is an exclusive EU competence.

Article 107(1) TFEU applies to aid provided to "undertakings." This term has a settled meaning in EU law and signifies economic entities, which may be made up of a group of firms.[42] The Regulation on Foreign Subsidies follows the same approach. Although its substantive rules refer to "undertakings," their application is based on the turnover of and the aggregate financial contributions received by the economic entity (group of undertakings).[43] The economic entity's turnover is *898** relevant from the perspective of financial penalties. To have a deterrent effect, the fines imposed for the violation of the Regulation, the same as general competition fines,[44] have to fit the economic unit and not the individual firm. The aggregation of the financial contributions serves a similar purpose. It has to be noted that the Regulation's scope covers only subsidies that affect the internal market. Hence, while a financial contribution provided to a parent or sister company located outside the EU has to be taken into account, it will be caught in the net of the Regulation only if it "confers a benefit on an undertaking engaging in an economic activity in the internal market." For instance, if the Chinese government grants a subsidy to a Chinese company, which, in turn, relays the benefit to its subsidiary in the EU to help him to make an unduly advantageous bid in a public tender, the Regulation may apply. On the other hand, if the Chinese company uses the financial contribution to construct a structure in China, this will not qualify as a foreign subsidy under the Regulation.[45]

The scope of Article 107 TFEU extends to aid "granted by public or private bodies designated or established by the State."[46] Similarly to WTO law, the benefits granted by state-owned enterprises are subject to a case-by-case analysis extending to circumstances beyond the mere fact of state-control.[47] Any benefit accruing from a transaction on non-market terms may qualify as an advantage up-to the extend the undertaking enjoys terms that are more favorable than those available under normal market conditions.[48] "The existence of a benefit should be determined on the basis of comparative benchmarks, such as the investment practice of private investors, financing rates obtainable on the market, a comparable tax treatment, or the adequate remuneration for a given good or service."[49] Accordingly, the provision of access to

[41] *See* Case T-55/99 *CETM v Commission*, [2000] ECR II-3207, para 86.
[42] Case C-222/04 Ministero dell'Economia e delle Finanze, ECLI:EU:C:2006:8, paras 107-114.
[43] Articles 22-23 of the Regulation on Foreign Subsidies.
[44] Article 23(2) of Regulation 1/2003.
[45] *See* Article 3 of the Regulation on Foreign Subsidies.
[46] Joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schiffahrts* [1993] ECR I-887, para 19.
[47] See Joined Cases 67, 68 & 70/85 *Van der Kooy* [1988] ECR 219, paras 35-38; Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paras 11-12; Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paras 13-14; Case C-482/99 *France v Commission*, ECLI:EU:C:1993:97, paras 52-57.
[48] *See e.g.* Joined Cases 67, 68 & 70/85 *Kwekerij Gebroeders Van Der Kooy* [1988] ECR 219; Joined Cases T-116/01 & T-118/01 *P&O European Ferries (Vizcaya)* [2003] ECR II-2957, para 117, on appeal: Case C-442/03 P *P&O European Ferries (Vizcaya)* [2006] ECR I-4845; Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913; Case C-39/94 *Syndicat francais de l'Express international (SFEI) and Others v La Poste and Others* [1996] ECR I-3547.
[49] Recital (13) of the Regulation on Foreign Subsidies.

infrastructure on favorable terms, the sale of products below the market price, the purchase of products above the market price, loans on preferential terms, credit guarantees, takeovers not in compliance with the market economy investor principle may all amount to a state aid. As a general principle, member states are required to act as a "market economy operator."[50] They have to behave as a market buyer when buying services, as a *899** market seller when providing services and as a market investor when lending, financing and investing. Any advantage emerging from a departure from this principle may amount to an advantage and, hence, a state aid. This is particularly the case where the contract was not awarded in a competitive public tender.[51]

For Article 107 TFEU to apply, there needs not to be a financial contribution in terms of a burden on the funding state. This may be relevant in the rare cases where the state can generate a financial benefit without incurring a corresponding financial burden.[52] For instance, in *France Télécom*,[53] the Court of Justice of the European Union (CJEU) ruled that the declaration of the French minister for economic affairs made to assist France Télécom constituted a state aid, although it was not legally binding, created no legal obligation and resulted in no payment. France Télécom was in financial difficulties, and, in a public statement, the minister promised to take the appropriate measures, if necessary. As a result of this statement, the company's shares were not downrated and their price soared. Subsequently, French authorities also publicly offered a substantial shareholder loan, which was, however, finally not accepted by the company. The CJEU found both of the above to be prohibited state aid, since they conferred an advantage on France Télécom, even though France incurred no financial burden.[54] This implies that the scope of the Regulation is slightly narrower than that of EU state aid law.

The same as a foreign subsidy, a state aid is prohibited only if it "distorts or threatens to distort competition" in the internal market and has no counterbalancing value warranting an exemption.[55] Article 107(2)-(3) TFEU establishes various aims[56] – such as the promotion of economic development of poor areas, projects *900** that serve a common European interest or remedy a serious economic disturbance, the facilitation of the development of certain economic activities or of certain economic areas and the promotion of culture and heritage conservation – that may justify the provision of a distortive state aid, if the positive effects outweigh the

[50] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262/1, paras 73-114.
[51] According to the Commission's practice, the use of public tenders is one way for a Member State to avoid the application of state aid rules. The use of such procedures is a means to demonstrate that the Member State did not intend to favor a selected undertaking. Erika Szyszczak, The Regulation of the State in Competitive Markets in the EU 191 (Hart Publishing, Oxford, 2007).
[52] Under WTO law, the "benefit" is conceived from the perspective of the recipient. The "cost to government" is not relevant in determining the existence of a benefit and there is a no requirement that the cost and the benefit be proportionate. *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircrafts*, WT/DS70/AB/R (adopted Aug. 2, 1999), para 156. Still, there needs to be some financial contribution on the side of the government.
[53] Joined Cases C-399/10 & C-401/10 *France Télécom*, ECLI:EU:C:2013:175.
[54] Para 101.
[55] *See e.g.* Andrea Biondi, State Aid Is Falling Down, Falling Down: An Analysis of the Case Law on the Notion of Aid, 50 Common Market Law Review 1719 (2013).
[56] According to Article 107(2) TFEU, social benefits granted to individual consumers and aid aimed to make good the damage caused by natural disasters or exceptional occurrences are automatically exempted. These categories are not caught in the net of the Regulation on Foreign Subsidies. Social benefits are not provided to undertakings, hence, they are not covered by the Regulation, while subsidies provided in the context of a natural disaster are specifically exempted by Article 4(4) of the Regulation on Foreign Subsidies.

distortion of competition.[57] Furthermore, the Council of Ministers is authorized to exempt any categories of aid on the proposal of the Commission.

3.2. Procedure and sanctions

In terms of procedure and sanctions, the Regulation on Foreign Subsidies is a blend of EU state aid,[58] antitrust and merger[59] procedure. The reason why the Regulation, contrary to EU state aid, provides for a procedure to be carried out against the subsidized undertaking and not the subsidizing state is that, for reasons of sovereign immunity, the EU has no jurisdiction to conduct investigations against third countries.[60] This important difference between the status of member states and third countries accounts for the procedural differences between the two regimes.[61]

The same as in EU state aid law, under the Regulation, the provision of an illegal subsidy entails no financial penalty, merely a repayment obligation (with interest) and the concomitant prohibition of the concentration or the award of the contract in a public procurement procedure affected by the subsidy.[62] Alternatively, if the distortive effects can be lifted without repayment, the Commission may use corrective measures: it may adopt, by means of a redressive measure or commitments,[63] structural or behavioral corrective measures to remedy the competition problem and, thus, obviate the need of repayment. As temporary correction, interim measures may be adopted "[t]o preserve competition in the internal market and prevent irreparable damage."[64] Nonetheless, if the undertaking *901** offers to repay the subsidy with an appropriate interest rate, the Commission has to accept the repayment, provided it is "transparent, verifiable and effective, while taking into account the risk of circumvention."[65] No corrective measures may be adopted in this case. The possibility to avoid repayment by offsetting adverse effects on competition makes the Regulation more permissive than EU state aid law, which is mainly concerned with approving or prohibiting the aid.[66]

The Regulation provides for the imposition of financial penalties on the recipient only if the undertaking breaches the rules on *ex ante* approval (in case of concentrations and bids in public procurement procedures), refuses to repay the subsidy or to comply with a corrective measure.[67]

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[57] Article 107(3) TFEU.
[58] For an overview on the overlaps with and parallels to EU state aid law, *see* Wolfgang Weiß, Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures, (3) Zeitschrift für Europarechtliche Studien 467 (2022); Wolfgang Weiß, Ex Officio Third Country Subsidies' Review: Similarities with and Differences to State Aid Procedure, (2) European State Aid Law Quarterly 132 (2022).
[59] For a general comparison to EU merger control procedure, *see* Tabea Bauermeister, A Tool to Investigate M&A Transactions with Regard to Foreign Financial Contributions, (3) Zeitschrift für Europarechtliche Studien 477 (2022).
[60] The addressee of the decision is the recipient undertaking. Article 41 of the Regulation on Foreign Subsidies.
[61] *See* Wolfgang Weiß, Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures, (3) Zeitschrift für Europarechtliche Studien 467, 473 (2022).
[62] Articles 7, 25(3)(c) and 31 of the Regulation on Foreign Subsidies.
[63] Articles 7, 25(3) and 31 of the Regulation on Foreign Subsidies.
[64] Article 12 of the Regulation on Foreign Subsidies.
[65] Article 7(6) of the Regulation on Foreign Subsidies.
[66] *Cf.* François-Charles Laprévote and Wanjie Lin, Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination, (3) Zeitschrift für Europarechtliche Studien 443, 451-452 (2022); Wolfgang Weiß, Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures, (3) Zeitschrift für Europarechtliche Studien 467, 472 (2022).
[67] Articles 17, 26 & 33 of the Regulation on Foreign Subsidies.

The Regulation establishes a procedure of general application and two special regimes for concentrations and public tenders. Subsidies provided in the context of concentrations and public tenders and exceeding the thresholds set out in the Regulation[68] are subject to an *ex ante* system and a duty of notification modelled after EU merger procedure[69] (the definition of concentration is the verbatim transplantation of that of EU merger control law).[70] The Commission may also request the notification of any subsidized concentration under the thresholds; such concentrations qualify as notifiable concentrations.[71] Gun jumping may entail a hefty fine.[72] All other cases, including non-notifiable concentrations and tenders, are subject to *ex post* investigation modelled after EU antitrust procedure.[73]

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Similarly to EU state aid law[74] (and contrary to the competition rules embedded in Articles 101-102 TFEU, which are applied in a decentralized system by the Commission and the national competition authorities), the enforcement of the Regulation on Foreign Subsidies comes under the Commission's exclusive competence.[75] The same as EU state aid, the Commission can investigate a foreign subsidy within ten years.[76]

The Regulation vests the Commission with strong powers of investigation, which, in essence, are the replicates of the powers it has in antitrust and merger procedures. The Commission may require the undertakings and associations of undertakings to provide information[77] and may carry out on-the-spot inspections (dawn raids) within the EU.[78] In case of non-cooperation, the Commission may use its powers to carry out the inspections (if necessary, with the help of local authorities and the police),[79] impose a procedural fine[80] and make a decision on the basis of the

[68] A concentration is subject to *ex ante* mandatory filing requirement if at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the EU and generates an aggregate turnover in the Union of at least €500 million and the subsidy received in three consecutive years exceeds €50 million. Articles 20(3) and 21of the Regulation on Foreign Subsidies. The calculation of turnover follows the methodology of EU merger control law. Article 22-23 of the Regulation on Foreign Subsidies. In public procurement procedures, the *ex ante* mandatory filing requirement applies, if contract value is at least €250 million and the subsidy received in three consecutive years is at least €4 million. Article 28 of the Regulation on Foreign Subsidies. The thresholds of the Regulation "operate on a similar scale" as merger control law. *See* Tabea Bauermeister, A Tool to Investigate M&A Transactions with Regard to Foreign Financial Contributions, (3) Zeitschrift für Europarechtliche Studien 477, 483 (2022).

[69] Article 24(1) of the Regulation on Foreign Subsidies.

[70] Article 20(1)-(2) of the Regulation on Foreign Subsidies, in essence, reproduces Article 3 of Regulation 139/2004 on the control of concentrations between undertakings, [2004] OJ L 24/1. *See* Tabea Bauermeister, A Tool to Investigate M&A Transactions with Regard to Foreign Financial Contributions, (3) Zeitschrift für Europarechtliche Studien 477, 482 (2022).

[71] Article 21(5) of the Regulation on Foreign Subsidies.

[72] Article 26(3) of the Regulation on Foreign Subsidies.

[73] Article 9 of the Regulation on Foreign Subsidies.

[74] The Commission has the exclusive power to examine compatibility with the internal market of measure fulfilling the conditions of Article 107(1) TFEU, although national courts and national authorities also have a role in the application of the EU state aid rules. *See* Ranjana Andrea Achleitner, The Interplay between the European Commission, National Authorities and National Courts in State Aid Law: An Attempt to Cut the Gordian Knot, (2) European State Aid Law Quarterly 173 (2022).

[75] Recital (8) of the Regulation on Foreign Subsidies.

[76] Article 38 of the Regulation on Foreign Subsidies.

[77] Article 13 of the Regulation on Foreign Subsidies, in essence, reproduces Article 18 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, [2003] OJ L 1/1.

[78] Article 14 of the Regulation on Foreign Subsidies, in essence, reproduces Article 20 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, [2003] OJ L 1/1.

[79] Articles 14(5)-14(7) of the Regulation on Foreign Subsidies, in essence, reproduces Article 20(5)-(7) and Article 22 of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, [2003] OJ L 1/1.

[80] Article 17(1)-(4) of the Regulation on Foreign Subsidies.

facts available (and take the lack of cooperation into account in this regard).[81] It may also request information from third countries[82] and, with the permission of the third country or the undertaking, it may carry out verification visits outside the EU.[83]

The Regulation, the same as competition procedure, safeguards the right of defense of the undertaking. The Commission's decision can be based "only on grounds on which the undertakings concerned have been given the opportunity to submit their observations."[84] Commission decisions can be attacked before the CJEU.[85]
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4. Compliance with WTO law

The Regulation is a novel and unprecedented attempt to address foreign subsidies and may call for the interpretation of various aspects of WTO law, which so far have simply not been tested in practice.

There are two important WTO law restraints that need to be considered in respect to product subsidies. First, Article VI GATT permits countervailing duties only up-to the amount of the subsidy. Absent the authorization embedded in Article VI GATT, members would not be allowed to adopt counter-veiling duties, as these may go counter to their tariff-bindings[86] and the Most-Favored Nation (MFN) principle.[87] As a corollary, they may adopt countervailing (and anti-dumping) duties only to the extent enabled by Article VI, which, in turn, caps countervailing duties at the amount of the subsidy. Second, Article 32.1 of the SCM Agreement rules out unilateral measures against subsidies beyond the ones allowed by the Agreement itself.[88] This provision might, arguably, prevent members from adopting unilateral measures in response to extraterritorial subsidies (unless they can attribute the subsidy, on the basis of international law, to the state where the recipient is located), if the meaning of "subsidy" in Article 32.1 is not equated with the definition in Article 1. According to this line of interpretation, Article 1 defines the subsidies that may be potentially prohibited under the SCM Agreement, implying that subsidies not coming under this definition qualify as permitted subsidies. This is corroborated by the reference of Article 32.1 to the SCM Agreement as an interpretation of the GATT ("in accordance with the provisions of GATT 1994, as interpreted by this Agreement."). This suggests that the SCM Agreement is an authoritative and binding interpretation of Article VI GATT and, hence, subsidies not covered by the Agreement are not covered by Article VI GATT either. On the other hand, the exhaustive nature of the SCM Agreement is falsified by the fact that, initially, Article 8 of the SCM Agreement also set out non-actionable subsidies. Although this category was in force only until 31 December 1999 and was not extended, its existence questions that member states wanted to permit extraterritorial subsidies by means of a narrow definition of "subsidy" and not by a specific rule, if they really wanted to exempt them. The language and structure of the SCM Agreement suggests that extraterritorial subsidies may have been left out because they did not really exist (or at least

[81] Article 16 of the Regulation on Foreign Subsidies.
[82] Article 13(6) of the Regulation on Foreign Subsidies.
[83] Article 15 of the Regulation on Foreign Subsidies.
[84] Article 42 of the Regulation on Foreign Subsidies.
[85] Article 45 of the Regulation on Foreign Subsidies.
[86] Article II GATT.
[87] Article I GATT.
[88] As for compliance with the SCM Agreement, see Victor Crochet & Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law, 20 World Trade Rev. 343, 352-356 (2021).

they were not widespread) at the time and the drafters' imagination did not extend to them.[89] *904** This is reinforced by footnote 56 attached to Article 32.1 of the SCM Agreement, which confirms the intention that the Agreement was not meant to be the exhaustive regulation of countervailing measures adopted in response to subsidies and Article 32.1 of the SCM "is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."

Taking the above into account, it seems to be more plausible that, by adopting the SCM Agreement, member states did not give up the authorization conferred on them by Article VI, which applies to subsidized products at large, irrespective of whether the source is a domestic or an extraterritorial subsidy. It would be contradictory to argue that Article 32.1 of the SCM Agreement uses the term "subsidy" in a wider sense than Article 1, which sets out the very scope of the Agreement. If the scope of the Agreement does not extend to a subsidy, none of its provisions should apply to it, including Article 32.1.

WTO law contains no specific disciplines on service subsidies: counter-veiling measures are neither specifically authorized, nor specifically prohibited, but have to comply with the general principles of WTO law. The most important question is whether these countervailing measures may go counter to the MFN principle, enshrined in Article I GATT and Article II GATS, and the principle of National Treatment (NT), enshrined in Article II GATT and Article XVII GATS, and, if they do, whether they can be exonerated under the general exceptions embedded in Article XX GATT and Article XIV GATS. The does not distinguish on the basis of the recipient undertaking's identity, hence, it contains no facial discrimination. Nonetheless, it may have an asymmetric impact, on the one hand, between the undertakings of different countries (MFN) and, on the other, between EU and non-EU undertakings (NT).

The MFN principle requires that the products, services and service suppliers of a member have to be accorded "treatment no less favorable" than accorded to the "like" products, services and service suppliers of another member. Although the Regulation applies the same rules to all members, it may have an asymmetric impact, given that certain members may be more prone to subsidization than others.[90] Subsidization is, however, neither inherently linked to national origin, nor an inherent feature. Subsidized and not subsidized foreign services and service providers are not in the same situation and the regulatory distinction turns on a characteristic that is under the undertaking's control. The Regulation on Foreign Subsidies reacts to the conduct and not the status of the undertaking. Recipients are free not to receive a subsidy. The regulatory distinction used by the Regulation *905** would be a case of first impression under the MFN principle, but, as expanded below, the decisional practice developed under the NT principle may provide appropriate guidance.

It also has to be noted that the Regulation is anticipated to lift the very asymmetric impact that may be used as an argument against it. The Regulation's prohibition is expected to effectively reduce foreign subsidies and, thereby, to eliminate the differences between subsidizing and non-subsidizing countries.

[89] *Contra* Gary N. Horlick, An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures, 8(9) Global Trade and Customs Journal 297 (2013) (Arguing that the purpose of the territoriality criterion was to immunize financial assistance programs such as World Bank loans and US Marshall Plan aids provided to European countries from the SCM Agreement.).
[90] Victor Crochet & Marcus Gustafsson, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization Under WTO Law, 20 World Trade Rev. 343, 356-357 (2021).

National treatment requires that foreign products, services and service suppliers be afforded "treatment no less favorable" than accorded to domestic products, services and service suppliers. Although the Regulation equally applies to domestic and foreign entities, it may have an asymmetric impact, given that foreign subsidies may usually be granted to foreign or foreign-owned undertakings. It is an important difference to the MFN analysis that foreign subsidies are subject to the same treatment, while intra-EU and extra-EU subsidies are subject to separate regimes. Accordingly, the relevant question is whether the treatment afforded by the Regulation to foreign subsidies is "less favorable" than the treatment afforded by EU state aid law to intra-EU subsidies.[91]

In the decisional practice of the WTO Dispute Settlement Body (DSB), asymmetric impact does not equal discrimination and, hence, in itself, does not violate the requirement of NT. The complainant needs to prove that the distinction is based on national origin and asymmetric impact, in itself, does not corroborate that. For instance, the DSB's decision in *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* suggests that asymmetric impact, at least in itself, may not be sufficient to establish discrimination: it needs to accrue from national origin.[92] Furthermore, legitimate regulatory distinctions in themselves may not violate the NT principle.[93] As to both of these arguments it should be decisive that the EU has a very comprehensive and rigorous state aid regime in place and the treatment of foreign subsidies is modelled after this regime. In fact, the Regulation abolished an inverse discrimination: EU member states have been prohibited from granting subsidies restrictive of competition in the internal market, while foreign states have not.

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As demonstrated in Section 4, a detailed comparison demonstrates that intra-EU and extra-EU subsidies are governed by the same substantive principles, while the differences in terms of procedure and sanctions are warranted by legitimate regulatory considerations that emerge from objective differences between the two categories. The defendant of the EU state aid procedure is the granting state, while the Regulation on Foreign Subsidies, for reasons of sovereign immunity, applies to the recipient undertaking. Hence, the Regulation draws heavily on the regulatory patterns of EU antitrust and merger procedure. The equal treatment of intra-EU and extra-EU state subsidies is reinforced by the provision that both the substantive and procedural rules of the Regulation have to be applied and interpreted congruently with the EU legislation it draws on.[94]

The question whether the differences between EU state aid and foreign subsidies procedure entail asymmetric burdens can be answered only by way of a comprehensive assessment. It also has to be noted that the Regulation involves a lighter administrative burden than EU state aid law, although this lighter burden is placed on the recipient undertaking and not on the grating state. EU state aid law is also based on a notification duty, what is more, all state aids coming

[91] *See* François-Charles Laprévote and Wanjie Lin, Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination, (3) Zeitschrift für Europarechtliche Studien 443, 451 (2022). Of course, these provisions of the GATS are relevant only if a member state made commitments under its schedule.

[92] *See e.g.* Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted Apr. 25, 2005), para 96.

[93] *See* Appellate Body Report, *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R (Jun. 17, 2011), paras 128-130 ("[T]he mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is 'less favourable' within the meaning of Article III:4.").

[94] Recital (9) of the Regulation on Foreign Subsidies.

under Article 107 TFEU are notifiable to the Commission in an *ex ante* system.[95] Furthermore, the Regulation's *ex ante* procedure operates under shorter and stricter deadlines.[96] At the same time, the Regulation is more favorable to recipients in terms of procedural rights and remedies. The administrative burden of being the defendant in the investigation comes with the benefit of being the master of the case and vested with the right of defense[97] (contrary to the EU state aid procedure, where the recipient is only an interested third party).[98] In the same vein, EU state aid law's repayment sanction is non-negotiable, while the Regulation enables the undertaking to avoid repayment, if the competition problem can be tackled by a redressive measure and a commitment.

The Regulation envisages extending to foreign subsidies the rules that, for the time being, apply solely to member state subsidies. This circumstance justifies a reference to the General Exceptions. Article XX(d) GATT and Article XIV(c) GATS exempt measures aimed to secure compliance with internal regulations. EU state aid law may be regarded as such and there is a general presumption for the *907** WTO-compliance of domestic regulation.[99]. As EU state aid law applies to intra-EU subsidies and the Regulation extends this regime *mutatis mutandis* to extra-EU ones, no arbitrary or unjustifiable discrimination or disguised restriction on trade may emerge.

It has to be noted that while the Regulation levels out the status of EU member state and foreign subsidies, no specific restrictions apply to the aids provided by the EU itself,[100] although a major part of the European budget is made up of agricultural subsidies and various cohesion, recovery, infrastructure and R&D funds. This is, however, an aspect that can be judged only on the basis of the EU's funding practice. Nonetheless, as a general principle, EU funding programs do not discriminate against foreign and foreign-owned undertakings, which can participate in these programs as long as they can contribute to the European development aims.

5. Closing thoughts

It is no exaggeration to say that the last couple of decades have seen the paralyzation of the world trade system. Even though the Trump administration has been reprimanded for being the culprit, the root cause has been a set of real and genuine institutional problems and the WTO's "constitutional" crisis lingered on after the expiry of President Trump's term of office. The world trade system's bedrock was laid more than seventy years ago (with the adoption of GATT 1947) and reached its full-blown institutional architecture three decades ago (with the

[95] Articles 2-3 of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), [2015] OJ L 248/9.
[96] *See* the times limits set out in Article 24(1) of the Regulation on Foreign Subsidies and Articles 4(5) & 9(6)-(7) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), [2015] OJ L 248/9.
[97] François-Charles Laprévote and Wanjie Lin, Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination, (3) Zeitschrift für Europarechtliche Studien 443, 451-452 (2022); Wolfgang Weiß, Ex Officio Third Country Subsidies' Review – Similarities with and Differences to State Aid Procedures, (3) Zeitschrift für Europarechtliche Studien 467, 474 (2022).
[98] Articles 1(h) and 24 of Regulation 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification), [2015] OJ L 248/9.
[99] Panel Report, *EU and its Member States — Certain Measures Relating to the Energy Sector*, WT/DS476/R (adopted Aug. 10, 2018), paras. 7.625–7.626 (not reversed on appeal); Panel Report, *Colombia — Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R (Apr. 27, 2009), para. 7.529.
[100] Xueji SU, A Critical Analysis of the EU's Eclectic Foreign Subsidies Regulation: Can the Level Playing Field Be Achieved?, 50(1) Legal Issues of Economic Integration 1, 11 (2023).

establishment of the WTO in 1994). Its architecture and structural principles were shaped by the societal paradigm of western democracies, featured by a democratic political system based on democratic sovereignty, free market, autonomy of economic operators and a clear separation between the private and the public sector, which implied that private enterprises cannot be aligned to serve foreign policy aims.

This paradigm has lately come into conflict with the realities of the world trade club. The last two decades have seen the WTO's large-scale enlargement, with China joining in 2001, Saudi Arabia in 2005, Viet Nam in 2007 and Russia in 2012. While this was a very welcome development, which enhanced the strength of the world trade system and turned the club of western democracies into a truly universal global trade system,[101] it raised serious paradigmatical challenges. The *908** system tailored to the needs and characteristics of western democracies proved to be inadequately equipped to handle the problems raised by government-dominated state-capitalist economies. This enlargement process not only brought some of the world's biggest economies into the club, it also extended the WTO to countries where the state has a central role in the economy. These polities have a different view on the relationship between the state and the market, the autonomy of state-owned enterprises and their (in)dependence from political governance, the relationship between rule of law and political hierarchy. Government-dominated economies are not planned economies but market-based economic systems where the government has a decisive formal and informal influence over market operators and informal governmental rules play a central role. Furthermore, these systems have a higher tendency to subsidize economic activities[102] and quite often this occurs via state-owned enterprises. These traits challenge the system of WTO in various way. Some of these issues are simply not caught in the net of WTO law at all, while other, although covered by WTO rules, emerge with such a high intensity that the WTO cannot handle effectively.

The EU Regulation on Foreign Subsidies is an attempt to find a unilateral solution for a multilateral problem by extending, *mutatis mutandis*, EU state aid law to foreign subsidies. It provides a WTO-conform pattern for tackling the issue and also offers a pattern for multilateral use.

[101] *See* Csongor István Nagy, World Trade, Imperial Fantasies and Protectionism: Can You Really Have Your Cake and Eat It Too?, 26(1) Indiana Journal of Global Legal Studies 87, 103 (2019).
[102] Chu Yeong Lim, Jiwei Wang, Cheng (Colin)Zeng, China's "Mercantilist" Government Subsidies, the Cost of Debt and Firm Performance, 86 Journal of Banking & Finance 37-52 (2018); Tom Hancock & Yizhen Jia, China paid record $22bn in corporate subsidies in 2018 (Financial Times, May 27, 2019), available at https://www.ft.com/content/e2916586-8048-11e9-b592-5fe435b57a3b.