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ORIGINAL ARTICLE

Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law

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Abstract
Discontentment is growing such that governments, and notably that of China, are increasingly providing subsidies to companies outside their jurisdiction, 'buying their way' into other countries' markets and undermining fair competition therein as they do so. In response, the European Union recently published a proposal to tackle such foreign subsidization in its own market. This article asks whether foreign subsidies can instead be addressed under the existing rules of the World Trade Organization, and, if not, whether those rules allow States to take matters into their own hands and act unilaterally. The authors shed light on these issues and provide preliminary guidance on how to design a response to foreign subsidization which is consistent with international trade law.

Keywords: Subsidies; European Union; China; extraterritoriality; WTO

1. Introduction

Recent developments show that cross-border subsidies, whereby a government subsidizes a firm outside of its territory, have become a growing source of concern among many developed economies as certain emerging economies, and China in particular, increasingly globalize their use of subsidies.[1] In this regard, the European Commission recently published the 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', aimed at levelling the playing field in the European Union (EU) internal market as regards foreign subsidies.[2] In this White Paper, the Commission considers how the EU may respond to subsidization by a non-EU government of a recipient located, or active, in the EU. The White Paper notes that these 'subsidies appear to have facilitated the acquisition of EU undertakings, influenced other investment decisions or have distorted the market behaviour of their beneficiaries'.[3]

The Commission's White Paper raises interesting questions concerning the law of the World Trade Organization (WTO). The Commission claims that current international trade rules do not provide appropriate remedies against foreign subsidies as these rules do 'not apply to subsidies

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[1]V. Crochet and V. Hegde (2020) 'China's "Going Global" Policy: Transnational Production Subsidies under the WTO SCM Agreement', *Journal of International Economic Law* 23, 841.

[2]European Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', COM(2020) 253 final, 17 June 2020, https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf. See also the European Commission's recent inception impact assessment concerning 'proposal(s) for Regulation(s) of the European Parliament and the Council to address distortions caused by foreign subsidies in the internal market generally and in the specific cases of acquisitions and public procurement', 1 October 2020, Ref. Ares(2020)5160372.

[3]Ibid., at 4.

related to trade in services and in relation to the establishment and operation of undertakings in the EU which are backed by foreign subsidies and which do not entail any trade in goods'.[4] The question thus arises as to whether it is correct to assume that WTO rules fail to provide adequate remedies to address foreign subsidies granted to services' suppliers and to goods' producers when there is no cross-border trade taking place.

In light of this alleged regulatory gap, the Commission envisions designing instruments that would allow it and EU Member States to take unilateral action against foreign subsidies. Such unilateral action is becoming an ever-more pronounced part of the EU's foreign policy toolkit, as the EU realizes that it can force other countries or multinational companies to adopt its own rules and standards, lest they risk facing barriers to entry to its large internal market.[5] The introduction of data and privacy rules under the recent General Data Protection Regulation has been a noted success in this regard, becoming the new data and privacy gold standard worldwide.[6] However, does WTO law permit WTO Members to take similar unilateral action as regards foreign subsidies?

This article aims to clarify these questions. For this purpose, foreign subsidies are defined as financial contributions granted to an entity by a government other than that of the country where the receiving entity is established, which distorts the conditions of competition in the market of the receiving entity.

This article first provides a general overview of how the issue of foreign subsidies emerged (section 2), before assessing whether the WTO Agreement provides adequate multilateral remedies against these subsidies (section 3). It then analyses whether the WTO Agreement prevents WTO Members from addressing these subsidies unilaterally using the measures proposed in the Commission's White Paper as an illustrative example (section 4). Section 5 presents our conclusions.

2. Growing Concerns over Foreign Subsidies

2.1 The Emergence of Foreign Subsidies

Subsidies were perceived historically as a tool for countries to spur industrialization and to create economic growth in specific domestic sectors. This is why, as regards producer subsidies – subsidies which benefit a producer of goods – the WTO Agreement on Subsidies and Countervailing Measures (hereinafter 'SCM Agreement') was 'drafted to address situations where a WTO Member is subsidizing the production or sale of its own goods'.[7] Similarly, subsidies for the provision of services which created concerns during the negotiations of the General Agreement on Trade in Services (GATS) mainly concerned subsidized firms within the subsidizing State's territory, such as firms in the tourism or construction sectors.[8] The aim of these subsidies was to create jobs, spur innovation, or reduce prices for domestic consumers.[9] As a result, situations in which a government subsidizes a firm outside of its territory were seen as 'unrealistic'[10] or, at least, difficult to conceive of outside the context of foreign aid.[11]

[4]Ibid., at 42.

[5]A. Bradford (2020) *The Brussels Effect: How the European Union Rules the World*. New York: Oxford University Press. See further section 5 *infra*.

[6]Ibid., at 131.

[7]WTO, 'Expert Group Meeting on Trade Financing – Note by the Secretariat', 16 March 2004, WT/GC/W/527, at 5.

[8]WTO, 'Subsidies for Services Sectors: Information Contained in WTO Trade Policy Review', 12 December 2000, S/WPGR/W/25/Add.2.

[9]WTO (2006) *WTO Trade Report 2006, Exploring the Links between Subsidies, Trade and the WTO*, www.wto.org/english/res_e/booksp_e/anrep_e/wtr06–2d_e.pdf.

[10]M. Benitah (2019) *The WTO Law of Subsidies: A Comprehensive Approach*. Alphen aan den Rijn: Kluwer Law International, 605.

[11]G. Horlick (2013) 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures', *Global Trade and Customs Journal* 8, 278, at 297.

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Such subsidies, however, were already being granted. They were simply not a cause for alarm so long as outward foreign direct investment flowed from the West to developing countries. The West's State-owned enterprises have long expanded abroad with the help of the State.[12] The EU itself would allow subsidization of EU foreign direct investment in the 1980s, provided that it did not distort the EU's internal market.[13] As outward foreign investment is now also flowing from emerging economies to developed ones,[14] this situation is becoming a source of concern among the latter.

This is accentuated by the rise of China as a global power, as Chinese firms and State-owned enterprises establish branches[15] and participate in large projects abroad.[16] Concerns are growing that they undermine competitors in the countries into which they expand due to the support of the Chinese government. Furthermore, there are concerns that the United Kingdom (UK) or the United States (US) might subsidize their own outward foreign investors to other developed countries[17] and that States are using their State-owned enterprises in order to acquire strategic targets.[18] Subsidies are thus evolving from mere instruments to spur economic growth domestically into tools used by States to pursue strategic goals and to extend their economic influence abroad.[19] The main concern over subsidies is thus no longer that they might lead to trade based on 'competitive subsidization' rather than on market forces,[20] but instead that they are increasingly used by governments to buy their way into other countries' markets, undermining fair competition as they do so.[21]

It is unclear whether current international trade rules are adequately equipped to address these new situations. Arguably, the SCM Agreement does not expressly address the issue of foreign subsidies. In the words of the WTO Expert Group on Trade Financing, 'it is not entirely clear whether or not the [SCM Agreement] applies where the subsidizing entity is not within the territory of the Member whose goods are allegedly being subsidized'.[22] Furthermore, the SCM Agreement only applies to subsidies granted for the production of goods. With regard to subsidies granted for the provision of services, the GATS recognizes the problems of service subsidies and calls on WTO Members to negotiate rules similar to those contained in the SCM Agreement.[23]

[12]M. Stothard (2016) 'France: The Politics of State Ownership', *Financial Times*, www.ft.com/content/9be75d5c-a72e-11e6-8898-79a99e2a4de6; P. Toral (2008) 'The Foreign Direct Investments of Spanish Multinational Enterprises in Latin America, 1989–2005', *Journal of Latin American Studies* 40, 513.

[13]Commission Decision 97/257/EC of 5 June 1996, OJ 1997 L 102/36; Commission Decision 97/240/EC of 5 June 1996, OJ 1997 L 96/15; Commission Decision 97/241/EC of 5 June 1996, OJ 1997 L 96/23.

[14]United Nations Conference on Trade and Development (UNCTAD) (2019) *World Investment Report 2019: Special Economic Zones*, https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf.

[15]E. Ng (2019) 'More Chinese Industrial Firms Are Building Their Factories in Europe, Says Regional Head of Germany's Exyte', *South China Morning Post*, www.scmp.com/business/article/2189414/more-chinese-industrial-firms-are-building-their-factories-europe-says-head; A. Tartar et al. (2018) 'How China Is Buying Its Way Into Europe', *Bloomberg*, www.bloomberg.com/graphics/2018-china-business-in-europe/.

[16]A notable recent example is the construction of a large bridge in Croatia by a Chinese state-owned enterprise. See L. Jukić (2020) 'Connecting Croatia on a Bridge Built by China', *Politico*, www.politico.eu/interactive/connecting-croatia-on-a-bridge-built-by-china/. See also the recent report by the European Court of Auditors documenting increasing Chinese investments in the EU. 'Review No 03/2020: The EU's Response to China's State-Driven Investment Strategy' (2020) www.eca.europa.eu/en/Pages/DocItem.aspx?did=54733.

[17]P. Sauvé and M. Soprana (2015) *Learning by Not Doing: Subsidy Disciplines in Services Trade*, http://e15initiative.org/wp–content/uploads/2015/04/E15_Subsidies_Sauve–and–Soprana_final.pdf.

[18]See further on this issue, G. Hufbauer, T. Moll, and L. Rubini (2008) 'Investment Subsidies for Cross–Border M&A: Trends and Policy Implications', Occasional Paper No. 2, The United States Council Foundation¸ New York.

[19]Ibid.

[20]T.P. Stewart (1993) *The GATT Uruguay Round – A Negotiating History (1986–1992) – Volume Ia: Commentary*. Kluwer Law International, 817.

[21]Tartar et al., *supra* note 15.

[22]WTO, 'Expert Group Meeting on Trade Financing', *supra* note 7, at 5.

[23]See Article XVI GATS.

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However, no such rules have emerged. Therefore, it is uncertain to what extent the WTO offers a solution to the concerns identified above. We explore this issue further in section 3.

2.2 Recent Proposals to Address Foreign Subsidization

Concerns over foreign subsidies arose in the US at the end of the 2000s due to potential acquisitions of US companies by Chinese and Korean bidders, but did not lead to any concrete action.[24] Recent proposals to address foreign subsidies have instead originated in the EU. Aid granted by EU Member States to their companies is already prohibited pursuant to Article 107 of the Treaty on the Functioning of the European Union (TFEU). However, EU State aid rules only apply to aid by EU Member States.[25] To redress this perceived unfairness and potential threat to the competitiveness in the EU market, the Netherlands published a 'non-paper' in 2019 proposing that firms benefitting from foreign subsidies could be made subject to certain constraints if their behaviour distorted competition in the EU market.[26] In June 2020, the Commission put forward its White Paper, which is both more detailed and goes further in its proposed remedies than the Netherlands' 'non-paper' does.

While the Commission acknowledges that the EU already has several tools at its disposal, such as trade defence instruments, competition rules, and public procurement rules, to address distortions caused by foreign subsidies,[27] the Commission considers that these tools are insufficient to tackle the unfair competition resulting from subsidies granted by non-EU authorities to entities established, or active, in the EU.[28] The Commission notes that '[m]any foreign subsidies would be problematic if they were granted by EU Member States and assessed under EU State aid rules'.[29] In order to address this gap, the White Paper proposes three different options, so-called modules, which could be implemented to complement the European Union's existing tools. Each of these modules envisages that the Commission, and possibly authorities at the Member State level, would be given far-reaching powers in order to investigate and issue remedies against foreign subsidies.

The first module envisions a general instrument to capture distortive effects caused by foreign subsidies. This module would empower the Commission or an authority of an EU Member State to investigate any type of foreign subsidy above a certain threshold that has been received by companies established or active in the EU.[30] This investigation would first determine the existence of a foreign subsidy and then whether the foreign subsidy is capable of distorting the EU market.[31] The White Paper envisions that commitments to divest, to license products, or to make redressive payments would be appropriate remedies in the case of foreign subsidies found to distort the EU market.[32]

The second module would focus on distortions caused by foreign subsidies facilitating the acquisition of EU companies. Under this module, companies benefitting from financial support provided by any non-EU government for the acquisition of EU companies would be obliged to notify a supervisory authority before the acquisition proceeds.[33] If it is found that the acquisition

[24]See further on this issue Hufbauer, Moll, and Rubini, *supra* note 18.

[25]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 5; Monopolkommission (2020) 'Chinese State Capitalism: A Challenge for the European Market Economy', *Biennial Report XXIII of the Monopolies Commission*, www.monopolkommission.de/images/HG23/Main_Report_XXIII_Chinese_state_capitalism.pdf, paras. 747–752.

[26]Netherlands, *Non–Paper Strengthening the Level Playing Field on the Internal Market*, 9 December 2019, www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field.

[27]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 9.

[28]Ibid., at 10, 13.

[29]Ibid., at 5.

[30]Ibid., at 13–14.

[31]Ibid., at 15–17.

[32]Ibid., at 19–20.

[33]Ibid., at 22–24.

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has been facilitated by a foreign subsidy that results in a distortion of the EU market, conditions could be imposed on the acquisition or the acquisition could be prohibited.[34]

Finally, the third module concentrates on the harmful effects caused by foreign subsidies on EU public procurement procedures.[35] Under this module, any company participating in a public procurement tender within the EU would be required to notify a supervisory authority whether it has received financial contributions from a foreign government. After the notification, it will be assessed whether that company has received a foreign subsidy which distorted the procedure.[36] If this is the case, the company could be prohibited from participating in the relevant public procurement procedure, as well as in any future procedures for a period of three years.[37] Under each of the three modules, the Commission and potentially the authorities of EU Member States would be granted significant investigatory powers. Amongst other things, they may decide to initiate investigations under each module on their own motion.[38] These investigations could involve carrying out verifications at the premises of the undertaking. Should an investigated undertaking not fully cooperate, the investigating authorities could also resort to facts available or impose economic sanctions in order to induce undertakings to comply with the information requirements.[39]

While unilateral initiatives such as the draft modules pursued by the Commission may create useful discussion on the issue of foreign subsidies, without careful implementation they may lead to retaliation, similar to what occurred with regard to the US' response to the EU's industrial subsidies in the 1970s.[40] Hence, the fact that the EU might be taking the matter of foreign subsidies into its own hands is concerning and raises the question whether unilateral actions against foreign subsidies would be in line with the EU's WTO obligations. Following our discussion on multilateral WTO remedies in the next section, this question is assessed in section 4.

3. Lack of Multilateral Remedies against Foreign Subsidies

As explained, it is unclear whether current international trade rules provide appropriate remedies against foreign subsidies.[41] Accordingly, this section assesses whether the WTO Agreements provide adequate avenues for a WTO Member to challenge other foreign subsidies granted to entities located within its territory.

As correctly acknowledged by the Commission in the White Paper,[42] the SCM Agreement does not apply to the provision of services or service producers.[43] The WTO Agreements are divided into three areas: goods, services, and intellectual property. Trade in goods is regulated mainly by the GATT, whose rules and disciplines are further elaborated upon by additional agreements, such as the SCM Agreement. Trade in services is solely regulated by the GATS.[44] Concerning subsidies for the production of goods and countervailing measures, Articles VI and XVI of the GATT provide the basic rules which are expanded upon in the SCM Agreement. The GATS does not contain any equivalent provision concerning subsidies for the supply of services and responses thereto. Although Article XV:1 of the GATS directs Members to enter into negotiations in order to develop 'multilateral disciplines' to avoid the trade-distortive

[34]Ibid., at 28–29.
[35]Ibid., at 30.
[36]Ibid., at 31.
[37]Ibid., at 34.
[38]Ibid., at 21, 29.
[39]Ibid., at 18, 20, 29, 32.
[40]R.R. Rivers and J.D. Greenwald (1979) 'The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences', *Law and Policy in International Business* 11, 1447.
[41]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 42.
[42]Ibid., at 41.
[43]As discussed below in section 3.1, the SCM Agreement only applies to subsidies granted for the production of goods.
[44]The difference between the GATT and the GATS is further discussed *infra* in footnote 109 and accompanying text.

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effects of subsidies, such negotiations have not taken place. Article XV:2 does allow Members to request consultations if they consider themselves adversely affected by services subsidizes; however, other Members are merely called upon to accord such requests 'sympathetic consideration'. The GATS does not therefore provide multilateral remedies concerning services subsidies. As a result, this section will focus on the availability of multilateral remedies against foreign producer subsidies, which are found under the SCM Agreement.

In this regard, the question is whether these foreign producer subsidies fall under the definition of a subsidy under Article 1.1 of the SCM Agreement, and whether the SCM Agreement provides an avenue for Members to challenge these subsidies multilaterally. Although Article 1.1 of the SCM Agreement does not impose any clear limitation on the location of the recipient of the subsidy, meaning that foreign producer subsidies qualify as subsidies (section 3.1), the SCM Agreement only provides adequate multilateral remedies against foreign producer subsidies that constitute prohibited subsidies under Article 3 (section 3.2). Foreign producer subsidies, however, would rarely constitute prohibited subsidies under this provision (section 3.3).

3.1 Are Foreign Producer Subsidies 'Subsidies' under the SCM Agreement?

The Commission's White Paper argues that the SCM Agreement only covers subsidies which 'are normally granted to beneficiaries outside the EU',[45] so that that there would be a gap in the SCM Agreement insofar as it does not provide adequate multilateral remedies to challenge foreign producer subsidies. Article 1.1 of the SCM Agreement provides that a subsidy exists if there is: (i) a financial contribution, (ii) by a government, (iii) that confers a benefit. By addressing these constitutive elements in turn, it can be concluded that the definition of a subsidy under the SCM Agreement does, in fact, cover foreign producer subsidies.

Article 1.1(a)(1) of the SCM Agreement states that 'there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as ("government")'. The qualifier term 'within the territory of a Member' in Article 1.1(a)(1) only refers to 'a government or a public body' and does not concern the term 'financial contribution'. In other words, it does not indicate where the recipient of the financial contribution must be located.[46] This is because the qualifier directly follows the term 'a government or any public body' and because the term 'by a government or any public body' is not between commas. This interpretation is further confirmed by the insertion of the definition of 'government' between brackets immediately after, which clarifies the term to mean 'a government or any public body within the territory of a Member'.[47] On this basis, Article 1.1(a)(1) of the SCM Agreement does not exclude financial contributions granted to recipients located in a different Member than the subsidizing Member.[48]

Article 1.1(b) of the SCM Agreement then provides that 'a benefit is thereby conferred'. Thus, although '[t]he SCM Agreement does not include a specific definition of the "recipient" of a "benefit"',[49] it seems that Article 1.1(b) does not preclude from the definition of a subsidy, those subsidies that are given to benefit a recipient who is outside the territory of the subsidizing Member. The location of the recipient of the benefit will, however, have an impact on the availability of remedies under Part II and following of the SCM Agreement,[50] as it is this recipient that will define the recipient of the subsidy throughout the

[45]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 47.

[46]Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US–Anti–Dumping and Countervailing Duties (China))* , WT/DS379/R (22 October 2010), para. 8.67.

[47]Ibid.

[48]Crochet and Hegde, *supra* note 1.

[49]Panel Report, *Brazil – Export Financing Programme for Aircraft* (*Second Recourse by Canada to Article 21.5 of the DSU) (Brazil–Aircraft (Article 21.5 DSU–Canada II))*, WT/DS46/RW2 (26 July 2001), at footnote 42.

[50]As discussed below in section 3.2.1, remedies against actionable subsidies are only available when the recipient is located within the territory of the granting authority under Article 2 of the SCM Agreement. Similarly, in accordance with Article 13

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SCM Agreement.[51] As the benefit is not defined in terms of subsidization of imported products but in terms of subsidization for the production of goods,[52] the recipient of the benefit is the 'economic entity'[53] that is 'actually engaged in production'.[54] Hence, the recipient of the benefit is the producer of goods to whom the financial contribution grants a benefit.[55] Thus, in order to assess the availability of the remedies under the SCM Agreement, it is the location of this recipient that will be used.

While it could be argued that Article 1.1 of the SCM Agreement should be interpreted to exclude financial contributions granting a benefit to a recipient located outside the territory of the subsidizing WTO Member from the definition of a subsidy under the SCM Agreement, those arguments do not hold up to scrutiny. Indeed, although other provisions of the SCM Agreement, in particular Articles 13 and 18, refer to the government of the exporting WTO Member so that the term 'a Member' in Article 1.1 could be understood as meaning the exporting WTO Member,[56] these provisions, which fall under Part V of the SCM Agreement, refer to the availability of countervailing measures to an importing Member. This is a separate matter to the scope of Article 1.1 of the SCM Agreement.[57] These provisions can thus not be used to assess the scope of the SCM Agreement. Furthermore, WTO case law does provide examples of where the recipient of the financial contribution was not located in the territory of the subsidizing Member and yet a subsidy was found. For example, in the *Brazil–Aircraft* dispute, export financing payments in the form of a direct transfer of funds by the Brazilian Government to foreign aircraft buyers were found to constitute a subsidy.[58]

It follows that foreign producer subsidies would qualify as subsidies under Article 1.1 of the SCM Agreement. Despite potential arguments to the contrary, it must be recognized that this definition does not exclude from its scope producer subsidies granted to entities located outside the territory of the subsidizing Member.

3.2 Does the SCM Agreement Provide for Adequate Multilateral Remedies against Foreign Producer Subsidies?

3.2.1 Multilateral Remedies for Actionable Subsidies

Article 1.2 of the SCM Agreement indicates that for a WTO Member to be able to have recourse to multilateral remedies at the WTO, a subsidy needs to be specific in accordance with the provisions of Article 2.

Article 2 of the SCM Agreement states that for a subsidy to be 'specific', it needs to be given to an enterprise or industry or group of enterprises or industries 'within the jurisdiction of the

and 18 of the SCM Agreement, countervailing duties do not appear to be available when the subsidizing Member is not also the exporting Member.

[51]See, Article 14 SCM Agreement. See for a more detailed analysis, Crochet and Hegde, *supra* note 1.

[52]Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US–Countervailing Measures on Certain EC Products)*, WT/DS212/R (31 July 2002), para. 7.54. See further on this issue, Hufbauer, Moll, and Rubini, *supra* note 18.

[53]Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US–Countervailing Measures on Certain EC Products)*, WT/DS212/AB/R (9 December 2002), para. 112.

[54]Ibid. See also, GATT, Article VI and SCM Agreement, at footnote 36.

[55]Panel Report, *US–Countervailing Measures on Certain EC Products*, para. 7.52.

[56]We similarly note that Article XVI of the GATT, which refers to subsidies by a WTO Member which operates 'to increase exports of any product from, or to reduce imports of any products into, its territory'. However, this provision of the GATT only discusses what became 'prohibited subsidies' under Part II of the SCM Agreement concerning which the SCM Agreement considerably strengthened the applicable disciplines. Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US–Carbon Steel)*, WT/DS213/AB/R (28 November 2002), para. 73.

[57]For a detailed analysis of this question, please refer to Crochet and Hegde, *supra* note 1.

[58]Panel Report, *Brazil – Export Financing Programme for Aircraft (Brazil–Aircraft)*, WT/DS46/R (14 April 1999), paras. 2.1–2.6, 4.19–4.20, and 4.40–4.48.

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granting authority' except if that subsidy is a prohibited subsidy under Article 3. Thus, with regard to actionable subsidies, the possible recipients of the subsidy need to be 'within the jurisdiction of the granting authority' for remedies to be available under the SCM Agreement. This is not the case for foreign subsidies.

While there has been little discussion in WTO jurisprudence regarding the term 'within the jurisdiction', 'jurisdiction' is defined as '[t]he extent or range of judicial or administrative power; the territory over which such power extends'.[59] The traditional understanding of State jurisdiction is, as explained in the *Lotus* case, 'certainly territorial; it cannot be exercised by a State outside its territory'.[60] Although this understanding may not fully reflect today's reality,[61] the interpretation of the term 'jurisdiction' in Article 2.1 of the SCM Agreement as meaning 'territory' appears to be the most appropriate. The SCM Agreement's legislative history confirms this interpretation. At a meeting of the Negotiating Group on Subsidies and Countervailing Measures, '[i]t was proposed to clarify that specificity may exist only within the territory of a signatory'.[62] Article 2.1 of the draft SCM Agreement was, thus, amended so that for a subsidy to be specific it had to be granted to enterprises 'within the territory of the subsidizing country'.[63] Article 2.1 was, however, subsequently amended together with Article 2.2 at the request of Canada, because read together, these Articles 'deemed any subsidy offered by a provincial government in Canada to be specific even if it was generally available throughout the province'.[64] As a result, both Articles were amended to mention the term 'within the jurisdiction of the granting authority'. The idea that jurisdiction, under WTO law, is mainly territorial is also in line with the views taken by the Appellate Body[65] and by the US in *US–FSC (Article 21.5 DSU)*.[66]

It thus appears that the SCM Agreement fails to provide an adequate avenue to challenge foreign producer subsidies which do not qualify as prohibited subsidies under Part II of the SCM Agreement.[67]

3.2.2 Multilateral Remedies for Prohibited Subsidies

Article 3 of the SCM Agreement provides two types of prohibited subsidies which can be the object of a multilateral challenge without demonstrating that they are specific or cause serious prejudice. Article 3.1 prohibits export subsidies – subsidies which aim at increasing the receiving

[59]Oxford English Dictionary, *Jurisdiction*. See also V. Crochet and V. Hegde, *supra* note 1.

[60]*The Case of the S.S. Lotus France v Turkey*, Judgment, 7 September 1927, PCIJ Series A no 10, ICGJ 248 (PCIJ 1927), para. 45.

[61]A. Mill (2014) 'Rethinking Jurisdiction in International Law', *British Yearbook of International Law* 84, 187.

[62]Multilateral Trade Negotiations the Uruguay Round, Meeting of 6 November 1990 Note by the Secretariat, 29 November 1990, MTN/GNG/NG10/24, para. 3.

[63]Multilateral Trade Negotiations the Uruguay Round, 'Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations', 20 December 1991, I.2, MTN.TNC/W/FA.

[64]Multilateral Trade Negotiations the Uruguay Round, Trade Negotiations Committee: Thirty-Third Meeting, 29 November 1993, MTN.TNC/37, para. 25.

[65]See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US–Shrimp)* WT/DS58/AB/R (12 August 1998), para. 133.

[66]Panel Report, *United States – Tax Treatment for 'Foreign Sales Corporations' (Article 21.5 DSU) (US–FSC (Article 21.5 DSU))*, WT/DS108/R (8 October 1999), at Annex F–3, para. 108 where the US explained that '[i]n the case of an alleged subsidy taking the form of a tax measure, it would seem appropriate to interpret the term "jurisdiction" as referring to the taxing jurisdiction of the Member in question'.

[67]Furthermore, even if it was accepted that a subsidy granted to an entity established in the territory of a Member which is not the subsidizing Member is specific, it would be difficult for the Member where the subsidized entity is established to show that it has suffered adverse effects in accordance with Article 5 of the SCM Agreement. In order to demonstrate that it has suffered adverse effects, a Member must establish that its domestic industry or its products have been negatively affected by the subsidy. However, according to Article 16 of the SCM Agreement, this Member's domestic industry would encompass the subsidized entity and the subsidized entity's products would constitute 'products' of the Member where it is located under Article 6.3 of the SCM Agreement. Thus, any attempt to show adverse effects would be rather odd.

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entities' exports – while Article 3.2 prohibits import-substitution subsidies – subsidies aimed at increasing the receiving entities' use of domestic products over imports.

Concerning foreign export subsidies, it seems unlikely that the WTO Member within which the receiving entity is located will complain that a foreign government is subsidizing production destined for export from its territory.[68] To be a source of concern to the WTO Member where the receiving entity is located, a foreign subsidy would rather have to increase sales output in this Member's market. Indeed, a foreign export subsidy normally provides clear benefits to the Member in which the recipient is located, such as the creation of jobs or increased tax revenues, with limited impact on other domestic producers in that Member. Such a subsidy could, however, raise issues for other WTO Members to which the subsidized producer's products are exported. In this regard, if these latter WTO Members can establish that the subsidy is a prohibited export subsidy under Article 3.1 of the SCM Agreement, they may be able to successfully challenge it before the WTO.[69]

Foreign import-substitution subsidies, on the other hand, seem unlikely to occur in practice as it would mean that the subsidizing Member would grant the subsidy on the condition that the receiving entities use domestic products, i.e. products originating in the Member where the receiving entity is located, instead of imports. It is much more likely that the subsidizing Member will make the subsidy contingent upon the use of imported products originating in its own territory. As an example, this would be the case if a foreign-owned factory located in the EU received a subsidy contingent upon the use of imported raw materials from China. However, such a subsidy would not qualify as an import-substitution subsidy under Article 3.2 of the SCM Agreement as it would increase the receiving entities' use of imports over domestic products.

3.3 Conclusion

It follows from the above that the WTO Agreements, and in particular the GATS and the SCM Agreement, fail to provide adequate multilateral remedies to address foreign subsidies. This means that only if foreign producer subsidies are considered prohibited subsidies under Article 3 of the SCM Agreement would the SCM Agreement offer an avenue for a WTO challenge. Such subsidies would, however, be rare in practice and, in any event, would most likely not be an issue to the WTO Member where the subsidized entity is located. Thus, WTO Members are left to their own devices in addressing the issue of foreign subsidies. This then raises the question whether the WTO Agreement allows WTO Members to take unilateral action against these types of subsidies.

4. Designing WTO-Compliant Unilateral Remedies against Foreign Subsidies

The only unilateral tool expressly provided by the WTO Agreements to address subsidies is countervailing measures. These can be imposed on subsidized imports following an investigation by the national investigating authorities. Countervailing measures are, however, of no use when the producer of the goods is subsidized and is already located in the territory of the WTO Member that alleges that its market is distorted by the subsidization, as these measures are imposed on imported products.[70] Furthermore, they do not cover subsidized services. The question is, thus, whether WTO Members are allowed to take other forms of unilateral actions to address these situations. It is argued that while the SCM Agreement appears to prevent other forms of

[68]Hufbauer, Moll, and Rubini, *supra* note 18, at Annex C.

[69]Crochet and Hegde, *supra* note 1.

[70]Concerning the question of whether a WTO Member can impose countervailing measures against imported products subsidized by a government other than that of establishment of the producing entity, please see Crochet and Hegde, *supra* note 1.

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unilateral actions against foreign producer subsidies, such actions should be allowed if they can be justified under the general exceptions provided for in Article XX of the GATT (sections 4.1 and 4.3). Similarly, whereas a unilateral instrument to take action against the foreign subsidization of service providers may result in discrimination violating the provisions of the GATS, these actions may be justified if they meet the requirements of the general exceptions provided for in Article XIV of the GATS (sections 4.2 and 4.3). Designing an instrument which would meet the requirements of the general exception provisions would, however, be a difficult task (section 4.4).

We do not discuss violations that may arise under the GATT, since the GATT generally only applies when goods cross borders. By contrast, as discussed in the following section, the rules established under the SCM Agreement appear to go further than the GATT in this respect and apply to subsidization of the production of goods as such, not just the subsidization of internationally traded goods.

4.1 Are Unilateral Remedies Prohibited against Foreign Producer Subsidies under the SCM Agreement?

4.1.1 Limitation on Unilateral Remedies under the SCM Agreement

The predecessor of the SCM Agreement, the Subsidies Code, was aimed not only at imposing more stringent rules on the use of subsidies, but also at reining in those actions that could be taken against these subsidies in light of the extensive use of unilateral measures by the US.[71] Thus, the Subsidies Code, and subsequently the SCM Agreement, expressly limited which actions are allowed against a subsidy of another Member.[72] Article 32.1 of the SCM Agreement currently provides that '[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Taking unilateral action against foreign subsidies may thus run afoul of this provision.

While it could be argued that Article 32.1 of the SCM Agreement only prevents specific actions against imported subsidized goods but not against subsidies as such,[73] the Appellate Body clarified that 'Article 32.1 of the SCM Agreement refers to specific action against "a subsidy", not action against the imported subsidized product or a responsible entity'.[74] Article 32.1 of the SCM Agreement fulfils a function of limiting the range of actions that a Member may take unilaterally to counter subsidization[75] by restricting available unilateral actions against subsidization to those expressly provided for in the GATT 1994 and in the SCM Agreement.[76] A response to subsidization must thus be either in the form of definitive countervailing duties, provisional measures, or price undertakings, or in the form of multilateral remedies from resorting to the WTO dispute settlement system.[77]

[71]GATT, *Subsidies/Countervailing Measures, Outline of an Arrangement*, 10 July 1978, MTN/NTM/W/168; D. Coppens (2014) *WTO Disciplines on Subsidies and Countervailing Measures – Balancing Policy Space and Legal Constraints*. Cambridge: University Press Cambridge, at 27; Rivers and Greenwald, *supra* note 40.

[72]Article 19, Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariff and Trade (the 'Subsidies Code').

[73]In this regard, we note that a paragraph indicating that '[n]o measures other than anti-dumping or countervailing duties shall be applied by any contracting party in respect of any product of the territory of any other contracting party for the purpose of offsetting dumping or subsidization' was put forth during the negotiations of the GATT 1947 but was not included in the final draft (see reference in Panel Report, *United States – Anti-Dumping Act of 1916 (US–1916 Act (EC))*, WT/DS136/R (31 March 2000), footnote 444). While this provision's wording is similar to that of Article 32.1 of the SCM Agreement, Article 32.1 of the SCM Agreement's prohibition is broader insofar as it is not limited to measures against products.

[74]Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US–Offset Act (Byrd Amendment))*, WT/DS217/AB/R; WT/DS234/AB/R (16 January 2003), para. 251.

[75]Ibid., para. 252.

[76]Ibid., para. 272.

[77]Ibid., para. 273.

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It follows that any action: (i) 'specific' to subsidization, and (ii) 'against' subsidization, and which is not in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally sanctioned countermeasures, will lead to a violation of Article 32.1 of the SCM Agreement.[78] Each of these two conditions is assessed in turn.

First, a measure that is inextricably linked to, or has a strong correlation with, the constituent elements of a subsidy as defined by the SCM Agreement is a 'specific action' in response to subsidization.[79] In the words of the WTO Panel in *EC–Commercial Vessels*, this will be the case when the constituent elements of a subsidy under Article 1.1 of the SCM Agreement 'are implicit in the express conditions for taking such action'.[80] The question is, thus, whether any unilateral remedy against foreign subsidies would be inextricably linked to, or would have a strong correlation with, the constituent elements of a subsidy.[81]

In this regard, the Commission acknowledges in section 6.5 of the White Paper that '[t]he definition of a subsidy according to the SCM Agreement by and large coincides with the definition of' a foreign subsidy.[82] As a result, the unilateral measures proposed in the White Paper would appear to be specific measures against subsidization. The Commission, however, argues that the SCM Agreement only covers subsidies which 'are normally granted to beneficiaries outside the EU',[83] so that by addressing subsidies granted to entities in the EU, the White Paper's proposed instruments would not violate Article 32.1. The Commission adds that the SCM Agreement only covers 'subsidized imports of goods from third countries' that would make it similar in scope to the GATT.[84] Yet, the SCM Agreement contains 'a set of rights and obligations that go well beyond'[85] the scope of the GATT's provisions on subsidized imports.[86] It regulates the provision of subsidies by WTO Members' governments for the production of goods[87] so that the SCM Agreement's focus is not on the importation of subsidized products, but on subsidization.[88] This is clear from the contextual consideration that the SCM Agreement provides that WTO Members can challenge other Members' subsidies even if these subsidies do not lead to increased imports in the former Member's territory[89] or to an increase in imports at all.[90] For these reasons, and as discussed in section 3.1, foreign producer subsidies seem to fall under the definition of a subsidy under Article 1.1 of the SCM Agreement, and taking unilateral remedies against them would appear to be inextricably linked to, and have a strong correlation with, the constituent elements of a subsidy under Article 1.1 of the SCM Agreement.[91]

Second, to determine whether a measure is 'against' subsidization within the meaning of Article 32.1 of the SCM Agreement, it is necessary to assess whether the design and structure of a measure is such that the measure is 'opposed to', has an 'adverse bearing on', or, more

[78]Ibid., para. 236.

[79]Ibid. See also Appellate Body Report, *United States – Anti-Dumping Act of 1916* (*US–1916 Act (EC)*), WT/DS136/AB/R; WT/DS162/AB/R (28 August 2000), paras. 122, 130.

[80]Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels (EC–Commercial Vessels)*, WT/DS301/R (22 April 2005), para. 7.112. See also Appellate Body Report, *US–Offset Act (Byrd Amendment)*, para. 244.

[81]Appellate Body Report, *US–Offset Act (Byrd Amendment)*, para. 240. See also Panel Report, *EC–Commercial Vessels*, para. 7.113.

[82]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 41.

[83]Ibid., at 47.

[84]Ibid., at 10 and 41–42.

[85]Appellate Body Report, *US–Carbon Steel*, para. 73.

[86]Namely, GATT, Articles VI, XVI and XXIII.

[87]Panel Report, *Brazil–Aircraft (Article 21.5–Canada II)*, para. 5.28; Appellate Body Report, *US–Countervailing Measures on Certain EC Products*, para. 112.

[88]Hufbauer, Moll, and Rubini, *supra* note 18, at Annex C.

[89]Appellate Body Report, *US–Offset Act (Byrd Amendment)*, para. 251; Hufbauer, Moll, and Rubini, *supra* note 18, at Annex C.

[90]In case of import substitution subsidies under Article 3 of the SCM Agreement.

[91]Appellate Body Report, *US–Offset Act (Byrd Amendment)*, para. 240. See also Panel Report, EC–Commercial Vessels, para. 7.113.

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specifically, 'has the effect of dissuading the practice' of subsidization, or 'creates an incentive to terminate such practices'.[92] In *US–Offset Act (Byrd Amendment)*, a measure which provided that funds resulting from anti-dumping and countervailing duties shall be distributed to the domestic producers filing the complaints, and a measure that provided for fines or the imprisonment of importers of dumped products, were found to constitute measures 'against' subsidization and dumping.[93] However, in *EC–Commercial Vessels*, the WTO Panel found that a measure consisting in 'a subsidy provided in response to another Member's subsidy'[94] did not constitute an action 'against' a subsidy, because it did not dissuade the practice of subsidization.

Taking redressive measures against foreign producer subsidies may have the effect of dissuading or terminating the practice of subsidization and, as such, would most likely constitute action 'against' subsidization. To exemplify, under the White Paper's proposed instruments, the envisaged remedies would include commitments to divest, to license products, or to make redressive payments.[95] In this regard, the stated aim of the White Paper's proposed instruments would be to 'level the playing field' so that other WTO Members would abide by rules similar to those of the EU State aid regime.[96] As these instruments impose direct penalties on the foreign subsidy recipient in order to dissuade the practice of subsidization by other WTO Members, in the same way as the EU State aid regime does with regard to EU Member States, the proposed remedies would likely constitute actions 'against' a subsidy in the sense of Article 32.1 of the SCM Agreement.

The conclusion that the White Paper's proposed instruments, and most likely also other types of measures seeking to address foreign subsidies granted to goods producers, would violate Article 32.1 of the SCM Agreement creates certain systemic issues. It suggests that WTO Members would be prevented from responding to a situation which was not foreseen at the time of the drafting of the SCM Agreement. It could be argued that this would go against the negotiated balance of the SCM Agreement, which is that WTO Members are allowed to take actions against subsidies granted for the production of goods, but only if these actions follow the negotiated rules.[97]

Consequently, the question of how WTO Members may address foreign subsidies would, in our opinion, best be resolved by the political organs of the WTO. However, as so often in the WTO, the WTO's dispute settlement body will most likely be seized to rule on the question before a political agreement can be negotiated.[98] In this regard, a WTO Panel may be tempted to find that the SCM Agreement only applies to goods produced in other WTO Members and which have crossed a border, so that Article 32.1 of the SCM Agreement would not prevent unilateral actions against foreign producer subsidies. Yet this would have the effect of allowing WTO Members to act without restriction against foreign producers established within their territories. That is likely to lead to exactly the type of undesirable discrimination that the WTO agreements are supposed to prevent. A way to balance these competing demands would be to find first that a

[92]Appellate Body Report, *US–Offset Act (Byrd Amendment)*, para. 254.

[93]Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US–Offset Act (Byrd Amendment))*, WT/DS217/R; WT/DS234/R (16 September 2002), para. 7.46.

[94]Panel Report, *EC–Commercial Vessels*, para. 7.164, Panel Report, *United States – Anti-Dumping Act of 1916 (US–1916 Act (Japan))*, WT/DS162/R (29 May 2000), para. 6.231.

[95]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 19–20.

[96]This is often referred to as the 'Brussels effect'. See Bradford, *supra* note 5, at 99. ('In addition to shaping the global marketplace through the extraterritorial enforcement of its own competition law, the EU has been remarkably successful in exporting its regime abroad.')

[97]L. Rubini (2017) 'The Age of Innocence: The Evolution of the Case–Law of the WTO Dispute Settlement. Subsidies as Case–Study', in M. Elsig et al. (eds.), *Assessing the World Trade Organization. Fit for Purpose?* Cambridge: Cambridge University Press. See also Panel Report, *Brazil–Aircraft*, para. 7.26; Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea (US–Countervailing Duty Investigations on DRAMS)*, WT/DS296/AB/R (27 June 2005), para. 115.

[98]L. Bartels (2004) 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', *International & Comparative Law Quarterly* 53, 861.

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unilateral measure would violate Article 32.1 of the SCM Agreement, and then second to consider whether such a violation can be justified under Article XX of the GATT. This possibility is discussed in the following section.

4.1.2 Application of Article XX of the GATT to a Violation of Article 32.1 of SCM Agreement

As explained in the preceding section, either finding that the prohibition on unilateral action under Article 32.1 of the SCM Agreement is absolute, or that the SCM Agreement does not apply at all, would in both instances appear to undermine the negotiated balance of the SCM Agreement that WTO Members are allowed to act but subject to the negotiated rules. A means to avoid undermining this balance would be to allow WTO Members to have recourse to Article XX of the GATT to justify a violation of Article 32.1 of the SCM Agreement. As we explain below, this approach would also be fully consistent with WTO precedent.

Article XX of the GATT presents a general exception for violations of the GATT in order to resolve contradictions between trade liberalization and other legitimate aims. There have been several disputes in which WTO Panels and the Appellate Body have considered the extent to which Article XX of the GATT is available to justify violations of provisions of WTO Agreements other than the GATT.[99] While it is generally acknowledged that Article XX of the GATT cannot be relied upon to justify a subsidy which has been adopted in violation of the rules of the SCM Agreement,[100] there has been no discussion as to whether Article XX can be relied upon to justify a violation of Article 32.1 of the SCM Agreement. The Appellate Body has explained that the question whether Article XX of the GATT is available to justify a violation of another agreement is not to be assessed with respect to this other agreement as a whole but to the relevant provision whose violation is sought to be justified.[101] It thus articulated a standard 'analytical approach' which entails a case-by-case analysis through a proper interpretation of the relevant provision.[102] This means that the relationship between the provision at issue and Article XX of the GATT 'must be ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations'.[103]

Article 32.1 of the SCM Agreement allows WTO Members to take specific actions against subsidies which are 'in accordance with the provisions of GATT 1994, as interpreted by this Agreement'. Footnote 56 to that provision further provides that '[t]his paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate'. When discussing whether Article XX of the GATT could be relied upon by China to justify a violation of its Accession Protocol, the Appellate Body indicated that the phrase, 'China's right to regulate trade in a manner consistent with the WTO Agreement' meant that China could either not contravene any WTO obligation or, if it contravened a WTO obligation, it would be justified under an applicable exception.[104] A similar reading of the term 'in accordance with the provisions of GATT 1994' in Article 32.1 of the SCM Agreement would suggest that a specific action against a subsidy can be taken in a way that either does not contravene any GATT obligation or that is justified under the GATT's exceptions. This reading appears to be confirmed by footnote 56 to that provision, as

[99]Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines (Article 21.5 DSU) (Thailand–Cigarettes (Article 21.5 DSU))* WT/DS371/R (15 November 2010), para. 7.744.

[100]See C. Tran (2010) 'Using GATT, Art XX to Justify Climate Change Measures in Claims under the WTO Agreements', *Environmental and Planning Law Journal* 27, 34. See also Coppens, *supra* note 71, at 192.

[101]Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (China–Rare Earths)*, WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R (7 August 2014), para. 5.74.

[102]Ibid., para. 5.55.

[103]Ibid.

[104]Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China–Publications and Audiovisual Products)*, WT/DS363/AB/R (21 December 2009), para. 223.

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this footnote helps ensure that Article 32.1 does not 'prevent Members from adopting other types of measures which are compatible with the WTO Agreement'.[105] It is also in line with the legislative history of this Agreement since, it was 'agreed that measures other than compensatory … countervailing duties may not be applied to counteract … subsidization except in so far as such other measures are permitted under other provisions of the General Agreement'.[106]

Furthermore, the balance between the different objects and purposes of the agreement at hand must also be taken into account when assessing whether or not Article XX of the GATT might be available to justify a violation of a provision of another agreement.[107] In that regard, as mentioned, the object and purpose of the SCM Agreement reflect a delicate balance between WTO Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on unilateral responses to subsidies.[108] Not allowing a violation of Article 32.1 of the SCM Agreement to be justified under Article XX of the GATT would put this delicate balance at risk as WTO Members would be prevented from taking any action against types of subsidies for which the SCM Agreement does not provide appropriate remedies, even if this action is not applied in a discriminatory or protectionist manner.

It thus follows that while taking unilateral action against foreign producer subsidies would most likely constitute specific action against a subsidy in violation of Article 32.1 of the SCM Agreement, such a violation should be justifiable under Article XX of the GATT. The question of how a violation of Article 32.1 of the SCM Agreement can be justified under Article XX of the GATT is further discussed in section 4.3 below.

4.2 Are Unilateral Remedies Allowed against Foreign Subsidization of Services under the GATS?

As explained in section 3 above, subsidies granted to service suppliers are not regulated under the GATS or any other WTO Agreement. In contrast to the ability of WTO Members to impose countervailing duties under the SCM Agreement, there is, thus, no expressly authorized means of unilaterally addressing foreign services subsidies. On the other hand, there is also no prohibition on unilaterally targeting services subsidies equivalent to Article 32.1 of the SCM Agreement. Attempts at designing an instrument to take unilateral action against foreign subsidies granted to service providers may nevertheless violate the most-favoured nation (MFN) or national treatment obligations under the GATS, as these disciplines apply as regards foreign services suppliers with an established commercial presence abroad.[109] This section therefore analyses both of these obligations in turn.

4.2.1 MFN under Article II:1 of the GATS

A unilateral measure aimed at targeting foreign subsidies for the supply of services may result in a violation of the MFN obligation under Article II:1 of the GATS, which requires WTO Members

[105]Panel Report, *US–1916 Act (EC)*, para. 6.199, regarding Article 18.1 of the Anti–Dumping Agreement whose wording mirrors that of Article 32.1 of the SCM Agreement.

[106]Report of the Working Party on Modifications to the General Agreement on 1–2 September 1948, BISD Vol. II, p. 41 (1952).

[107]Panel Report, *Thailand–Cigarettes (Article 21.5 DSU)*, para. 7.755.

[108]Ibid., quoting Appellate Body Report, *US–Countervailing Duty Investigations on DRAMS*, para. 115.

[109]Article I:2 GATS. Commercial presence is defined in Article XXVIII(d) GATS as '(i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service'. It is important to note that whereas the GATT mostly apply to goods themselves, the GATS also apply to service *suppliers*. Therefore, in contrast to the situation of a goods producer under the GATT, a foreign owned subsidiary would not be considered to be part of the domestic industry of the WTO Member in which it is established. There are suggestions in the White Paper that the measures could also be extended to services suppliers established outside the EU. See Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 46. A unilateral measure targeting these suppliers could also affect the cross–border supply services under Mode 1.

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to accord services and service suppliers of any other Member 'treatment no less favourable' than that which it accords to 'like' services and service suppliers of any other country.[110]

As the subsidization of a service supplier does not have a bearing on the nature of the services it provides, service suppliers from one WTO Member and non-subsidized service suppliers from another WTO Member within the same sector must be considered 'like'.[111] It thus follows that a Member must treat these services suppliers similarly.[112]

While unilateral measures against foreign subsidies for the supply of services are unlikely to lead to *de jure* discrimination, since such measures would apply to all established service providers irrespective of their nationality, they may lead to *de facto* less favourable treatment.[113] This would be the case if the design, structure, and expected operation of a unilateral instrument targeting foreign subsidized service providers modified the conditions of competition to the detriment of service suppliers of certain WTO Members.[114] Such a situation would arise if this instrument targeted the majority of services suppliers from one Member, while it never or rarely targeted the suppliers of another Member.[115]

In this regard, it is likely that unilateral measures against foreign subsidies for the supply of services would target service suppliers from certain large WTO Members, such as China, the EU, or the US, over others. China is already the main target of countervailing measures in many jurisdictions,[116] and the EU and the US, which have large services sectors, provide substantial subsidies to these sectors.[117] Furthermore, taking the White Paper as an example, the Commission highlights that its proposed measure aims to address investment from places 'where public undertakings are not subject to the same rules as private undertakings, and where financial relations between the state and its undertakings are not transparent'.[118] The White Paper also takes specific issue with Chinese investment funds such as Sino-CEEF.[119]

[110]Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (*Canada–Autos)*, WT/DS139/AB/R; WT/DS142/AB/R (31 May 2000), paras. 170–171.

[111]Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services (Argentina–Financial Services)*, WT/DS453/AB/R (14 April 2016), para. 6.24.

[112]Ibid., para. 6.111.

[113]Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC–Bananas III)*, WT/DS27/AB/R (9 September 1997), para. 234.

[114]Panel Report, *European Union and its Member States – Certain Measures Relating to the Energy Sector (EU–Energy Package)*, WT/DS476/R (10 August 2018), paras. 7.488–7.491.

[115]Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC–Seal Products)*, WT/DS400/R; WT/DS401/R (25 November 2011), para. 7.597; Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (EC–Seal Products)*, WT/DS400/AB/R; WT/DS401/AB/R (22 May 2014), paras. 5.95–5.96. See also Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC–Bananas III)*, WT/DS27/R/ECU (22 May 1997), para. 7.336. In the oft–quoted *Canada–Automotive Industry* dispute, the Appellate Body did not clearly explain whether *de facto* discrimination arises in situations in which *any* good from *any* WTO Member is given less favourable treatment compared with a good from another WTO Member, as opposed to whether the majority of goods from one WTO Member is given less favourable treatment than the majority of goods from another WTO Member. See WorldTradeLaw.net (2014) *Dispute Settlement Commentary: Canada – Automotive Industry*, www.worldtradelaw.net/document.php?id=dsc/ab/canada–autos(dsc)(ab).pdf. *EC–Seal Products* appears to settle the question in favour of the latter, and more permissive, standard.

[116]According to WTO statistics, China was targeted in 123 countervailing duty investigations between 2005 and 2019, compared to a combined total of 88 times for other countries. See WTO, Subsidies and countervailing measures, www.wto.org/english/tratop_e/scm_e/scm_e.htm.

[117]D. Rusche (2018) 'US Cities and States Give Big Tech $9.3bn in Subsidies in Five Years', *The Guardian*, www.theguardian.com/cities/2018/jul/02/us-cities-and-states-give-big-tech-93bn-in-subsidies-in-five-years-tax-breaks#:~:text=Giant%20technology%20companies%20in%20the,struggling%20schools%20and%20broken%20budgets; (2016) 'Orange: pas d'aide illégale de l'État', *Le Figaro*, www.lefigaro.fr/flash-eco/2016/11/30/97002-20161130FILWWW00115-orange-pas-d-aide-illegale-de-l-etat.php; W. Williams et al. (2020) 'Germany Reaches EU Deal on $9.9 Billion Lufthansa Bailout', Bloomberg, https://www.bloomberg.com/news/articles/2020-05-29/germany-and-eu-said-to-reach-deal-over-lufthansa-bailout.

[118]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 6.

[119]Ibid., at footnote 10.

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Moreover, in a joint statement, the German and French economy ministers emphasized that the White Paper was a tool to establish a level playing field and to enable competition with China and the US.[120] Similarly, Members of the European Parliament have highlighted that the White Paper was a step in the right direction to address takeovers by Chinese companies.[121] It would appear, then, that the measures proposed in the White Paper have been designed to address concerns over certain Members' subsidies in particular. Consequently, the White Paper's modules would likely modify the conditions of competition to the detriment of services or service suppliers of these Members, and thereby potentially violate Article II:1 of the GATS.[122]

4.2.2 National Treatment Obligation under Article XVII of the GATS

A unilateral measure aimed at targeting foreign subsidies for the supply of services may result in a violation of the national treatment obligation under Article XVII of the GATS, which requires WTO Members to accord to services and service suppliers of any other Member 'treatment no less favourable' than that which it accords to its own like services and service suppliers.[123]

A WTO Member could choose to enact a measure targeting foreign subsidization by enacting a single measure applicable to both domestic and foreign subsidies. This would help the WTO Member avoid a national treatment violation as long as it could not be established that this single instrument's design, structure and expected operation modified the conditions of competition to the detriment of service suppliers of other WTO Members. We propose how this can be done in section 4.4 below.

For most WTO Members, however, designing a separate measure to investigate solely foreign subsidization will make more sense because whereas a State can be expected to be aware of and control most of its own level of subsidization, subsidies granted by foreign governments would have to be investigated. Notably, enacting a separate measure is the approach suggested in the EU's White Paper.[124] Such an approach would, however, certainly lead to a national treatment violation regardless of whether the implementing Member has in place a system to address its own domestic subsidies. This is because the relevant measure to be assessed for the national treatment analysis will be the instrument targeting foreign subsidies only.[125] Similar to the analysis under Article II:1 of the GATS, an instrument targeting solely foreign subsidies would not lead to a *de jure* violation of the national treatment obligation, since it would apply to foreign subsidies received by both domestic service suppliers and foreign-owned service suppliers. However, as foreign-owned service suppliers are more likely to be recipients of foreign subsidies

[120]Bundeministerium für Wortschaft und Energie, *Pressestament von Peter Altmaier und Bruno Le Maire zu aktuellen Wirtschaftsthemen und zur Corona–Pandemie*, 22 June 2020, www.bmwi.de/Redaktion/DE/Videos/2020/20200622-press-estatement-altmaier-le-maire.html. The White Paper also makes specific reference to Chinese investment funds, such as Sino–CEEF. See Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at footnote 10.

[121]D. ab Iago (2020) 'EU mulls tougher stance on foreign investments', *Argus*, www.argusmedia.com/news/2115229-eu-mulls-tougher-stance-on-foreign-investments?amp=1.

[122]How a WTO Panel may approach this question may in part be influenced by the broader systemic debate of whether the GATT and WTO is a system based on liberal market principles, or whether the WTO can and should accommodate certain levels of State intervention. For recent discussions of these issues, see, e.g., A. Lang (2019) 'Heterodox Markets and "Market Distortions" in the Global Trading System', *Journal of International Economic Law* 22, 677; P. Mavroidis and A. Sapir (2019) 'China and the WTO: Towards a Better Fit', *Bruegel Working Paper, Bruegel*, Brussels, https://bruegel.org/wp-content/uploads/2019/06/WP-2019-06-110619_.pdf.

[123]Panel Report, *Argentina – Measures Relating to Trade in Goods and Services (Argentina–Financial Services)*, WT/DS453/R (30 September 2015), para. 7.448.

[124]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2.

[125]This would be the case since the instrument targeting only foreign subsidies could not be said to be an implementing measure of the regime targeting domestic subsidies, and it would be difficult to argue that the two regimes operate in an integrated way. See Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Article 21.5 DSU) (US–Tuna II (Article 21.5 DSU))*, WT/DS381/AB/RW (3 December 2015), para. 7.13; Panel Report, *EC–Seal Products*, paras. 7.25–7.27.

than domestic service suppliers, the measure would result in *de facto* discrimination because it would target the majority of services suppliers from other WTO Members, while never or rarely targeting the suppliers of the Member enacting the measure.[126]

Nevertheless, the national treatment obligation under the GATS only applies to sectors and services modes for which a WTO Member has assumed commitments in its GATS Schedule.[127] A WTO Member may, thus, be able to avoid a violation where no commitments have been assumed with regard to the affected services, or if it has included an exemption for taking action against subsidization or State-owned entities in its GATS Schedule. However, if commitments can be clearly established, the enactment of a measure targeting solely foreign subsidies seems bound to violate the national treatment principle.

4.3 Justifications under the General Exceptions in the GATT and GATS

As discussed above, it seems that a unilateral instrument targeting foreign subsidies is likely to lead to several violations of the SCM Agreement and the GATS. Article XX of the GATT and Article XIV of the GATS contain a series of general exceptions allowing WTO Members to pursue certain regulatory objectives even when doing so would be inconsistent with other provisions.[128] A WTO Member may therefore argue that the above-mentioned violations are justified on the grounds that it has in place a similar regime against domestic subsidies, which seeks to prevent market distortions and thus needs to be complemented by a regime addressing foreign subsidies. As explained above, this is the case for the EU, which already has a State aid regime in place.[129]

For a measure to be justified under the general exemption provisions, that measure must meet the requirements set out in one of the subparagraphs of those Articles and must not be inconsistent with their *chapeau*.[130] These elements are analysed below.

4.3.1 Could a Measure be Justified on the Ground that it Aims at Avoiding Market Distortions and Ensuring Competition?

Article XX of the GATT and Article XIV of the GATS only allow Members to justify a measure if it pursues one of the policy objectives set out in the subparagraphs of these Articles. The difficulty is that there is no explicit subparagraph allowing for the justification of measures aimed at preventing distortions caused by subsidization. However, subparagraph (d) of Article XX of the GATT and subparagraph (c) of Article XIV of the GATS provide that WTO Members may take measures that are otherwise inconsistent with the GATT or GATS, as long as the measures are 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT/GATS]'. They would thus appear to allow for the argument that an instrument addressing foreign subsidies may be necessary to avoid economic distortions and ensure competitive markets.[131]

[126]Article XVII:3 GATS clarifies that the national treatment obligation covers *de facto* violations.

[127]Article XVII:1 GATS.

[128]Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US–Gambling)*, WT/DS285/AB/R (7 April 2005), para. 291. See also Appellate Body Report, *Argentina–Financial Services*, paras. 6.203–6.204; Appellate Body Report, *Colombia–Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia–Textiles)*, WT/DS461/AB/R (7 June 2016), footnote 270.

[129]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2.

[130]Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline (US–Gasoline)*, WT/DS2/AB/R (29 April 1996), para. 22.

[131]See Panel Report, *EU–Energy Package*; Panel Report *(Colombia–Ports of Entry)*, WT/DS366/R (27 April 2009); Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear (Colombia–Textiles)*, WT/DS461/R (27 November 2015); Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Korea–Beef)*, WT/DS161/R; WT/DS169/R (31 July 2000). See also T. Cottier et al. (2008) 'Article XIV GATS: General

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In this regard, WTO Members taking unilateral actions against foreign subsidies could argue that such measures are necessary to ensure compliance with their antitrust laws or laws aimed at ensuring free and competitive markets.[132] Taking the White Paper as an example, Article 26 of the TFEU states that '[t]he Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market', which comprises 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'. Article 107 of the TFEU, which contains the EU prohibition on State aid, aims to further the establishment of this internal market.[133] The EU could, thus, possibly argue that unilateral actions against foreign subsidies are necessary to ensure compliance with Article 26 of the TFEU.[134]

A WTO Member's legislation is generally presumed to be WTO-consistent unless proven otherwise.[135] In light of this presumption, if a broadly worded provision or set of provisions, similar to Article 26 of the TFEU under EU law, is invoked as the law with which compliance is sought, such a law would most likely be considered GATS- and/or GATT-consistent.

Given that the list of exceptions in Article XX of the GATT and Article XIV of the GATS does not contain a competitive markets exception, it could be argued that allowing a WTO Member to enact a law containing general economic policy preferences, and then to apply those preferences to foreign firms or imports by arguing that such measures are 'necessary' to secure compliance with these general policy preferences, would widen the existing list of exceptions. However, past WTO Panels have accepted broadly formulated laws and policy objectives, such as preventing deceptive consumer practices contrary to Korea's Unfair Competition Act,[136] or the avoidance of tax evasion.[137]

In the alternative, it could be argued that an instrument targeting foreign subsidies in order to prevent economic distortions and ensure competitive markets is necessary to protect public morals under Articles XX(a) of the GATT and XIV(a) of the GATS. While including such aims under the concept of 'public morals' would appear to the authors as stretching this concept significantly, the WTO Panel in *US–Tariff Measures* found that it can encompass economic concerns, and in particular concerns pertaining to unfair competition.[138]

Regardless of which policy exception is invoked, it could, however, be argued that a unilateral instrument is not 'necessary' to meet the public policy objectives in Article XX GATT and Article XIV GATS, if less trade-restrictive measures are reasonably available.[139] For instance, a principal concern with the instruments proposed by the EU in the White Paper is their wide scope and that a heavy procedural burden would be imposed on foreign companies to demonstrate that they are not subsidized.[140] Alternatively, a red flag approach in which an investigation of foreign

Exceptions' in R. Wolfrum et al. (eds.), *WTO – Trade in services, Max Planck commentaries on World Trade Law, No. 6*. Leiden: Martinus Nijhoff Publishers.

[132]In this regard, in Panel Report, *Argentina–Financial Services,* at paras. 7.637–7.643, the Panel concluded that the measures at issue sought to secure tax collection and avoid tax evasion.

[133]Article 107 TFEU only applies to aid or 'State resources' granted by or imputable to EU Member States, which is the reason the Commission considers a new measure to be necessary. See Monopolkommission, *supra* note 25, paras. 747–752; Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 6.

[134]Under US law, a similar argument could be made under the 'Dormant Commerce Clause' as this provision has been held to prevent US states from taking measures that restrict inter–state commerce. However, this principle has so far not been held to prohibit state subsidisation. See Sykes, A. (2010) 'The Questionable Case for Subsidies Regulation: A Comparative Perspective', 2 *Journal of Legal Analysis* 473, at 477–479.

[135]Panel Report, *EU–Energy Package,* paras. 7.625–7.626 (not reversed on appeal) and Panel Report, *Colombia–Ports of Entry*, para. 7.529.

[136]Panel Report, *Korea–Beef*, para. 658.

[137]Panel Report, *EU–Energy Package*, paras. 7.637–7.643.

[138]Panel Report, *US – Tariff Measures on Certain Goods from China (US–Tariff Measures)*, WT/DS543/R (15 September 2020), paras. 7.113–7–153.

[139]Appellate Body Report, *EC–Seal Products*, para. 5.214.

[140]See section 2 *supra* and section 4.3.2 *infra*.

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subsidization is triggered only when a firm's behaviour deviates from what could be expected under normal market conditions,[141] would lower the trade restrictiveness of the measure while making an equivalent, or even greater, contribution to the stated objective.

It follows that, if a WTO Member enacts a measure targeting subsidies granted to companies established in its jurisdiction, such a measure may be possible to justify on the basis that it seeks to maintain efficient markets and effective competition. However, it could be found that the measure is not 'necessary' to the objective pursued.

4.3.2 Can a Unilateral Instrument Avoid Leading to Arbitrary and Unjustifiable Discrimination?

In order to justify a measure under the general exception provisions of the GATT and GATS, it is not sufficient for it to be justified under one of the subparagraphs. The *chapeau* of these provisions also requires that the application of the measure does not result in discrimination that is arbitrary or unjustifiable with regard to countries where similar conditions prevail.[142] It thus needs to be assessed whether any substantial differences exist between the WTO Member enacting the instrument's treatment of foreign subsidies and the way it treats domestic subsidies, both substantively and procedurally.[143] Needless to say, a WTO Member having a sole instrument targeting only foreign subsidies without at the same time regulating its own domestic subsidies would inevitably fail to justify this instrument under the *chapeau*.

In terms of substantive requirements, the measure at issue must define foreign and domestic subsidies similarly. If a Member designs a single instrument to target both types of subsidies, this may not be an issue. However, if a Member designs two different instruments, as would be the case for the EU through the instruments proposed in the White Paper, difficulties could arise if those instruments were to define foreign subsidies differently from domestic subsidies. In this regard, under the White Paper's proposed instruments, the concept of foreign subsidies, that would be applied to aid granted by other WTO Members, differs from the concept of State aid applied to EU Member States. Specifically, the concept of foreign subsidy is based on the definition found in the SCM Agreement[144] and not on the concept of State aid under EU law.[145] While these concepts resemble each other, the concept of State aid does not cover financial contributions conferred through private parties who are 'entrusted and directed',[146] which could have a major impact on the scope and magnitude of the subsidies that may be found to exist.[147] Furthermore, Article 107 TFEU does not apply to subsidies directly granted by EU bodies.[148] Such subsidies therefore fall outside the EU State aid regime, whereas all types of foreign subsidies would be covered by the measures proposed in the White Paper. Finally, exceptions in the regime applicable to domestic subsidies are also not replicated as regards foreign subsidies.[149] Under EU State aid law, aid may be granted if it pursues certain public policy objectives provided for in paragraphs 2 and 3 of Article 107 of the TFEU, or as further elaborated by the Commission

[141]This principle forms part of the Dutch proposal. See Netherlands, *supra* note 26. See also comments in Monopolkommission, *supra* note 25, paras. 905–907, 910–915. Similar red flag systems are used in the EU Financial Regulation, see section 23 of Annex I of Regulation (EU, Euratom) 2018/1046, OJ 2018 L193, Article 10.11 of the EU–Japan FTA and Article 17.6 of CETA, which provide that EU contracting authorities can refuse subsidized tenders in procurement procedures if prices appear to be abnormally low.

[142]Appellate Body Report, *US–Shrimp*, para. 150.

[143]Appellate Body Report, *EC–Seal Products*, para. 5.302; Appellate Body Report, *US–Shrimp*, para. 165.

[144]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 46.

[145]See 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, OJ 2016 C 262.

[146]Article 1.1(a)(1)(iv) SCM Agreement.

[147]The concept of 'entrusted and directed' is routinely used by certain trade defence investigating authorities to find that certain private or public companies, such as banks, have offered subsidies in the form of loans at below market rates.

[148]Commission, 'Notice on the Notion of State Aid', *supra* note 145, para. 60.

[149]The need for a consistent application of exceptions was discussed in Appellate Body Report, *EC–Seal Products*, para. 5.338.

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in the General Block Exemption Regulation (GBER).[150] The White Paper makes no mention of these exceptions. It is unclear how some of these exemptions, such as the 'regional aid' exception, can even be replicated in an international context. There appears to be no argument to justify these differences.

Moreover, under EU State aid law, EU Member States' subsidies have to be paid back if illegally granted.[151] The redressive measures proposed in the White Paper appear more far-reaching as they would, for example, consist of commitments to divest, to license products, or to make redressive payments.[152] While the White Paper argues that 'it may be difficult in practice to establish that the foreign subsidy is actually and irreversibly paid back to the third country',[153] it is questionable whether monitoring a repayment to a non-EU State is more difficult than monitoring the repayment to an EU Member State, given that the entity which has to repay is located in the EU and can be audited. This imbalance in redressive measures is thus liable to result in arbitrary discrimination.

In terms of procedural requirements, it would have to be assessed whether the measure at issue puts a heavier overall procedural burden on foreign companies. Under the EU State aid regime, aid must be notified by the EU Member State to the Commission, which must declare it compatible with the EU single market.[154] However, the measure proposed in the White Paper would put this burden on the undertaking, with the potential of a notification obligation on the entity[155] or in-depth investigations, which may include 'visits at the EU premises of the alleged beneficiary'.[156] Furthermore, as discussed above, the Commission and EU Member States would be granted significant powers under the White Paper's proposed instruments. Coupled with the malleable definition of 'foreign subsidy', this would grant a wide margin of discretion to the investigatory bodies,[157] which would make it more likely that the instruments would be found to lead to arbitrary discrimination.[158]

Dissymmetry will necessarily exist between the information held by the investigating authority concerning its own domestic subsidies and the information held concerning foreign subsidies. For this reason, some procedural differences would be justifiable taking into account that the provisional justification of the measure is to secure compliance with other laws and regulations.[159] However, the differences highlighted are probably too pronounced, and the risks of arbitrary discrimination too great, to be found to be justified in the case of the White Paper's proposed instruments.[160] The

[150]Commission Regulation (EU) 651/2014, OJ 2014 L187. The consolidated version of the GBER is available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02014R0651-20170710 and the Commission's Practical Guide to the GBER is available at https://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf.

[151]Commission, 'Commission Notice on the recovery of unlawful and incompatible State Aid', OJ 2019 C 247.

[152]See Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 19.

[153]Ibid.

[154]In accordance with Article 109 TFEU, the Council may adopt regulations for the application of Articles 107 and 108 TFEU, and determine the conditions under which the prior notification procedure is to apply. In particular, the Council may decide that certain categories of aid are exempt from the prior notification procedure.

[155]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 18, 31.

[156]Ibid., at 18.

[157]These effects would be exacerbated by the suggestion in the White Paper to use 'facts available' when certain information cannot be obtained similar to the trade defence context. See Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 18 and see Article 12.7 SCM Agreement. Facts available can, however, be used to shift part of the burden of proof to the investigated company by demanding information the investigated company may have difficulty accessing. See further R. Updegraff (2018) 'Striking a Balance between Necessity and Fairness: The Use of Adverse Facts Available in Dumping and Subsidies Investigations', *Georgetown Journal of International Law* 49, 709.

[158]Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres (Brazil–Retreaded Tyres)*, WT/DS332/AB/R (3 December 2007), para. 232.

[159]Appellate Body Report, *US–Gasoline*, para. 22.

[160]For instance, in *US–Gambling*, the Appellate Body upheld the Panel's finding that the United States' failure to treat foreign and domestically supplied online betting services in a "consistent manner" resulted in arbitrary and unjustifiable discrimination. Appellate Body Report, *US–Gambling*, paras. 348–351.

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above discussion suggests similar inconsistencies of treatment would likely arise with regard to foreign and domestic service suppliers.

Furthermore, although the EU could attempt to argue that the existence of its own domestic State aid regime means that 'similar conditions' do not prevail among its own firms compared with firms of other WTO Members, the difference in conditions would stem from the very regulatory framework which is at issue. That is, the existence of its own State aid regime is not a type of 'condition'[161] that may justify discrimination. Rather, it is part of the policy framework that leads to the discrimination at issue by applying a different set of rules to domestic firms.

In addition, the instruments proposed by the EU's White Paper would be considered too rigid and inflexible to be justifiable.[162] While the EU has the most far-reaching regulations over domestic subsidies, if other Members were to implement equivalent regimes[163] those would have to be taken into account.[164] The fact that the White Paper's proposed instruments do not do so further confirms that they would likely not be possible to justify under the general exception provisions.

Finally, prior good faith engagement with trading partners is a necessary component for ensuring that the measures taken are not arbitrary or unjustifiable.[165] However, taking the White Paper as an example, the issue of foreign subsidization has never been brought up by the EU in an international forum despite recent opportunities to do so in the context of the trilateral discussion among the US, the EU, and Japan, which suggested reforms to the SCM Agreement.[166] Furthermore, the issue has also not come up in the EU's free trade agreements.[167] This would make it more difficult for the EU to justify the measures proposed in the White Paper as per existing WTO case law. Nevertheless, the EU's recent impact assessment concerning a potential legislative follow-up regarding foreign subsidization notes that one option to tackle foreign subsidies would be to address them 'at their source by strengthening international rules'.[168] In our opinion, that would likely be a necessary step whether or not the EU would also be prepared to act unilaterally.

The above discussion concerning the White Paper is illustrative of the challenges a unilateral instrument against foreign subsidies would face under the GATT's and GATS' general exceptions, in particular if this instrument were to take the form of a measure distinct from that which applies to domestic subsidies. Given that the current proposals contained in the White Paper appear to envisage such a regime, certain adjustments would likely to be necessary to make sure that it would pass scrutiny under the chapeau. In this regard, the Commission's inception impact assessment considers the possibility of 'adapting the existing EU acquis on competition, trade and public procurement' in order for them to cover foreign subsidies as well as EU Member States' subsidies as an alternative to a new legislative instrument.[169] Such an approach would likely be easier to justify as WTO-consistent.

In the next section, we further consider how such a joint foreign and domestic subsidies regime could be designed to comply with the applicable WTO rules. In particular, we look

[161]Appellate Body Report, *EC–Seal Products*, para. 5.299.

[162]Appellate Body Report, *US–Shrimp*, paras. 164–165.

[163]Regarding the UK's intention to develop its own subsidy control regime, see Zekaria, S. (2020) 'UK to adopt WTO subsidy regime for state aid post–Brexit', *MLex*, www.mlex.com/NewTI/DetailView.aspx?cid=1221330&siteid=197&rdir=1. See also Sykes, *supra* note 134.

[164]Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Article 21.5 DSU) (US–Shrimp (Article 21.5 DSU))*, WT/DS58/AB/RW (22 October 2001), para. 144.

[165]Appellate Body Report, *US–Shrimp*, paras. 166–169.

[166]Commission, 'Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan,' the United States and the European Union, 14 January 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf.

[167]Although we note that the EU has, in its most recent FTAs, included provisions to reject subsidized tenders. See Article 10.11, EU–Japan FTA; Article 17.6, CETA.

[168]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, p. 3.

[169]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, p. 2.

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beyond the European context to WTO Members who do not already regulate the granting of subsidies domestically.

4.4 How to Design a Unilateral Instrument to Address Foreign Subsidies that is WTO Compliant

As the above discussion demonstrates, designing a unilateral instrument against foreign subsidies capable of withstanding WTO scrutiny is no easy task. The best way to design such an instrument would therefore be to enact a single instrument targeting both foreign and domestic subsidies. While such an instrument would still run afoul of Article 32.1 of the SCM Agreement, and potentially the MFN obligation in Article II:1 of the GATS, it might, if designed correctly, avoid violating the national treatment obligation under the GATS and be justifiable under the general exception provisions of the GATT and GATS.

A single instrument applicable to both domestic and foreign subsidies would avoid the *de facto* discrimination between domestic and foreign service suppliers that results from a measure targeting only foreign subsidization. However, as discussed above, because the implementing Member would have less information concerning the existence and extent of foreign subsidization, such a measure might still result in a heavier procedural burden being imposed on foreign companies, as well as considerable discretion being awarded to investigating authorities. To be WTO-consistent, the instrument should therefore be administered and enforced by an independent, semi-judicial agency.[170]

There are two main reasons for creating an independent agency. First, such an agency would avoid undue politicization of its mission and the risk of being used to further protectionist objectives. In this regard, the agency should initiate investigations on the basis of complaints from both domestic and foreign firms, but not on its own motion. Such an institutional set-up would allow for transparent investigations of both domestic and foreign subsidies, in the same way and according to the same substantive rules. Any exception to these rules should be objective and similarly applicable to both domestic and foreign subsidies. Second, an independent agency would be able to monitor subsidies granted by the central government itself. This is currently not the case in the EU, whose State aid regime does not apply to subsidies granted by EU bodies.[171] Moreover, the agency should take into account whether other Members have in place domestic subsidy regimes that are comparable to that of the implementing Member.

Before taking any unilateral action to address foreign subsidies, in order to ensure consistency with the chapeau of the general provisions of the GATT/GATS, a Member should first seek to find a multilateral solution to the issue of foreign subsidies. Multilateral discussions regarding subsidies with other concerned WTO Members should at least be attempted, as international discussions on subsidies over the last decade have led to some results.[172]

While the EU's State aid regime was enshrined in the EU treaties due to the particular nature of EU Member States' economic integration, it is not inconceivable that other WTO Members would wish to enact similar limitations on subsidies to complete a more integrated internal market amongst their own territorial divisions.[173] If those Members also decide to address foreign subsidies, the system suggested above would likely be the best way of ensuring WTO-compliance. In addition, it would likely be the most accurate and efficient way to tackle overall market distortions, while minimizing the risk of inadvertent protectionism. That is,

[170]The United States has a tradition of bipartisan commissions, such as the International Trade Commission and Securities Exchange Commission, which hear legal arguments and in the latter case also writes and enforces its own rules. In the EU, the European Anti–fraud Office conducts fraud investigations and has its legal independence guaranteed under Article 3 of Commission Decision of 28 April 1999 establishing the European Anti–fraud Office (OLAF), OJ 1999 L136.

[171]Commission, 'Notice on the Notion of State Aid', *supra* note 145, para. 60.

[172]Commission, *supra* note 155.

[173]See Zekaria, *supra* note 163, in this sense for the UK's intention to enact its own domestic subsidy rules. See also Sykes, *supra* note 134.

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after all, one of the main objectives underlying the WTO rules and should thus be the guiding principle for any country seeking to reform this complex and emerging area of international trade law.

5. Conclusion

Foreign subsidies are a growing source of concern as States increasingly subsidize their firms' expansion into other markets. Yet the WTO Agreements, and in particular the GATS and the SCM Agreement, fail to provide an adequate avenue to address these concerns multilaterally. States are thus left to their own devices in addressing the issue of foreign subsidies.

However, the SCM Agreement appears to forbid WTO Members from taking unilateral action against foreign producer subsidies. Leaving WTO Members without any remedy whatsoever in these situations seems to go against the negotiated balance of the SCM Agreement, which generally allows WTO Members to take action against subsidies, but only in accordance with the strict rules set out therein. Hence, this article suggests that such unilateral actions should be allowed if they meet the requirements of the GATT's general exception clause. Similarly, as regards unilateral action against foreign services subsidies, the analysis shows that an instrument to undertake such actions may lead to violations of the MFN and national treatment principles under the GATS.

Both the violations of the SCM Agreement and the GATS would thus have to be justified under the general exceptions in the GATT and GATS. Due to the need to treat foreign and domestic subsidies similarly, with respect to both substantial and procedural matters, doing so will be no easy feat. While theoretically possible, we do not consider this would be the case for the instruments put forward in the Commission's White Paper, as currently designed. As a WTO-compliant alternative, we propose that WTO Members wishing to address foreign subsidies set up an independent, semi-judicial agency, able to investigate both domestic and foreign subsidies under the same procedural standards and in accordance with the same substantive rules. Implementing such a system would demonstrate a strong commitment to ensuring WTO-compatibility and that the measures form part of a genuine good faith effort to prevent market distortions. It would also be the most economically efficient solution by minimizing the risk of inadvertent protectionism. Short of agreeing to new multilateral rules, integrating WTO-compatibility into the core design of a unilateral instrument would also be the best way to build international legitimacy and to avoid a tit-for-tat trade war.[174]

The Commission's White Paper seems more attuned to a different strategy. As the White Paper notes, it is a means to 'level the playing field' when faced with foreign competition.[175] The EU has been increasingly willing to leverage access to its large internal market so as to force other countries and multinational companies to abide by EU rules and standards, through what has been termed the Brussels effect.[176] However, in areas that are already governed by global rules, such as trade, the Commission should tread more carefully.[177] The extra-territorial effects

[174]The recent high–profile dispute in which both the Panel and the Appellate Body confirmed the WTO–consistency of Australia's controversial plain packaging regulations on tobacco products demonstrates the rewards from a strategy of a carefully designed measures from the outset. See Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Australia–Tobacco Plain Packaging)*, WT/DS435/AB/R; DS441/AB/R (9 June 2020).

[175]Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', *supra* note 2, at 19–20.

[176]See Bradford, *supra* note 5 and accompanying text.

[177]In the field of environmental regulation, the Commission in 2016 backed down from extending its carbon emissions trading scheme to airline travel outside EU airspace. Furthermore, Indonesia recently brought a WTO action concerning the EU's revised Renewable Energy Directive, and the EU will likely face further litigation if it proceeds with a planned carbon border tax. See further M. Gustafsson and V. Crochet (2020) 'At the Crossroads of Trade and Environment: The Growing Influence of Environmental Policy on EU Trade Law', in A. Orsini and E. Kavvatha (eds.), *EU Environmental Governance: Current and Future Challenges*. Abingdon: Routledge, 190–193.

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of the proposed unilateral measures, as well as the lack of international consultations thus far,[178] increase the risk that the Commission's actions will be seen as illegitimate. It also risks retaliation from trading partners and further damaging an already embattled global trading system. Moreover, a dispute over foreign subsidization could undermine the willingness among WTO Members to follow the general rules under the SCM Agreement as well as under the WTO Anti-Dumping Agreement. This would be particularly worrisome for the EU's many export-oriented industries. It would thus greatly benefit the EU, as well as any other WTO Member, to strongly anchor any foreign subsidy policies within the existing framework of global trade rules.

[178]See section 4.3.2.

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