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1 Special Issue: Breaching the Boundaries of Law and Anthropology:
2 New Pathways for Legal Research

3 The EU Trade Agenda – Rules on State Intervention in
4 the Market

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9 **Abstract**

10 This Article critically analyzes the main legal and policy issues that are likely to determine the development
11 of the EU's trade policy concerning rules on State intervention in the market, specifically on subsidies and
12 SOEs. The article assesses the aforementioned issue especially within the context of the new trade strategy
13 entitled “An Open, Sustainable and Assertive Trade Policy” set out by the European Commission in
14 February 2021, at the core of which stands the concept of *strategic autonomy*. The focus of our analysis
15 is on key elements of the current EU competition and trade policies and normative initiatives, namely: the
16 relaxation of the usual State aid regime under Articles 107 and 108 TFEU to give Member States more
17 flexibility in supporting their economies and strengthen EU industrial policy; the likelihood of EU pro-
18 posals resulting in any substantial change to international trade law on subsidies and SOEs at the multi-
19 lateral (WTO) level; a systemic horizontal investigation into the relevant trade rules promoted by the EU in
20 its most recent practice of PTAs; and, finally, the EU pursuing stronger protection of its companies with its
21 recently announced new regulation on foreign subsidies, on the basis of which the European Commission
22 can investigate foreign subsidies and impose remedies. Even though, at first sight, it may seem that the
23 current evolution of the EU trade policy on these issues seems inconsistent, the Article argues that the
24 unilateral, bilateral, and multilateral approaches are indeed strictly intertwined, and they reveal a signifi-
25 cant shift in the most recent EU trade policy objective in relation to the role of State in the market.

26 **Keywords:** SOE; State aid; WTO; Preferential Trade Agreements; Article 107 TFEU

27 **A. Introduction**

28 The purpose of this Article is to critically analyze the issue of trade regulation of State Owned
29 Enterprises (SOEs) and subsidies in the current evolution of EU Trade Agenda, and especially
30 within the context of the new strategy entitled “An Open, Sustainable and Assertive Trade
31 Policy” set out by the European Commission in February 2021.¹ This new trade strategy was pre-
32 sented as an answer to global economic upheavals from supply chain disruptions to unfair trade

*This article is the outcome of a joint effort of both authors. However, Sections A, B, C and D are to be attributed to Stefano Silingardi, while Nerina Boschiero wrote Sections E and F.

¹Commission Trade Policy Review - *An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final (Feb. 18, 2021).

practices. The US protectionist unilateral measures adopted under the Trump presidency;² China's assertive state policies to support and expand industries vital to its most strategic interests—notably, ITC, energy, agro-technology, defense, infrastructure, finance;³ the World Trade Organization's ("WTO") deep crisis as a forum for the negotiation of new trade agreements and the demise of its Appellate Body are only the most salient aspects/outcomes of these national *go-it-alone* strategies that largely contributed to the worsening of the geo-economic and trade tensions among the major trading powers, and somehow former allies—China, USA and the EU.⁴ The outbreak of the Covid-19 global pandemic has further accelerated and focused attention on these shifts, revealing, among others, the EU's vulnerability to foreign competitors that enjoy state support.

Against this backdrop, the new EU trade strategy includes a series of headline actions to contribute to economic recovery. On the one end, it advocates for support for the green and digital transformations, as well as a renewed focus on strengthening multilateralism and reforming global trade rules to ensure that they are fair and sustainable. At the other end, at the core of this new agenda stands the quite opposite concept of *strategic autonomy*, which the EU Commission describes in quite ambiguous and self-centered terms (see, *infra*, Section F) as "the EU's ability to make its own choices and shape the world around it through leadership and engagement."⁵ The shift in EU discourse about autonomy and sovereignty in economic policy is particularly in relief when contrasted to previous decades, in which the EU proclaimed itself a leader of the liberal economic order characterized by economic openness: free trade, freedom of capital movement, balanced budgets, export competitiveness, and non-intervention by the state.⁶

Following the different threads of the debate hosted in this Special Issue, we will focus our attention on whether an *open* and an *autonomous* approach to economic policy could coexist. As the EU Commission Communication's makes it very clear, the EU approach to these matters is based at the same time on *openness* to trade and investment for the EU economy to recover from the crisis and remain competitive, as well as on *assertiveness* and *rules-based cooperation* to showcase "the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed."⁷

As a preliminary remark, it is worth noting that the use of official EU policies to bolster the development of the EU economy and its industrial policy seems based more on a bottom-up, States-driven approach rather than on a top-down, EU institutions driven approach. Already in 2019, some European industries and politicians indeed favored a more active role for the

²See Thomas J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, in this special issue.

³See Ming Du, *Unpacking the Black Box of China's State Capitalism*, in this special issue; Petros Mavroidis & André Sapir, *China in the WTO Twenty Years On: How to Mend a Broken Relationship?*, in this special issue.

⁴See generally Bernard Hoekman, Xinquan Tu & Robert Wolfe, *China and WTO Reform*, (RSC Working Paper 2022/59, 2022); Bernard Hoekman & Douglas Nelson, *Rethinking International Subsidies Rules*, 43 WORLD ECON. 3104 (2020); PETROS C. MAVROIDIS & ANDRÉ SAPIR, CHINA AND THE WTO: WHY MULTILATERALISM STILL MATTERS (2021).

⁵*Commission Trade Policy Review*, *supra* note 1, at 4. The concept of strategic autonomy is not new, though. It was originally introduced at the end of the 1990s as an aim for the EU's security and defense policy. See Joint Declaration on European Defence, Fr.-U.K., Dec. 4 1998, https://www.cvce.eu/content/publication/2008/3/31/f3cd16fb-fc37-4d52-936f-c8e9bc80f24f/publishable_en.pdf.

However, given the increased use of economic and trade instruments for geostrategic goals over the last decade, that concept has acquired a fundamental relevance also in the economic and trade contexts. See Josep Borrell, *Why European Strategic Autonomy Matters*, EUR. UNION EXTERNAL ACTION (Dec. 3, 2020), https://www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en ("Strategic autonomy has been widened to new subjects of an economic and technological nature, as revealed by the Covid-19 pandemic..."). See also Niklas Helwig & Ville Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*, 27 EUR. FOREIGN AFF.'S 1–19 (2022); Mark Leonard, Jean Pisani-Ferry, Elina Rybakova, Jeremy Shapiro & Guntram Wolff, *Redefining Europe's economic sovereignty*, BRUEGEL POLICY BRIEF (June, 24 2019), <https://www.bruegel.org/policy-brief/redefining-europes-economic-sovereignty>.

⁶See Tobias Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, 27 EUR. FOREIGN AFF.'S 61, 62–63 (2022).

⁷*Commission Trade Policy Review*, *supra* note 1, at 5.

64 EU in order to ensure a level playing field, not only through its trade diplomacy “but also through
 65 developing a more active industrial policy and transforming its approach to competition policy.”⁸
 66 This was especially the case for Germany. In early February 2019, the German Minister of
 67 Economic Affairs and Energy, Peter Altmaier, supported by the highly influential Federation of
 68 German Industries, unveiled the National Industrial Strategy 2030.⁹ Mainly driven by the necessity
 69 to confront Chinese capitalism, this plan advocates far-reaching, targeted, and strategic industrial
 70 policy interventions to selectively promote “game changer” technologies, to build “national and
 71 European champions” large enough to persist in world market competition, to maintain and promote
 72 “industrial and technological sovereignty” by reshoring global value chains, and to prevent foreign
 73 take-overs of key technology firms through tightened FDI-screening and a “national participation
 74 facility.”¹⁰ Only a couple of weeks later a joint French-German “Manifesto for a European industrial
 75 policy fit for the 21st century” was launched, which called, *inter alia*, for greater flexibility in EU
 76 merger control by taking into consideration the state-control of and subsidies for undertakings,
 77 and demanded the Commission to take into account the potential for future global competition when
 78 assessing relevant markets and to address third country state support in merger control.¹¹ Despite
 79 encountering adverse reactions from smaller Member States and the initial opposition of the
 80 European Commission for misrepresenting the reality of its merger regime,¹² in 2020 France and
 81 Germany reiterated their call for “moderniz[ing] European competition policy by accelerating the
 82 adaptation of State aid and competition rules”, and for “adapting the competition rules . . . to help
 83 European champions emerge.”¹³ Finally, in October 2021—following a European Council summit—
 84 President Michel concluded as follows: “We will reduce dependencies and achieve resilience in areas
 85 such as energy, digital, cyber security, semi-conductors, industrial policy, trade and reinforcing the
 86 single market.”¹⁴

87 In light of such developments, we seek to answer two key questions: First, how the proposals on
 88 strengthening subsidies and SOEs regulations advanced in the new EU trade agenda take into
 89 account the increasing importance given across the globe to the use of economic statecraft¹⁵ as a
 90 means to seek advantage in economic sectors deemed to be strategically important? Second, what
 91 role do the multilateral, the bilateral, and the unilateral approaches endorsed by the EU trade agenda
 92 play in rewiring the international trade rules on States intervening in the market?

93 Our main finding is that the recent trade and geo-economic tensions fostered by national
 94 *go-it-alone* strategies have accelerated ongoing changes even at the EU level. Insofar as these

⁸Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, *Introduction to EU Industrial Policy in the Multipolar Economy: past lessons, current challenges and future scenarios*, in EU INDUSTRIAL POLICY IN THE MULTIPOLAR SCENARIO 1, 5 (Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, eds. 2022).

⁹See FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY, NATIONAL INDUSTRIAL STRATEGY 2030: STRATEGIC GUIDELINES FOR A GERMAN AND EUROPEAN INDUSTRIAL POLICY (2019).

¹⁰See, e.g., Defraigne et al., *supra* note 8, at 5; Etienne Schneider, *Germany’s Industrial strategy 2030, EU competition policy and the Crisis of New Constitutionalism (Geo-)political economy of a contested paradigm shift*, N. POL. ECON. 1 (2022).

¹¹See A Franco-German Manifesto for a European industrial policy fit for the 21st Century, Fra.-Ger., Mar. 19, 2019, https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2.

¹²See Sophie J Meunier & Justinas Mickus, *Sizing up the competition: explaining reform of European Union competition policy in the Covid-19 era*, 42 J. EUR. INTEGRATION 1077 (2020).

¹³Defraigne et al., *supra* note 8, at 5 (quoting the German Chancellor Merkel and the French Minister for the Economy and Finance Bruno Lemaire).

¹⁴Charles Michel, President, European Council, Oral Conclusions Drawn by President Charles Michel Following the Informal Meeting of the Members of the European Council in Brdo pri Kranju Slovenia (Oct. 6, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/10/06/oral-conclusions-drawn-by-president-charles-michel-following-the-informal-meeting-of-the-members-of-the-european-council-in-brdo-pri-kranju-slovenia/>.

¹⁵See Vinod K. Aggarwal & Andrew W. Reddie, *Economic Statecraft in the 21st Century: Implications for the Future of the Global Trade Regime*, 20 WORLD TRADE REV. 137 (2021) (providing an insightful analysis of the use of “economic statecraft” across the globe and the use of industrial policy, trade measures and investment regulation as key components of economic statecraft).

95 developments may encroach too deeply on the traditional openness of the EU trade regime, and
 96 given the limitations posed by international politics towards obtaining a political global consensus
 97 regarding a modernization of subsidies and SOEs rules at the multilateral WTO level, this would
 98 feed a reassessment of the EU towards a very aggressive unilateral posture. As these developments
 99 would have irreparable consequences on the current very fragile trade environment, a strong coordi-
 100 nated response at the multilateral level became preferable. For these reasons, the EU legislative
 101 proposal of a new regulation to address distortions caused by foreign subsidies on the EU's internal
 102 market should be seen as a strong "political signal" to third countries that bilateral or multi-
 103 lateral trade agreements remain the best solution to reach a fair, predictable, and consensual
 104 regime, able to guarantee legal certainty.

105 Our argument proceeds as follows. Section B introduces the EU legal framework on State aid
 106 rules, and then analyses the relaxation of such rules in response to the Covid-19 global pandemic
 107 to promote European industrial autonomy in critical supply chains. Section C explores the most
 108 recent EU proposals on how to modernize the WTO rules on subsidies and SOEs. Section D then
 109 provides a systemic horizontal investigation into the relevant trade rules promoted by the EU in its
 110 Preferential Trade Agreements ("PTAs"), which have been concluded, or are currently under
 111 negotiation, at the bilateral level. Rooted in frustration with the old multilateral rules, provisions
 112 on subsidies and SOEs included in recent EU PTAs indeed dissolve some uncertainties left open
 113 by WTO law. As the recently announced open, sustainable, and assertive trade strategy also
 114 includes the possibility for the EU to pursue stronger protection of European companies at
 115 the unilateral level, Section E then analyzes how the EU is developing new trade tools aiming
 116 at protecting European companies and citizens from alleged unfair trading practices.
 117 Specifically, the proposal of a new regulation to address distortions caused by foreign subsidies
 118 on the EU's internal market, which extends the application of EU State aid laws to subsidies
 119 granted by foreign countries, is critically discussed. Finally, the conclusion revisits the research
 120 questions and argues that the unilateral, bilateral, and multilateral approaches are indeed strictly
 121 intertwined, and they reveal a shift in the most recent EU trade policy objectives concerning the
 122 role of State in the market.

123 B. The Relaxation of EU State Aid Rules in Response to the Covid-19 Global 124 Pandemic Crisis

125 State aid control is commonly understood as a true peculiarity of the EU legal order.¹⁶ There is
 126 indeed no other legal system in the world that contains a comparable principle prohibiting gov-
 127 ernment support for companies.¹⁷ The fundamental provision on the regulation of state aid in the
 128 EU legal framework is to be found in Article 107 TFEU, which contains both the general
 129 prohibition to grant state aid as well as categories of aid that shall, or may be, compatible with
 130 the internal market. According to Article 107 (1), the notion of state aid is as follows:

131 [A]ny aid granted by a Member State or through State resources in any forms whatsoever
 132 which distorts or threatens to distort competition by favoring certain undertakings or the
 133 production of certain goods . . . in so far as it affects trade between Member States.¹⁸

¹⁶See Tim Maxian Rusche, *Article 107 TFEU*, in *THE EU TREATIES AND CHARTER OF FUNDAMENTAL RIGHTS* 1111 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin, eds. 2019).

¹⁷At the global level, government support for companies is modeled upon the regulation provided by the WTO Agreement on Subsidies and Countervailing Duties (SCM Agreement) that contains a less stringent subsidy discipline. See Luca Rubini, *THE DEFINITION OF SUBSIDIES AND STATE AID* (2009); see also Luca Rubini, *State aid and international trade law*, in *RESEARCH HANDBOOK ON EUROPEAN STATE AID LAW* 103–33 (Leigh Hancker & Juan J. Piernas Lopez, eds. 2021).

¹⁸Treaty on the Functioning of the European Union art. 107, 2008 O.J. (C115) 91–92 [hereinafter TFEU].

134 To be state aid, a measure thus needs to comprise four cumulative conditions: (i) there has been
 135 an *intervention by the State* or through State resources which can take a variety of forms (e.g.
 136 grants, interest and tax reliefs, guarantees, government holdings of all or part of a company,
 137 or providing goods and services on preferential terms, etc.); (ii) the intervention *grants an advan-*
 138 *tage* to the recipient on a selective basis—for example to specific companies or industry sectors, or
 139 to companies located in specific regions); (iii) as a result, *competition has been or may be distorted*;
 140 and (iv) the intervention is likely to *affect trade between Member States*. As a preliminary obser-
 141 vation, it is useful to note that the definition of state aid under EU law is, for many and different
 142 reasons, broader than the notion of subsidies under WTO law.¹⁹

143 In principle, state aids that fulfill the requirements of Article 107(1) are prohibited. Meanwhile,
 144 that prohibition is softened by a set of derogations laid down in Article 107 (2) and (3). Subsidies
 145 pertaining to the former type are automatically compatible with no discretion by the Commission,
 146 those pertaining to the latter type are compatible pending the Commission’s approval. The com-
 147 petence to apply and enforce Article 107 TFEU is attributed to the Commission under article 108
 148 TFEU.²⁰ This provision distinguishes between existing aid (para 1), which is subject to constant
 149 review, and new aid (par. 2), which is subject to an obligation to notify to the Commission.²¹ The
 150 provisions of the TFEU are supplemented by Regulation No. 2015/1589, of 13 July 2015,²² which
 151 repeats the classification of Article 108 and completes it by distinguishing depending on whether
 152 the aid is a notified, existing, unlawful or misused aid. Further, the General Block Exemption
 153 Regulation (GBER) No 651/2014, of 17 June 2014, exempts from the obligation of prior notifi-
 154 cation new aid that meets the criteria for exemption set out in it.²³

155 The Covid-19 global pandemic has quickly made a clean sweep of many taboos in European
 156 politics, involving also some orthodox approaches to state intervention in the market and rules on
 157 competition policy. One of the key decisions taken by the EU in this field has been to temporarily
 158 relax the usual state aid regime under Articles 107 and 108 TFEU to give Member States more
 159 flexibility in supporting their economies.²⁴ On March 19, 2020, the European Commission
 160 adopted a Temporary Framework²⁵ outlining *ex-ante* which aid measures were likely to be con-
 161 sidered compatible under Article 107 (3)(b) TFEU.²⁶ The approach chosen was to specify the basic

¹⁹See Maxian Rusche, *supra* note 16, at 1116 (“[T]he notion of ‘benefit’ is narrower than the notion of ‘advantage’ under 107(1) TFEU, because the latter takes as its point of comparison not the situation absent the state intervention, but that following regulatory intervention of the state. Furthermore, the notion of ‘specificity’ under the agreement is also less broad than the notion of ‘selectivity’. In addition, the ‘state resources’ requirement may be less stringent than under the SCM Agreement, where ‘entrustment and direction’ suffice.”).

²⁰TFEU, *supra* note 18.

²¹See Tim Maxian Rusche, *Article 108 TFEU*, in THE EU TREATIES AND CHARTER OF FUNDAMENTAL RIGHTS 1167 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin, eds. 2019).

²²2015 O.J. (L248) 24

²³2015 OJ (L187) 26.

²⁴See, e.g., Federico Fabbrini, *The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic*, 60 J. COMMON MKT. STUDIES 186 (2022) (presenting an overview of the set of measures adopted by the EU to address the devastating economic effects of COVID-19); Bruno de Witte, *Guest Editorial – EU Emergency Law and its Impact on the EU Legal Order*, 59 COMMON MKT. L. REV. 3, 4 (2022) (affirming that these measures can be conceptualized as *EU emergency laws*, which “refer to the rules of primary and secondary EU law that serve to address sudden threats to the core values and structures of the Union and its Member States . . .”).

²⁵2020 O.J. (C91) 1.

²⁶See European Commission Press Release IP/20/459, COVID-19: Commission Sets Out European Coordinated Response to Counter the Economic Impact of the Coronavirus (Mar. 13, 2020); *Coronavirus Outbreak - List of Member State Measures Approved Under Articles 107(2)B, 107(3)B AND 107(3)C TFEU and under the State Aid Temporary Framework* (Dec. 20, 2022), https://competition-policy.ec.europa.eu/system/files/2022-08/State_aid_decisions_TF_and_107_2b_107_3b_107_3c_1.pdf (showcasing a comprehensive list of measures adopted by Member States, and approved by the Commission, that fall under these derogatory categories).

162 requirements for compatible State aid measures to be cleared by the Commission,²⁷ removing the
 163 need for the detailed (and lengthy) case-by-case assessment procedure under Article 108 TFEU. In
 164 such a way, the Commission allowed Member States to inject substantial amounts of public
 165 money, totaling dozens or even hundreds of billions of euros,²⁸ into their economies “at the speed
 166 of light.”²⁹

167 After a series of subsequent amendments intended to extend its scope,³⁰ the EU finally decided
 168 to put an end to the Temporary Framework, which expired on June 30, 2022.³¹ As of that date, the
 169 EU Commission has adopted more than 1,350 decisions, approving more than 980 State aid mea-
 170 sures for an estimated total of more than €3.2 trillion over a span of two and a half years.³²
 171 Investment and solvency support measures, however, may still be put in place until December
 172 31, 2022 and December 31, 2023 respectively. In addition, the Temporary Framework provides
 173 for a flexible transition—under clear safeguards—for the conversion and restructuring options of

²⁷The Temporary Framework enabled Member States to provide support through direct grants, or tax advantages, of up to €1.8 million to a company; State guarantees for loans taken by companies from banks; public loans with favorable subsidized interest rates to companies; safeguards for banks that channel support to businesses of all sizes; additional short-term export credit insurance to be provided by the state.

²⁸See, e.g., See European Commission Press Release IP/20/503, State aid: Commission approves French schemes to support economy in Coronavirus outbreak (Mar. 21, 2020) (French guarantee program designed to mobilize more than €300 billion in liquidity support for companies affected the Coronavirus outbreak approved just 48 hours after the entry into force of the Temporary Framework); see also European Commission Press Release IP/20/596, Commission approves Polish scheme enabling public guarantees up to €22 billion to support economy in coronavirus outbreak (Apr. 3, 2020) (showing a €22 billion Polish scheme accessible by all medium and large Polish companies, allowing for the provision of public guarantees on investment loans and working capital loans by the Polish National Development Bank); European Commission Press Release IP/20/599, State aid: Commission approves €13 billion Portuguese schemes to support economy in coronavirus outbreak (Apr. 4, 2020) (discussing two Portuguese schemes, with a budget of €13 billion, to support small and medium enterprises through direct grants and State guarantees for investment and working capital loans granted by commercial banks); European Commission Press Release IP/20/1668, State aid: Commission approves €44 billion Italian recapitalisation scheme to support large companies affected by coronavirus outbreak (Sept. 17, 2020), (expedited review of a €44 billion Italian scheme to support large companies through recapitalization instruments). See generally Julia Anderson, Francesco Papadia & Nicolas Véron, *Covid-19 credit-support programme: Europe’s five largest economies*, BRUEGEL WORKING PAPER 03/2021 (Feb. 24, 2021) (discussing the measures adopted by some Member States in the weeks immediately following the Covid-19 outbreak).

²⁹Andrea Biondi, *State Aid in the Time of COVID-19*, EU L. LIVE (March 25, 2020), <https://eulawlive.com/op-ed-state-aid-in-the-time-of-covid-19-by-andrea-biondi/>; see also Delia Ferri, *The Role of EU State Aid Law as a “Risk Management Tool” in the COVID-19 Crisis*, 12 EUR. J. OF RISK REGUL. 176 (2021). It is true, on the one hand, that derogations under Article 107 (2) (b) (“aid to make good the damage caused by natural disasters or exceptional occurrences”); 107 (3) (b) (“aid to . . . remedy a serious disturbance in the economy of a Member State”) and (c) (“aid to facilitate the development of certain economic activities”) were in theory available for Member States. The general regime, however, does not allow massive amounts of State aid to be injected in the market, then it resulted inadequate to provide an effective response to the acute economic crisis that followed the Covid-19 pandemic.

³⁰See 2020 O.J. (C 2215) 1; 2020 O.J. (C 3156) 1; 2020 O.J. (C 4509) 1; 2020 O.J. (C 7127) 1; 2021 O.J. (C 564) 1; 2021 O.J. (C 8442) 1; Among others, these amendments allowed the Temporary Framework to cover: aid in form of tax deferral, suspension of social security contributions, and wage support to employees; recapitalization of failing businesses directly by taking an equity share (which could amount to nationalization in certain cases); support for uncovered fixed costs of companies facing a decline in turnover of at least 30% due to the pandemic, up to a maximum amount of €10 million per undertaking; conversion of repayable instruments such as loans and guarantees into direct grants.

³¹European Commission Statement/22/2980, State aid: Commission will phase out State aid COVID Temporary Framework (May 12, 2022).

³²See 2020 O.J. (C 91), *supra* note 24. As for effective expenditures, in 2020 the 27 EU Member States spent, in nominal terms, €320.22 billion on State aid, corresponding to 2.43% of their 2020 GDP. Total expenditure for Covid-19 measures amounts to €227.97 billion (covering about 59% of the total spending). See *State aid Scoreboard 2021*, at 22 (Sept. 8, 2022), https://competition-policy.ec.europa.eu/system/files/2022-09/state_aid_scoreboard_note_2021.pdf. In nominal terms, concerning the Covid-19 State aid measures, Germany is the Member State that has granted the most (EUR 63.66 billion), followed by Italy (EUR 29.64 billion), France (EUR 28.96 billion) and Poland (EUR 19.90 billion). These are quite exceptional outcomes if compared to the pre-Covid era. For example, the 2020 State Aid Scoreboard shows that Member States in 2019 spent just €134.6 billion. See *State aid Scoreboard 2020*, AT 17 (June, 14 2021) https://competition-policy.ec.europa.eu/system/files/2021-06/state_aid_scoreboard_note_2020.pdf

174 debt instruments, such as loans and guarantees, into other forms of aid, such as direct grants, until
175 June 30, 2023.

176 The approach taken by the Commission has not been without criticism. According to some
177 scholars, the decision to relax State aid rules would deepen the economic inequalities among
178 Member States, favoring the wealthy ones.³³ Others emphasized that Member States benefitting
179 more from the Temporary Framework were countries with lower public debt, which due to their
180 different fiscal situations, were able to inject major amounts of money into their companies.³⁴
181 Such delicate issues lie outside the scope of this Article.³⁵ What is noteworthy here is that the
182 approach based upon a very intrusive and aggressive use of state interventionist measures in
183 the market seems to herald a more permanent feature of competition regulation in the EU.

184 As a preliminary observation, it is worthy to note that some initial—but widely unnoticed—
185 modifications to EU state aid regulation were introduced prior to the pandemic. In 2014, the
186 Commission introduced an instrument called Important Projects for Common European
187 Interests (IPCEI), which exempts subsidies for research and development up to the first industrial
188 deployment in transnational industrial alliances from state aid rules.³⁶ Until 2018 the Commission
189 has activated that framework only for infrastructure projects, then in 2019 the Commission
190 approved a \$3.2 billion project in battery value chains involving seven Member States.³⁷ Since then,
191 a \$2.9 billion project along the entire battery value chains involving twelve member States,³⁸ and a
192 £5.4 billion project in the hydrogen technology value chain involving fifteen Member States have
193 been approved, respectively in 2021 and 2022.³⁹ This last project is also the first approved on the
194 basis of the 2021 *State aid IPCEI Communication*, setting out the rules for the granting of subsidies
195 to important projects of common European interest under Article 107(3)(b)TFUE.⁴⁰

196 This same goal, aiming at adopting a more proactive stance when designing new regulations so
197 as to be better equipped to promote the EU industrial policy's objectives, is apparent when taking
198 into account further interventions by the Commission in the last couple of years. In 2021 and
199 2022, respectively, new guidelines have been adopted to facilitate the granting of regional aid
200 which supports the ecological and digital transformation of disadvantaged areas,⁴¹ and subsidies
201 which pursue general energy and environmental goals.⁴² As a result, there is today a corpus of legal
202 instruments that adopts a proactive approach to enable EU industries to make the ecological and
203 digital transition, and to promote European industrial autonomy in critical supply chains.
204 Consequently, it seems perhaps correct to affirm that the outbreak of the Covid-19 global pan-
205 demic, and the following economic and industrial crisis, neither disrupted nor changed the EU
206 Commission's activity and agenda concerning competition policy; indeed it simply accelerated

³³Lena Hornkohl & Jens van 't Klooster, *With Exclusive Competence Comes Great Responsibility*, VERFASSUNGSBLOG, April, 29 2020, <https://verfassungsblog.de/with-exclusive-competence-comes-great-responsibility/>.

³⁴See, e.g., António Goucha Soares, *The EU-UK Trade and Cooperative Agreement. The Level Playing Field Issue*, 8 INTERDISCIPLINARY POL. STUD. 213 (2022).

³⁵See Ferri, *supra* note 29, at 192–195.

³⁶2014 O.J. (C 188) 4, at 5–7; see also Edoardo Traversa & Pierre M. Sabbadini, *Industrial policy and EU state aid rules*, in EU INDUSTRIAL POLICY IN THE MULTIPOLAR SCENARIO 45 (Jean-Christophe Defraigne, Edoardo Traversa, Jan Wouters & Dimitri Zurstrassen, eds. 2022).

³⁷See European Commission Press Release IP/19/6705, State aid: Commission approves €3.2 billion public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain (Dec. 9, 2019).

³⁸See European Commission Press Release IP/21/226, State aid: Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain (Jan. 26, 2021).

³⁹See European Commission Press Release IP/22/4544, State Aid: Commission approves up to €5.4 billion of public support by fifteen Member States for an Important Project of Common European Interest in the hydrogen technology value chain (July 15, 2022).

⁴⁰2021 O.J. (C 528) 10.

⁴¹See 2021 O.J. (C 153) 1.

⁴²2022 O.J. (C 80) 1.

207 recent efforts to shift the focus of EU competition policy and State aid rules towards supporting
 208 industrial policy objectives rather than on lowering prices for consumers.⁴³

209 Then, on March 23, 2022, amidst the crisis generated by the Russian armed aggression against
 210 Ukraine, the Commission adopted a Temporary Crisis Framework allowing Member States to use
 211 State aid rules more flexibly in order to remedy a serious disturbance in the economy caused by the
 212 Russian aggression and/or by the sanctions imposed, or by the retaliatory counter-measures taken
 213 in response.⁴⁴ In a similar fashion to the Covid-19 Temporary Framework, the Commission will
 214 consider all the national measures compatible with the Internal Market that meet the conditions
 215 set out in the Framework.⁴⁵ These include, in particular: aid in the form of guarantees and of
 216 subsidized loans to ensure that sufficient liquidity remains available to businesses, and to com-
 217 pensate companies for the additional costs incurred due to exceptionally high gas and electricity
 218 prices. The Commission amended the Crisis Framework twice. On July 20, 2022, by increasing the
 219 maximum amount of aid that companies are allowed to received, as well as by including new types
 220 of State aid that can be deemed compatible with the internal market under Article 107 (3) (c)
 221 TFEU.⁴⁶ Further, on October 28, 2022 the Commission introduced additional flexibility for liquid-
 222 ity support to energy utilities for their trading activities, and allowed Member States to provide
 223 support more flexibly to particularly affected energy-intensive sectors subject to safeguards to
 224 avoid overcompensation.⁴⁷

225 This course of action raises several concerns. Insofar as its specific objectives are concerned – to
 226 react to very exceptional circumstances threatening the international peace and security as well as
 227 the domestic security of the EU as a whole – perhaps the most correct way to intend the
 228 Temporary Crisis Framework is as a piece of “war legislation.” If maintained for too much time,
 229 the strong relaxation of the State Aid rules envisaged in that instrument may, however, finally
 230 result in very robust distortive effects on the market. Accordingly, they may impair the consistency
 231 of the overall structure of the EU competition legal framework, and further betray decades of EU’s
 232 efforts towards the “green transition.”

233 C. The EU Acting Multilaterally: The EU’s 2021 Trade Policy Agenda and the 234 Proposals on How to Modernize the WTO Rules on Subsidies and SOEs in the Market

235 The many and different causes of the WTO’s contemporary crisis, as well as the many and
 236 different proposals of reforming the WTO system to revitalize it, are matters that deserve a detail
 237 analysis and that will continue to preoccupy the minds of scholars, government officials, decision-
 238 makers and policy-makers in the years to come. With regard to the specific focus of this Article,
 239 the goal is narrower. As the latest communiqué of G7 Trade Ministers makes it clear, it is time, in
 240 the context of WTO reform, “for the start of negotiations to develop stronger international rules
 241 on market-distorting industrial subsidies and trade-distorting actions by state enterprises.”⁴⁸

⁴³Defraigne et al., *supra* note 8, at 10.

⁴⁴2022 O.J. (C 131) 1.

⁴⁵However, the Framework also presents significant differences with the Covid-19 Temporary Framework. First, it does not provide for recapitalization measures. Second, it does not require aid to be granted only to undertakings that were not facing difficulty before Russia’s military aggression of Ukraine.

⁴⁶See 2022 O.J. (C 280) 1. These are: (i) aid for accelerating the rollout of renewable energy, storage, and renewable heat relevant for the repower EU Plan, and (ii) aid for the de-carbonization of industrial production processes. As these measures operate in the context of, and in support of, the Winter Preparedness Package proposal, the Commission seized the opportunity to redirect the objective and results of the Temporary Crisis Framework towards phasing out fossil fuels imported from Russia.

⁴⁷2022 O.J. (C 7945) final.

⁴⁸Elizabeth Truss, *G7 Trade Ministers’ Communiqué*, GOV.UK (May 28, 2021) <https://www.gov.uk/government/news/g7-trade-ministers-communiqué>.

242 The necessity to pursue a modernization of WTO rules on subsidies and the actions of SOEs is
 243 also one of the key priorities highlighted by the 2021 EU trade agenda.⁴⁹ From the specific side of
 244 the EU, most of the concerns are based on absence of competition and state aid rules in third
 245 markets, which put EU companies at a competitive disadvantage with their non-EU competitors
 246 and limits their access in non-Member States.⁵⁰ In order to address current imbalances between
 247 WTO Member's market access commitments, the necessity thus arises, according to the
 248 Commission, to modernize rules on competitive neutrality: in particular, with regards to subsidies,
 249 which are artificially lowering process of goods, and SOEs, which are abusing their dominant position
 250 in a market.⁵¹

251 To better substantiate these ambitious goals, the EU Trade agenda is accompanied by a second
 252 lengthy document detailing some specific proposals. These include proposals concerning: (i) the
 253 restoration of a fully functioning WTO dispute settlement system with a reformed Appellate Body;
 254 (ii) the restoration of the effectiveness and credibility of the WTO as a forum for the negotiation of
 255 trade rules and further liberalization; (iii) the strengthening of the monitoring and deliberative
 256 function of the WTO as well as the role of the Director General and the Secretariat; and finally
 257 (iv) some proposals on how to better engage with the business and civil society.⁵²

258 Quite evidently, these policy areas are strictly interconnected. An agreement on new binding
 259 rules on contested policies, including subsidies and SOEs, is unlikely to work without improving
 260 transparency of actors behavior and expectations. Insofar as transparency is concerned, period
 261 and effective monitoring plays a major role especially in times with virtually no outcomes in
 262 rule-making and a paralyzed dispute settlement system. The need then arises to reinforce the
 263 monitoring and deliberative functions of the WTO, primarily at the committee-level.⁵³ Finally,
 264 for existing WTO agreements to remain meaningful, and for the negotiation of new agreements,
 265 an effective dispute settlement system is critical.⁵⁴ Given the focus of the Article, our analyses will

⁴⁹See European Commission Concept Note, WTO modernization: Introduction to future EU proposals (2018) https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (consisting of three sections on rulemaking, WTO notification work and transparency, and dispute settlement procedure. It discusses WTO reform systematically).

⁵⁰See Luca Rubini, *Transcending territoriality: Expanding EU State aid control through consensus and coercion*, RSC 2022/33 Robert Schuman Centre for Advanced Studies Global Governance Programme-469, Working Paper 3–6 (2022).

⁵¹Unlike many bland WTO statements coming out of G7 or G20 declarations, the 2021 EU trade agenda does not hesitate to point fingers at various problems of the WTO. For instance, it points to problems with Special and Differential Treatment (SDT), including the need to develop a new approach that should “combine a more targeted focus on how to support integration into the trading system, along with greater differentiation between developing countries, based on identified needs.” Further, the Review highlights how market access commitments do not reflect the actual level of openness of many countries, thus failing to reflect the significant changes in weight of certain major trading powers (e.g. China). See *Commission Trade Policy Review*, *supra* note 1, at 6, 10; see also FREDRIK ERIXON, *THE GOOD, THE BAD AND THE UGLY: TAKING STOCK OF THE EUROPE'S NEW TRADE POLICY STRATEGY*, (Eur. Ctr. for Int'l Pol. Econ. 2021). The emphasis put by the EU on WTO reform is also rational and justifiable from a political perspective, as the Biden administration seems more open to rebuilding multilateralism and because there is now a new Director-General. See Schoenbaum, *supra* note 2; see also Garret Martin & Ville Sinkkonen, *Past as Prologue? The United States and European Strategic Autonomy in the Biden Era*, 27 EUR. FOREIGN AFF. 99 (2022). In the outcome document of the Geneva Ministerial Conference, held in June 2022, Member States registered the need “to work towards necessary reforms of the WTO . . . to improve all its functions.” To this end, the General Council and its subsidiary bodies “will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference” World Trade Organization, M12 Outcome Document Adopted 17 June 2022, WTO Doc. WT/MIN(22)/24, par. 3 (June 22, 2022).

⁵²*Annex to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final 7–15, (Feb. 18, 2021).

⁵³*Annex to the communication from the Commission*, *supra* note 52, at 13. See also Hoekman, Tu & Wolfe, *supra* note 4, at 11; Robert Wolfe, *Reforming WTO Conflict Management: Why and How to Improve the Use of 'Specific Trade Concerns'*, 23 J. OF INT'L ECON. L. 817, 817–839 (2020) (highlighting committees and councils in the WTO are, first and foremost, deliberative bodies for discussing emerging issues and addressing trade concerns without recourse to the dispute settlement system).

⁵⁴As the EU Commission makes it clear: “The most urgent of WTO reforms is finding an agreed basis to restore a functioning dispute settlement system . . . In the absence of a functioning dispute settlement system, it is difficult to see what could

266 be limited to the EU proposals under point ii): that is, specific proposals on the establishment of
 267 new rules to avoid competitive distortions due to State intervention in the economy.

268 *I. Proposals on the Establishment of New Rules on Industrial Subsidies*

269 Far from being intended as a critique on rehashing the role of the State as such,⁵⁵ the key challenge
 270 foreseen by the EU Commission in its proposal of new rules on industrial subsidies actually seems
 271 the necessity to counter those interventions that have negative spill-over effects, or that distort
 272 competition by favoring domestic firms, goods or services *vis-à-vis* foreign ones. Accordingly,
 273 the Commission outlines three options for actions in the field of industrial subsidies' rules.
 274 These are: (i) to formulate new rules on industrial subsidies to counter the negative effects of heavy
 275 subsidization on international trade, which can generate distortions of competition in both tradi-
 276 tional sectors and new technologies; (ii) to arrive at significantly greater transparency and identify
 277 additional categories of prohibited ("red box") subsidies, as well as categories of subsidies pre-
 278 sumed to be injurious ("amber box"); and (iii) to expand the category of the permitted ("green
 279 box") subsidies, by including those subsidies that support legitimate public goals while having
 280 minimal distortive impact on trade, such as, for instance, certain types of environmental and
 281 R&D subsidies, provided they are subject to full transparency and agreed disciplines.⁵⁶

282 Some of these proposals echo the proposals that have been formulated by the Trilateral
 283 Cooperation Initiative in a Joint Statement released in January 2020.⁵⁷ According to a common
 284 concern that the current list of prohibited subsidies provided for in Article 3.1 of the ASCM is
 285 insufficient to tackle market and trade distorting subsidization existing in certain jurisdictions, the
 286 Trade Ministers of Japan, the US and EU agreed, first, that new types of unconditionally prohib-
 287 ited subsidies need to be added to the ASCM. These are subsidies that are unlimited guarantees,
 288 subsidies to "insolvent or ailing" enterprises that lack "a credible restructuring plan", subsidies to
 289 enterprises that cannot "obtain long-term financing or investment from independent commercial
 290 sources operating in sectors or industries in overcapacity", and certain direct forgiveness of debt.

be the motivation for countries to modernize and fill gaps in the rules." See *Annex to the communication from the Commission*, *supra* note 52, at 7. The EU proposal is based on restoring a fully functioning WTO dispute settlement system with a reformed Appellate Body. Such reform, according to the EU Commission, should maintain the negative consensus rule, the independence of the Appellate Body and "the central role of dispute settlement in providing security and predictability to the multi-lateral trading system." Further, it is emphasized that "adjudicators should exercise judicial economy and are not bound by 'precedent' but should take into account previous rulings to the extent they find them relevant in the dispute they have before them." The independence of panels and of the Appellate Body is highlighted as "essential so that cases are decided exclusively on their merits." It is also reiterated that mandatory timelines "should be strictly respected both at the Panel and Appellate Body stage of disputes—justice delayed is justice denied—and appropriate measures should be adopted in order to make this possible."

⁵⁵*Id.* at 9. The Commission duly notes on that regard that "Public intervention may be needed to achieve legitimate goals, and the WTO should accommodate different degrees of public ownership in the economy."

⁵⁶*Annex to the communication from the Commission*, *supra* note 52, at 9.

⁵⁷JOINT STATEMENT OF THE TRILATERAL MEETING OF THE TRADE MINISTERS OF JAPAN, THE UNITED STATES AND THE EUROPEAN UNION (2020), https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf [hereinafter 2020 Joint Statement]. The Trilateral cooperation initiative was launched by US, EU, and Japan in December 2017 to address several "unfair market distorting and protectionist practices", including subsidies and SOEs. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, JOINT STATEMENT BY THE UNITED STATES, EUROPEAN UNION AND JAPAN AT MC11 (2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states>. According to the declaration, most significant challenges are the increased recourse to subsidies as part of value-chain production and trade (in goods and services), the heavy subsidization for competitive reasons by state-led economies, and the use of subsidies to support economic transformation towards sustainability. In May 2018, the Trilateral ministers endorsed a joint scoping paper defining the basis for the development of stronger rules on industrial subsidies contributing to excess production capacity in sectors such as semiconductors, steel, aluminum and others, and on state-owned enterprises (SOEs). See OFFICE OF THE U.S. TRADE REPRESENTATIVE, JOINT STATEMENT ON TRILATERAL MEETING OF THE TRADE MINISTERS OF THE UNITED STATES, JAPAN, AND THE EUROPEAN UNION (2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting> [hereinafter 2018 Joint Statement].

291 Further, the three Ministers also proposed some changes to the ASCM to simplify imposing coun-
 292 tervailing duties on actionable subsidies, according to which the subsidizing Member must dem-
 293 onstrate that there are no serious negative trade or capacity effects and that there is effective
 294 transparency about the subsidy in question.⁵⁸

295 Tough most of the concerns raised by the EU Commission about the necessity to modernize the
 296 WTO legal regulation of subsidies in response to recent major trends echoes concerns raised by
 297 the Trilateral Group, the solutions proposed do not match. As we will see later on, of particular
 298 relevance is the focus placed by the EU Commission in its recent Trade agenda on the inclusion of
 299 new rules on exceptions, i.e. instances in which subsidies that support legitimate public goals must
 300 be deemed to be lawful, provided they have minimal distortive impact on trade.⁵⁹

301 II. Proposals on the Establishment of New Rules on SOEs

302 Concerns about the potential for SOEs to distort competition are well-known, they have been
 303 examined by a consistent literature both from the legal and the economic point of view,⁶⁰ and
 304 they are also specifically addressed by other Articles in this Special Issues.⁶¹ A key challenge
 305 in this regard will be not only whether the existing WTO legal framework is adequate enough
 306 to prevent the (mis)use of SOEs to circumvent or undermine existing regulations based upon
 307 the prohibition against discrimination and anti-competitive subsidization, but also whether
 308 SOEs should be disfavored by new WTO rules. In other words, the issue is also whether new
 309 international global (WTO) rules should constrain SOEs through new primary obligations.⁶²

⁵⁸Other changes proposed include that subsidies contributing to overcapacity should be explicitly challengeable via litigation at the WTO; and that a new strong incentive to notify subsidies properly should be added to Article 25 ASCM, rendering prohibited any non-notified subsidies that were counter-notified by another Member, unless the subsidizing Member provides the required information in writing within set timeframes. Finally, the three governments suggested that the ASCM should be amended to allow for domestic prices to be rejected in situations where the domestic market of the subsidizing Member is distorted and that a new price be constructed to establish the countervailing duty rate.

⁵⁹See Robert Howse, *Making the WTO (Not So) Great Again: The Case Against Responding to the Trump Trade Agenda Through Reform of WTO Rules on Subsidies and State Enterprises*, 23 J. OF INT'L ECON. L. 371, 371–389 (2020) (discussing a detailed critic assessment of the Trilateral Initiative's proposals on subsidies).

⁶⁰See Antonio Capobianco & Hans Christiansen, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options*, OECD CORPORATE GOVERNANCE WORKING PAPERS (2011); Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications*, 147 OECD TRADE POLICY PAPER (2013); OECD, STATE-OWNED ENTERPRISES AND GLOBAL COMPETITORS (2016); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are we Moving in the Right Direction?*, 19 J. OF INT'L ECON. L. 657, 657–680 (2016); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261–324 (2016); Petros C. Mavroidis & Merit E. Janow, *Free Markets, State Involvement and the WTO: Chinese State-Owned Enterprises in the Ring*, 16 WORLD TRADE REV. 571, 571–581 (2017); Robert Wolfe, *Sunshine over Shanghai: Can the WTO Illuminate the Murky World of Chinese SOEs?*, 16 WORLD TRADE REV. 713, 713–732 (2017); YINGYING WU, REFORMING WTO RULES ON STATE-OWNED ENTERPRISES (2019); Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, 22 LEIDEN J. OF INT'L L. 313, 313–334 (2020); Mitsuo Matsushita & Chin Leng Lim, *Taming Leviathan as Merchant: Lingering Questions about the Practical Application of Trans-Pacific Partnership's State-Owned Enterprises Rules*, 19 WORLD TRADE REV. 402, 402–423 (2020); Luca Rubini & Tiffany Wang, *State-owned enterprises*, in HANDBOOK OF DEEP TRADE AGREEMENTS 463, 463–503 (Aaditya Mattoo, Nadia Rocha & Michele Ruta, eds. 2020); Bernard Hoekman & André Sapir, *State-Owned Enterprises and International Competition: Towards Plurilateral Agreement*, in REBOOTING MULTILATERAL TRADE COOPERATION: PERSPECTIVES FROM CHINA AND EUROPE 212 (Bernard Hoekman, Xinquan Tu & Dong Wang, eds. 2021); OECD, MEASURING DISTORTIONS IN INTERNATIONAL MARKETS: BELOW-MARKET FINANCE (2021); Robert Howse, *Official Business: International Trade Law and the Resurgence o (or Resilience) of the State as an Economic Actor*, 43 UNIV. OF PA. J. OF INT'L L. 821, 821–883 (2022); Ming Du, *The Status of Chinese State-owned Enterprises in International Investment Arbitration: Much Ado about Nothing?*, 20 CHINESE J. OF INT'L L. 785, 785–815 (2021) (raising issues in international investment law).

⁶¹See Du, *supra* note 3; Mitsuo Matsushita, *Interplay of Competition Law and Free Trade Agreements in Regulating State-Owned Enterprises*, in this special issue

⁶²See MAVROIDIS & SAPIR, *supra* note 4; but see Howse, *Official Business*, *supra* note 60, at 860–881.

310 From the specific point of view of the EU, the 2021 Trade Agenda describes SOEs as “instru-
 311 ments through which, in a number of countries, the state decisively influences the economy, some-
 312 times with market-distortive effects.”⁶³ Then it proposes that international SOE rules should
 313 “focus on the behavior of SOEs in their commercial activities, in line with the discipline already
 314 agreed upon in several free trade and investment agreements.”⁶⁴ Likewise, the 2018 Declaration of
 315 the Trilateral Initiative highlighted the importance “of securing a level playing field given the chal-
 316 lenges posed by third parties developing State Owned Enterprises into national champions and
 317 setting them loose in global markets.”⁶⁵ The 2020 Trilateral Statement then focuses the proposal
 318 on SOEs on a new definition of the concept of “public body”, as the interpretation delivered by the
 319 WTO Appellate Body results in undermining the effectiveness of WTO subsidy rules.⁶⁶

320 The EU Commission’s and the Trilateral Initiative’s proposals for new rules on SOEs, however,
 321 will not address the problem at all. They grasp the issue that the importance of SOEs in contem-
 322 porary global trade environment is not yet matched with sufficient regulation at the global (WTO)
 323 level to capture any market-distorting behavior. But this is just part of a more complex problem.
 324 As the recent OECD Recommendation on Competitive Equality makes it clear, the idea of ensur-
 325 ing a level playing field should be approached in a more sophisticated way, by taking into account
 326 difference in treatment between both public and private enterprises with different ownership
 327 structures.⁶⁷ The notion is, above all, that distortions should not be introduced by differential
 328 treatment of different ownership structures, except when such differential treatment is justified
 329 by a public policy objective that should be transparent to all, proportionate and periodically
 330 reviewed.

331 *III. Critical Remarks on Proposals on the Establishment of New Rules on Subsidies and SOEs*

332 An appraisal of the multilateral dimension of the EU to try to change (or renew) WTO rules on
 333 subsidies and SOEs must start from two key issues. First, as renowned scholars have aptly pointed
 334 out, before the elaboration of appropriate WTO multilateral rules on subsidies and SOEs may take
 335 place, additional fact-finding as well as analytical work is required to develop a common under-
 336 standing of the effects of subsidies, including cross-border spillover effects, and their motivations,
 337 as well as on SOEs operations and their effect on market competition.⁶⁸ This means, first and
 338 foremost, reinforcing the requirements of notification and transparency “not as a disciplinary
 339 exercise but as an opportunity for information exchange and best governance practices.”⁶⁹ To this
 340 end, it is worthy to mention that the WTO in cooperation with the IMF and the OECD is actually
 341 undertaking studies on different types of subsidies ahead of rulemaking.⁷⁰ The European
 342 Commission’s proposed new regulation on foreign subsidies, which will be discussed in
 343 Section E, could potentially also represent an interesting laboratory for developing a better knowl-
 344 edge base on subsidies.

345 Further, we should not forget that the WTO is a consensus-based system, and an agreement
 346 among all its 164 members is necessary before reforming existing subsidy and SOEs regulations.

⁶³Annex to the communication from the Commission, *supra* note 52, at 9.

⁶⁴*Id.*, at 9–10.

⁶⁵2018 Joint Statement, *supra* note 57.

⁶⁶2020 Joint Statement, *supra* note 57.

⁶⁷OECD, RECOMMENDATION OF THE COUNCIL ON COMPETITIVE NEUTRALITY, DOC. OECD/LEGAL/0462 (2021) (“[t]he objective of the Recommendation is to ensure a level playing field both between state-owned and privately-owned enterprises, and between different privately-owned enterprises.”).

⁶⁸Hoekman & Nelson *supra* note 4, at 22; Hoekman & Sapir, *supra* note 60, at 220–221; Robert Howse, *Official Business*, *supra* note 60, at 882–883.

⁶⁹Robert Howse, *Official Business*, *supra* note 60, at 882.

⁷⁰See OCED, SUBSIDIES, TRADE, AND INTERNATIONAL COOPERATION (2022) <https://www.oecd-ilibrary.org/docserver/a4f01ddb-en.pdf?expires=1666641168&id=id&accname=guest&checksum=2C398F32F2508B8A41B15D0DC50691FB>.

347 Therefore, both the EU's proposals and the Trilateral group's initiatives need widespread support
 348 before being submitted to the WTO. In the current environment, it is therefore quite easy to see
 349 why the chances of a robust reform of industrial subsidy rules and SOEs at the global level are very
 350 low. This is especially if these proposals are openly tilted against well-defined countries. As far as
 351 the EU proposals put forward in the 2021 Commission's Communication on "An Open,
 352 Sustainable and Assertive Trade Policy" are concerned, they have a clear target: China and its
 353 state-led economic model. This is not the place to trace the development of the Chinese economy
 354 as a mix between competitive market forces and a highly developmentalist state,⁷¹ nor to talk
 355 about the recent EU's reassessment of China as a "systemic rival."⁷²

356 Suffice is to remember that in a press conference on its WTO Trade Policy Review, in 2021,
 357 China listed three conditions in order to be available to starting negotiations on subsidies within
 358 the framework of WTO reform. They are: That agricultural subsidies must be discussed at the
 359 same time as industrial subsidies to ensure fair competition in both important areas; that coun-
 360 tervailing and anti-dumping regulations should be discussed to solve the alleged current abuse of
 361 trade relief measures; and finally, that the issue of restoring non-litigable subsidies be discussed, to
 362 leave policy space for members to cope with the epidemic and climate change.⁷³ Unless and until
 363 these issues are resolved, it is difficult to see how an ideal deal on subsidies and SOEs at the WTO
 364 level can be reached. Thus considered, it is perhaps no accident indeed that the issues of industrial
 365 subsidies (and subsidies more broadly)⁷⁴ and of SOEs have been left totally unaddressed during
 366 the 12th Ministerial Conference (MC12) that was held in Geneva from June 12–17, 2022.

367 D. The EU Acting Bilaterally: The Negotiation and Conclusion of Trade Agreements 368 Incorporating Subsidy and SOEs Disciplines

369 With the WTO being unable over the years to reach any significant reform of its ASCM
 370 Agreement and its rules concerning SOEs, many countries have increasingly started to negotiate
 371 trade agreements outside the WTO framework as well as to view these agreements as potential
 372 solutions to international trade key issues.⁷⁵ This point has been made very clear by the EU
 373 Commission in its 2006 Communication "Global Europe: Competing in the World — A
 374 Contribution to the EU's Growth and Jobs Strategy," where the Commission declared that

⁷¹See Du, *supra* note 3; Ming Du, *China State Capitalism and World Trade Law*, 63 INT'L AND COMPAR. L. Q. 409, 409–448 (2014); Wu, *The "China, Inc. Challenge"*, *supra* note 60; JEAN-FRANÇOIS DUFOUR, *CHINA CORP.*2025 (2019); ARTHUR R. KROEBER, *CHINA'S ECONOMY* (2 ed., 2020).

⁷²*EU-China – A strategic outlook*, JOIN (2019) 5 final (Mar. 12, 2019) (discussing where the EU stated that: "China is simultaneously, in different policy areas, a cooperation partner with whom the EU has closely aligned objectives, a negotiating partner with whom the EU needs to find a balance of interests, an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance").

⁷³See *China Is Open to Talks on Industrial Subsidies, Xi Says*, BLOOMBERG (November 4, 2021), <https://www.bloomberg.com/news/articles/2021-11-04/xi-says-china-open-to-talks-on-industrial-subsidies-state-firms>; see also *China's Proposal on WTO Reform in WTO document*, WTO Doc. WT/GC/W/773 (2019).

⁷⁴MC12 secured, however, the conclusion of a new multilateral agreement on fisheries subsidies, the second new agreement since the WTO began operations in 1995. See WTO, Draft Ministerial Decision of 17 June 2022 WTO Doc. WT/MIN(22)/W/22 (2022). The agreement is important, first and foremost, because it addresses a global environmental concern and because repeatedly missed deadlines to conclude an agreement generated a very high skepticism about the credibility of the WTO as a negotiating forum. An agreement was reached, however, only those matters on which there was consensus: banning subsidies for illegal, unreported and unregulated fishing and overfished stocks. On the other end, Members agreed to continue negotiating on other fishing subsidies disciplines (subsidies contributing to overcapacity and overfishing), and a sunset clause (Article 12) has been included, according to which the agreement will lapse unless comprehensive rules are adopted within four years of its entry into force.

⁷⁵See Aadiya Mattoo, Nadia Rocha & Michele Ruta, *Overview: the evolution of deep trade agreements*, in HANDBOOK OF DEEP TRADE AGREEMENTS, 1, 1–43 (Aadiya Mattoo, Nadia Rocha & Michele Ruta, eds. 2020) (observing, *inter alia*, that the number of PTAs increased from 50 in the early 1990s to roughly 300 in 2019; and that all WTO members are currently party to one, and often several, PTAs).

375 bilateral PTAs are “a necessary tool” within the more ambitious goal to take the EU “further and
 376 faster in promoting openness and integration, by tackling issues which are not ready for multi-
 377 lateral discussion and by preparing the ground for the next level of multilateral liberalization.”⁷⁶

378 Modern trade agreements have been concluded by the EU, or are under negotiations, with
 379 industrialized countries (South Korea, Canada, Japan, Australia, New Zealand), emerging market
 380 economies (Singapore, Mercosur, Mexico, Chile), and developing countries (Vietnam, Indonesia,
 381 India).⁷⁷ It goes without saying that partner countries vary greatly regarding their level of develop-
 382 ment, the convergence of competition policies, and the use of subsidies and SOEs. From this angle,
 383 quite different approaches are required for each partner country: in some cases the main goal of
 384 negotiation can be trade promotion or the economic development of the partner country, while in
 385 other cases the EU aims to push for the convergence in competition policy, including subsidy
 386 control and actions of SOEs. It would then be a grave error to oversimplify any of the final out-
 387 comes. As for their legal frameworks, these agreements contain, on the one end, rules that reflect
 388 (or are, at least, still based on the relevant) WTO law. On the other end, States agreed on pro-
 389 visions that go further the WTO law and lead to deeper market integration (WTO+ provisions).⁷⁸
 390 Accordingly, new international trade law rules are emerging that exist in parallel to the WTO legal
 391 framework.

392 For the purpose of this section, the focus is on the new generation of PTAs⁷⁹ that are irrelevant
 393 to accession and that provide enhanced subsidy and SOE disciplines.⁸⁰ Before starting the analysis,
 394 a very brief introduction is necessary to better understand the true role of EU bilateral trade agree-
 395 ments as instrumentalities of the EU Common Commercial Policy (CCP) and its trade agenda.

⁷⁶*Global Europe: Competing in the World – A Contribution to the EU’s Growth and Jobs Strategy*, COM (2006) 567 final, at 8 (Oct. 4, 2006).

⁷⁷See EU COMMISSION, OVERVIEW OF FTA AND OTHER TRADE NEGOTIATIONS (2022), <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a7aab8e0-085d-4e36-826f-cbe8e913cf13/details> (showcasing an overview of ongoing bilateral and regional negotiations); 2021 O.J. (L 149) 10. In this FTA, the EU has recently concluded a trade and cooperation agreement with the United Kingdom which is aimed at regulating their common trade relations after the UK’s withdrawal from the EU and the Internal single market. The Agreement contains a specific Title (number IX) on “Level Playing Field for Open and Fair Competition and Sustainable Development”, whose rationale is defined in Article 355. Articles 363–375 provide rules on subsidy control, according to which the right is recognized of the parties to maintain an autonomous system on State aid, and to implement it in accordance with the procedures provided for in the respective legal system. The TCA also provides that the control of subsidies must be made by an independent authority or body. Overall, the principles set out in the Agreement create a system of subsidy control which is very closely aligned with Article 107. The outcome of the negotiations has been surely made easier because of the long-standing membership of the UK in the Single market and the danger of fierce competition in the future.

⁷⁸See WTO, WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 11 (2011) (discussing the use of the expression “WTO+”).

⁷⁹According to academic literature, EU FTAs can be grouped under three broad categories: (i) agreements with candidate and potential candidate countries; (ii) agreements with former Soviet Union States and Southern Mediterranean countries that are neither candidates nor potential candidates; or (iii) agreements with strategic partners around the globe. See Leonardo Borlini & Claudio Dordi, *Deepening International Systems of Subsidy Control: the (Different) Legal Regimes of Subsidies in the EY Bilateral preferential Trade Agreements*, 23 COLUM. J. OF EUR. L. 551, 551–606 (2017). Such categorization partly mirrors the approach by the EU. The EU Commission classifies EU FTAs in four categories: (i) “First generation” trade agreements, most of them concluded before 2006, which tend to focus on tariff liberalization, (ii) “Deep and Comprehensive Free Trade Areas” (DCFTAs), which aim to deepen economic relations between the respective neighboring countries and the EU and focus on approximating their legislation to EU legislation, notably in trade-related areas, (iii) Economic Partnership Agreements (EPAs) with African, Caribbean and Pacific (ACP) States and regions, which are asymmetric by nature and have an explicit development objective, and (iv) “New generation agreements” (such as those with Singapore, Canada, Japan, Australia, New Zealand, Vietnam), which aim to develop stronger rules-based and values-based trade regimes with the trading partner countries concerned and include dedicated provisions on trade and sustainable development.

See 2019 Report on Implementation of EU Free Trade Agreements 1 January 2018 - 31 December 2018, at 8 (2019), https://trade.ec.europa.eu/doclib/docs/2019/october/tradoc_158387.pdf.

⁸⁰2014 O.J. (L 161) 3, at art. 267 (discussing the association agreements the regulation of subsidies is along the lines of Article 107 TFEU and tends to converge towards the EU *aquis communautaire* as a precondition for closer ties with and possibly later accession to the EU).

396 **I. PTAs as Instrumentalities of the CCP**

397 The CCP has “a special place”⁸¹ in the exclusive competences of the EU. First, EU external rela-
 398 tions had their “very constitutional origin”⁸² in the EU Treaty (then EEC Treaty) provisions on
 399 trade policy.⁸³ Further, it is precisely because of that competence that the EU was able to establish
 400 itself onto the international scene as one of the key players in the global trading system,⁸⁴ as well as
 401 proved itself able to participate in defining the rules of the game for global trade and economy.⁸⁵
 402 To date, the EU is applying 46 trade agreements with 78 different partners and, compared to
 403 China (the number one trading partner for 66 countries) and the US (the number one partner
 404 to 31 countries), is the most important trading partner for 74 countries around the world.⁸⁶
 405 Most importantly, trade agreements are also used to achieve a range of different (non-trade)
 406 objectives: from EU participation in the economic development of the partners, to foreign policy,
 407 environmental protection, the protection/promotion of human rights, and legal/regulatory con-
 408 vergence in the case of association agreements. As one prominent scholar has observed, in such
 409 cases “the non-trade objective is ulterior and the trade objective is manifest.”⁸⁷ Trade policy, in
 410 particular trade agreements, is therefore not only part of the EU’s external action agenda but also
 411 one (if not, *the*) “larger EU foreign policy toolbox.”⁸⁸

412 As a matter of policy goals and trade strategies, the 2021 EU Trade Policy Agenda does not
 413 make significant changes to the previous EU trade agenda published by the Commission in 2015;⁸⁹
 414 nor does it revolutionize the EU trade strategy as a whole. As for the bilateral agenda, however,
 415 some relevant adjustments can be easily identified. Whilst the 2015 EU Trade Agenda outlined a
 416 very detailed and ambitious list of bilateral trade partnerships that the EU was keen to conclude
 417 (including with the US and China),⁹⁰ the 2021 Trade Agenda is much more renitent on this topic.
 418 On the one side, it does not provide any list of new bilateral trade agreements to pursue; on the
 419 other, it does however explain, albeit in quite a general way, how the EU can strengthen and
 420 update the existing (and very broad) network of bilateral agreements. To achieve this objective,
 421 the 2021 Trade Agenda put particular emphasis on the need to increasingly focus on the full and
 422 effective implementation of these agreements.⁹¹

⁸¹Marise Cremona, *External Relations of the European Union: The Constitutional Framework for International Action, in THE EVOLUTION OF EU LAW* 444 (Paul Craig & Gráinne de Búrca, eds. 2021).

⁸²PIET EECKHOUT, *EU EXTERNAL RELATIONS LAW* 67 (2011).

⁸³Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon]. As it is well known, the European Treaties do not explicitly refer to the concept of sovereignty but there are certain areas where, as a corollary of the full transfer of powers from Member States to the EU, the EU “is (quasi-)sovereign.” See Christina Eckes & Ramses A. Wessel, *An International Perspective, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW* 95 (Robert Schütze & Takis Tridimas, eds. 2018); Theodore Konstadinides, *The Competences of the Union, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW* 191, 191–220 (Robert Schütze & Takis Tridimas, eds. 2018).

⁸⁴CJEU, Opinion 2/15 EU:C:2017:376 (May 16, 2017), at 34–35.

⁸⁵The CCP has been at the heart of the European integration process since its entry into force in the EEC Treaty in 1958, but it was, especially in the 1970s, and the 1980s that the EU Court of Justice, sided by the Commission, ruled that the commercial policy was exclusive. See Opinion 1/75, *OECD Understanding on a Local Cost Standard*, EU:C:1975:145 (Nov. 11, 1975); EECKHOUT, *supra* note 82, 11–69 (discussing the historical evolution of the CCP); see also Christine Kaddous, *The Transformation of the EU Common Commercial Policy, in THE EUROPEAN UNION’S EXTERNAL ACTION IN TIMES OF CRISIS* 429, 429–452 (Piet Eeckhout & Manuel López-Escudero, eds. 2016) (discussing the most recent evolution of the CCP since the entry into force of the Lisbon Treaty).

⁸⁶See EU COMMISSION, *An Open, Sustainable and Assertive Trade Policy: Key Facts and Figures* https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159431.pdf.

⁸⁷Cremona, *supra* note 81, at 443.

⁸⁸L. Johan Eliasson & Patricia Garcia-Duran, *The Saga Continues: contestation of EU trade policy*, 6 *GLOB. AFF.* 433 (2020).

⁸⁹*Trade for all – Towards a more responsible trade and investment policy*, COM(2015) 497 final (October 14, 2015).

⁹⁰*Id.* at 30–34.

⁹¹See *Commission Trade Policy Review*, *supra* note 1, 17–21.

423 **II. Subsidies Provisions in Recent EU PTAs**

424 Historically, the EU has not been, unlike the US, a driver of international subsidy regulation.⁹²
 425 This is for a number of reasons, not least of which is that the EU has traditionally been strongly
 426 protectionist in its agricultural policy, which still includes a high level of subsidies. Lately, how-
 427 ever, the regulation of subsidies (and SOEs) became a relevant aspect of the EU's trade policy, and
 428 this is not only at the multilateral level (i.e. pushing for a robust reforming agenda of the relevant
 429 WTO rules), but also at the bilateral level. Through the network of its newly concluded (or under
 430 negotiation) bilateral trade agreements (and, in particular PTAs), the EU is indeed looking at a
 431 closer convergence of the current subsidy rules to the model of EU state aid law, as this would
 432 make an important contribution for the creation of a level playing field in the context of its trade
 433 relationships with partner countries. The subsidy clauses in recently concluded agreements seem
 434 to contain five recurring elements.

435 First, the definition of subsidy/State aids covers not only goods but also services. A typical for-
 436 mulation is in Article 10.5 of the EU-Vietnam Agreement, that states: "A 'subsidy' means a mea-
 437 sure which fulfills the conditions set out in Article 1.1 of the SCM Agreement irrespective of
 438 whether it is granted to an enterprise manufacturing goods or supplying services."⁹³ As no parallel
 439 rule on subsidies yet exists at WTO level for trade in services, this rule can be referred to as
 440 WTO+. To the extent that such definition closes a relevant gap in the WTO legal framework,
 441 the inclusion of services within the definition of subsidies seems an effective tool to appropriately
 442 address the concerns, raised by the Commission in its 2021 EU Trade Agenda, to avoid state inter-
 443 vention possibly having negative spill-over effects and distorting competition by favoring domes-
 444 tic services *vis-à-vis* foreign ones.⁹⁴ Another reason to positively assess, from the side of the EU,
 445 such negotiation outcome originates from the increased difficulty in distinguishing between goods
 446 and services in the digital environment.⁹⁵

447 Another remarkable example of WTO+ provision is given by recent EU PTAs having signifi-
 448 cantly expanded the category of prohibited subsidies when they adversely affect international
 449 trade. Starting from the EU-Korea FTA, which had provisionally applied since July 2011 before
 450 it was formally ratified in December 2015, many recent PTAs include two additional categories of
 451 prohibited subsidies. These are: i) subsidies whereby a government guarantees debts or liabilities
 452 of certain enterprises without any limitation as to the amount of those debts and liabilities or the
 453 duration of such a guarantee, and ii) subsidies for restructuring an ailing or insolvent enterprise
 454 without the enterprise having prepared a credible restructuring plan.⁹⁶ The latter provision, in
 455 particular, transposes the centerpiece of the EU compatibility analysis under the rescue and
 456 restructuring guidelines⁹⁷ into the network of recent PTAs, ensuring that ailing companies are
 457 not artificially kept alive through public subsidies alone. This provision also constitutes an impor-
 458 tant mean to prevent EU-members from re-directing aid forbidden within the EU into partner
 459 countries, to support the commercial presence of national companies there.

⁹²See Philipp Reinhold, *European Trade Policy and the Regulation of Subsidies: What Can We Expect from the EU-Australia FTA?*, in AUSTRALIA-EUROPEAN UNION FREE TRADE AGREEMENT 203 (Marc Bungenberg & Andrew Mitchell, eds. 2022).

⁹³2020 O.J. (L 186) 3, at art. 10.5(1) [hereinafter *Viet. FTA*]; see also 2019 O.J. (L 294) 3, at art. 11.5(1) [hereinafter *Sing. FTA*]; *EU-Japan Economic Partnership Agreement*, at art. 12.2(b) COM (2018) 192 final (Apr. 18, 2018) [hereinafter *Japan EPA*]; *Modernisation of the Trade part of the EU-Mexico Global Agreement*, at art. X.7 (Apr. 21, 2018) [hereinafter *Mex. GA*]; *EU-New Zealand Free Trade Agreement* art. X.2 (June 30, 2022) [hereinafter *NZ FTA*]; but see 2017 O.J. (L 11) 23, at art. 7.1 [hereinafter *CETA*] (providing an exception, limiting the definition of subsidies to goods).

⁹⁴EU Commission, *Annex to the communication*, *supra* note 52, at 9.

⁹⁵Pedro Guilherme Lindenberg Schoueri & Jeffrey Owens, in *Pursuit of Fair Tax Competition: The Linkage Between PTA, WTO Subsidies and EU State Aid Rules*, 48 *INTERTAX* 585, 585 (2020).

⁹⁶See, e.g., 2011 O.J. (L 127), at art. 11.11 [hereinafter *S. Kor. FTA*]; *Sing. FTA*, *supra* note 93, at art. 11.7(2); *Japan EPA*, *supra* note 93, at art. 12.7); *Viet. FTA*, *supra* note 93, at art. 10.9; *Mex. GA*, *supra* note 93, at art. X.11; *NZ FTA*, *supra* note 93, at art. X.7.

⁹⁷2014 O.J. (C 249) 1, at 3.

460 A further significant innovation of recent PTAs concerns provisions introducing legitimate
 461 reasons for granting subsidies. From a trade perspective, the analysis traditionally concentrates
 462 on documenting the negative impact of subsidies as measures distorting the proper functioning
 463 of markets and undermining the benefits of trade liberalization. Under that perspective, “subsidies
 464 can and are just as effective a ‘barrier’ to trade as tariffs.”⁹⁸ These analyses thereby give short shrift
 465 to the real issue, which is how the effect on trade should be weighed against (legitimate) objectives
 466 and (positive) effects of subsidies. In other words, subsidies are “ambivalent” practices.⁹⁹ They
 467 may distort market functioning, at least as much as they can correct it, by producing positive
 468 effects and pursuing other legitimate non-economic, social, and distributive objectives.¹⁰⁰ Such
 469 normative rationale of subsidy control is very clearly articulated in recent EU PTAs. In this
 470 context, we can find different approaches. Some agreements reproduce the exceptions in
 471 Article XX GATT and Article XIV GATS, which reflected the same normative rationale though
 472 in a less manifest posture.¹⁰¹ The major part of these agreements, however, give express recog-
 473 nition of public policy objectives that can be pursued legitimately through subsidies. At first, some
 474 of these agreements provide a very general scope justification for subsidies granted to enterprises
 475 entrusted by the government with the provision of services to the general public for public policy
 476 objectives.¹⁰² As far as they are transparent and not go beyond their targeted public policy objec-
 477 tives, these subsidies are therefore outside the scope of application of the relevant legal frameworks
 478 on subsidy control. Both the agreements that contain the general exception as well as the agree-
 479 ments lacking it, further acknowledge that other subsidies, which respect specific legitimate policy
 480 objectives, should be tolerated. These include subsidies for audio-visual services,¹⁰³ cultural indus-
 481 tries,¹⁰⁴ the promotion of the economic development of areas where the standard of living is
 482 abnormally low or where there is serious underemployment,¹⁰⁵ exceptional occurrences such
 483 as natural disasters¹⁰⁶ or a national or global health emergency,¹⁰⁷ and the promotion of cultural
 484 and heritage conservation.¹⁰⁸ In some cases, these exemptions are very similar to those in EU state
 485 aid law, and in one specific case, that is the EU-Singapore FTA, there is an annex that reproduces
 486 *verbatim* almost all the exemptions under EU state aid law.¹⁰⁹

487 A final order of examination concerns the procedural aspects of PTAs agreements, namely
 488 enforcement and transparency. Almost all recent PTAs include a provision broadly related to
 489 its enforcement, designed as an obligation to engage in separate consultations and/or constant
 490 reviews. Consultations will allow Parties to raise their concerns in case a subsidy is likely to neg-
 491 atively affect trade, thereby excluding the subsidies clause from the state-state dispute settlement
 492 mechanism.¹¹⁰ At the same time, some agreements also contain review clauses that provide for

⁹⁸Brian Alexandre Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade’s Destiny)*, in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE. VOL. II: THE LEGAL ANALYSIS 231, 235 (Jadish Baghwati & Robert E. Hudec, eds. 1997).

⁹⁹Leonardo Borlini & Claudio Dordi, *supra* note 79, at 580.

¹⁰⁰Warren F. Schwartz & Eugen W Jr. Harper, *The Regulation of Subsidies Affecting International Trade*, 7 MICH. L. REV. 883 (1972).

¹⁰¹*Japan EPA*, *supra* note 93, at art. 12.9.

¹⁰²*Japan EPA*, *supra* note 93, at art. 12.9; *S. Kor. FTA*, *supra* note 96, at art. 11.11; *Viet. FTA*, *supra* note 93, at art.10.1; *Mex. GA*, *supra* note 93, at art. X.7(4); *Sing. FTA*, *supra* note 93, at art. 11.7(4).

¹⁰³*CETA*, *supra* note 93, at art. 7.7; *S. Kor. FTA*, *supra* note 96, at art. 11.11; *Japan EPA*, *supra* note 93, at art. 12.3(7); *NZ FTA*, *supra* note 93, at art. X.2(6); *Mex. GA*, *supra* note 93, at art. X.7(6).

¹⁰⁴*CETA*, *supra* note 93, at art. 7.7.

¹⁰⁵*Viet. FTA*, *supra* note 93, at art. 10.4(2).

¹⁰⁶*Japan EPA*, *supra* note 93, at art. 12.3(3); *Viet. FTA*, *supra* note 93, at art.10.4(2); *NZ FTA*, *supra* note 93, at art. X.2(7).

¹⁰⁷*NZ FTA*, *supra* note 93, at art. X.2(7).

¹⁰⁸*Viet. FTA*, *supra* note 93, at art. 10.4(2).

¹⁰⁹*Sing. FTA*, *supra* note 93, at annex 11-A.

¹¹⁰*CETA*, *supra* note 93, at art. 7.3; *Viet. FTA*, *supra* note 93, at art.10.8; *Sing. FTA*, *supra* note 93, at art. 11.13; *Japan EPA*, *supra* note 93, at art. 12.6; *Mex. GA*, *supra* note 93, at art. X.4; *NZ FTA*, *supra* note 93, at art. X.6.

493 future adjustments after a fixed period of time.¹¹¹ Further, these review clauses are often linked to a
 494 political agreement between the EU and its trading partner in order to ensure that further develop-
 495 ment of subsidy rules will occur in light of corresponding norms at the multilateral (WTO)
 496 level.¹¹² These provisions are strictly linked to provisions aimed at improving transparency on
 497 subsidies in the target country. Recent PTAs indeed contain a clause making it mandatory for
 498 partner countries to notify certain information (i.e. legal basis, form, amount or budget and, where
 499 possible, the name of the recipient) with regard to any subsidy granted or maintained within their
 500 respective territories.¹¹³ The presence of reinforced transparency clauses is relevant as these pro-
 501 visions attempt to tackle one of the main weaknesses of the WTO system, that is affected, as we
 502 have already pointed out, by a chronic incompleteness and delays of subsidy notifications from
 503 several members.

504 *III. SOEs Provisions in EU PTAs*

505 With regard to the provisions on SOEs, the new generation of EU PTAs provides rules to address
 506 some of the issues unsolved at the WTO level, thereby trying to ensure a level playing field.
 507 Almost all agreements require SOEs to act “in accordance with commercial considerations”
 508 and non-discrimination.¹¹⁴ This means that the buying and selling decisions of the SOEs must
 509 be commercially motivated by price, quality, availability, marketability, transportation and other
 510 terms and conditions of purchase or sale, according to market economy principles in a way that a
 511 privately owned enterprise would act. Also, SOEs should not use their position or the entrusted
 512 rights to engage, either directly or indirectly (e.g., through their dealings with parents, subsidiaries,
 513 or other undertakings with common ownership) in anti-competitive practices that adversely affect
 514 investments, trade in goods or services of the other parties, in a market where such undertakings
 515 have no special or exclusive rights.¹¹⁵ The rules concern only the commercial activities of the SOEs
 516 and most agreements also provide for general exemptions and specific limitations, with varying
 517 intensity.

518 It is worth mentioning that some PTAs widen the traditional legal definition of SOEs, adding
 519 that a SOE is also an enterprise in which the government has the power to legally direct its actions
 520 or otherwise exercises an equivalent degree of control in accordance with its laws and regula-
 521 tions.¹¹⁶ Some agreements limit their application to the largest SOEs,¹¹⁷ or to SOEs for which
 522 a Party has taken measures on a temporary basis in response to a national or global economic
 523 emergency,¹¹⁸ and/or exclude public service obligations, that is those obligations that are not
 524 required to follow commercial considerations.¹¹⁹

525 A few agreements also call on the Parties to respect and make the best use of relevant
 526 international standards including, *inter alia*, the OECD Guidelines on Corporate Governance

¹¹¹*Viet. FTA*, *supra* note 93, at art 10.10; EU Commission, *Sing. FTA*, *supra* note 93, at art.11.10; *S. Kor. FTA*, *supra* note 96, at art. 11.14.

¹¹²*Viet. FTA*, *supra* note 93, at art. 10.10; *S. Kor. FTA*, *supra* note 96, at art 11.15(2).

¹¹³*S. Kor. FTA*, *supra* note 96, at art 11.12; *CETA*, *supra* note 93, at art. 7.2; *Japan EPA*, *supra* note 93, at art. 12.5; *Viet. FTA*, *supra* note 93, at art. 10.7; *Sing. FTA*, *supra* note 93, at art. 11.9; *Mex. GA*, *supra* note 93, at art. X.9; *NZ FTA*, *supra* note 93, at art. X.5.

¹¹⁴*Sing. FTA*, *supra* note 93, at art. 11.3(4); *CETA*, *supra* note 93, at art. 18.4, 18.5; *Mex. GA*, *supra* note 93, at art. 6; *Japan EPA*, *supra* note 93, at art. 13.5; *Viet. FTA*, *supra* note 93, at art. 11.4; *NZ FTA*, *supra* note 93, at art. X.5.

¹¹⁵*Sing. FTA*, *supra* note 93, at art. 11.3(3).

¹¹⁶*NZ FTA*, *supra* note 93, at art. X.1(iv). See also Matsushita, *supra* note 61.

¹¹⁷*Japan EPA*, *supra* note 93, at art. 13.2(5); *Viet. FTA*, *supra* note 93, at art. 11.2(4); *NZ FTA*, *supra* note 93, at art. X.2(3).

¹¹⁸*Japan EPA*, *supra* note 93, at art. 13.1(h); *Viet. FTA*, *supra* note 93, at art. 11.2(3).

¹¹⁹*Mex. GA*, *supra* note 93, at art. 3; *CETA*, *supra* note 93, at art. 18.2(2); *Viet. FTA*, *supra* note 93, at art. 11.2(7); *Japan EPA*, *supra* note 93, at art. 13.2, at 3–4; *NZ FTA*, *supra* note 93, at art. X.2, at 4–5. Art. 13(8) of the EU-Japan EPA extends the scope of public policy interventions that parties can implement through SOEs, incorporating the general exceptions established by Art. XX GATT 1994 and Art. XIV GATS *mutatis mutandis*.

527 of State-Owned Enterprises¹²⁰ Finally, in case of potential problems, rules on transparency allow
 528 both sides to seek further information on particular enterprises and their activities on a case-by-
 529 case basis.¹²¹

530 *IV. Critical Remarks on Subsidies and SOEs Provisions in Recent EU PTAs*

531 Whether recent PTAs represent any advancement towards fulfilling the specific EU trade policy
 532 agenda goals concerning the role of the State in the economy is a very complex undertaking. On
 533 the one side, we can notice some points of strength. Most importantly, the analysis shows that
 534 recent EU agreements contain significant and persuasive borrowings from EU State aid law.
 535 Perhaps, the most remarkable is the expansion of the material scope of these agreements to
 536 include services within the definition of subsidies. By doing so, EU PTAs address one of the more
 537 pressing issues of the WTO SCM Agreement. The inclusion of a list of *good* subsidies (most of
 538 which reproduce the very same language of EU law)¹²² is also a far-reaching result, especially in
 539 the wake of the Covid-19 global pandemic and its economic and social aftermaths. The fact that
 540 “European” principles have been included in agreements that go beyond the circle of those coun-
 541 tries (like Japan, Vietnam, New Zealand, Singapore, South Korea, and Mexico) that can be defined
 542 as European is also a relevant data. The significant expansion of the geographical reach of recent
 543 PTAs, if compared to the experience of the first 12/13 years of the 2000s, should not be
 544 underestimated.¹²³

545 There are some positive results also from an international trade law perspective. The inclusion
 546 of WTO+ rules on justifications represent, for instance, one of the main steps forward compared
 547 to the current multilateral (WTO) system, which is generally based on the conceptual assumption
 548 that subsidies must be stopped, irrespective of their overall welfare implications. A closer look at
 549 illustrative lists of acceptable public policy objectives included in EU PTAs also reveals a certain
 550 level of flexibility, in the sense that the EU seems to duly take into account the need to cover the
 551 needs of developing countries, like Vietnam or Mexico.¹²⁴ This would lead to a more nuanced and
 552 policy-oriented approach than the one incorporated in the WTO SCM Agreement. Still, the exist-
 553 ence of transparency rules in all recent EU PTAs may prove a relevant improvement, by ensuring
 554 at least a certain level of political accountability and dialogue, even with respect to service
 555 subsidies.¹²⁵

556 Against this backdrop, there are also potential drawbacks. With regard to the regulation of
 557 SOEs, for example, while it is uncontroversial that the regulatory approach to SOEs envisaged
 558 in EU PTAs is much more effective compared to that of some treaties that provide no additional
 559 discipline for SOEs, such as in the recent practice of agreements negotiated by China or other
 560 countries with similar market-based economies,¹²⁶ more aggressive and ambitious approaches still
 561 exist. This is the case, for example, of the regulation shaped by the CPTPP and the USMCA, which
 562 aims to prevent adverse effects or injury to the interest of other parties as a result of advantages
 563 that SOEs obtain because of their proximity to the government. Another distinct feature of these

¹²⁰Japan EPA, *supra* note 93, at art. 13.6; NZ FTA, *supra* note 93, at art. X.6 (2019).

¹²¹Japan EPA, *supra* note 93, at art. 13.7; Viet. FTA, *supra* note 93, at art. 11.6; NZ FTA, *supra* note 93, at art. X.7; Mex. GA, *supra* note 93, at art. 8.

¹²²Rubini, *supra* note 50, at 8.

¹²³*Id.*

¹²⁴See Viet. FTA, *supra* note 93, at annex 11A; see Mex. GA, *supra* note 93, at Annex XX (2018) (providing for specific lists of exceptions tailored on the needs of the countries).

¹²⁵Lindenberg Schoueri & Owens, *supra* note 95, at 594.

¹²⁶Leonardo Borlini, *When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements*, 22 LEIDEN J. OF INT'L L. 313, 313–334 (2020).

564 two agreement, inspired by US dissatisfaction with the WTO Appellate Body rulings, is a focus on
 565 ownership and control in defining the coverage of SOE regulation.¹²⁷

566 As for the regulation of subsidies, the absence of an independent authority or dispute settle-
 567 ment can hamper the effectiveness of negotiated commitments. Arguably this is the case, for
 568 instance, of rules on justification. From an EU perspective, the inclusion of rules on justifications
 569 similar to that modeled by Article 107 TFEU is a very important outcome of negotiations, because
 570 it ensures that values having a symbolic and foundational significance for the Union are consid-
 571 ered by some partner countries as core elements of their models for society too.¹²⁸ Whether the
 572 promotion and inclusion of such exceptions that allow the granting of subsidies contributing to
 573 fundamental public goals and economic development ensure that the EU and its partner countries
 574 can effectively pursue these social and economic policy goals is debatable. Effectiveness indeed
 575 depends, first and foremost, on the existence and the functioning of mechanisms for the settle-
 576 ment of disputes concerning subsidy control. The lacking of such mechanisms means that compli-
 577 ance can now only be enforced at a political level. However, as scholars have observed, it is also
 578 worthy to mention that the fact that new EU PTAs exclude their subsidy clause from dispute
 579 settlements can prevent the risk of forum shopping, and potentially reduces the cost of the
 580 PTAs in terms of fragmentation.¹²⁹

581 A last point of contention concerns the concept of prohibited subsidies. Whilst the EU has
 582 successfully negotiated the inclusion of two more categories (unlimited guarantees and subsidies
 583 to an insolvent or ailing enterprise in the absence of a credible restructuring plan) it seems unclear
 584 why it does not succeed in also including the other two categories of prohibited subsidies (sub-
 585 sidies to enterprises unable to obtain long-term financing or investment from independent com-
 586 mercial sources operating in sectors or industries in overcapacity; and certain direct forgiveness of
 587 debt) that are included in the 2020 Joint Statement of the Trilateral Initiative.¹³⁰

588 E. The EU Acting Unilaterally: The European Commission's Proposal on Foreign 589 Subsidies

590 One might observe that the EU is already able to react unilaterally to unfair competition where
 591 products have been manufactured with the support of non-EU funding (anti-subsidy).¹³¹ On the
 592 international level, until a few years ago, the EU could have surely brought litigation against a
 593 WTO Member for breaches of the SCM Agreement and have the matter adjudicated by a
 594 WTO panel. However, this possibility has failed since the end of 2019 due to the paralysis of
 595 the WTO Appellate Body and the virtual collapse of the entire WTO dispute settlement system.
 596 It must also be remembered that (even in case of revival of the system) the SCM Agreement only
 597 covers subsidized imports of goods from third countries. It does not apply to subsidies related to
 598 trade in services and in relation to the establishment and operation of undertakings in the EU
 599 which are backed by foreign subsidies.

600 Important regulatory gaps also appear with respect to EU rules. The EU's system of State
 601 aid control, enshrined in Articles 107 and 108 TFEU, does not apply in the case that non-EU

¹²⁷The CPTPP defines, for instance, SOEs as for-profit entities with at least SDR 200 million annual turnover in which the government owns more than 50% of the shares of the SOE, has control through ownership interests of the exercise of more than 50% voting rights, or has the power to appoint most of the board members. See Hoekman & Sapir, *supra* note 60, at 213.

¹²⁸Borlini & Dordi, *supra* note 79, at 585.

¹²⁹See Lindenberg Schoueri & Owens, *supra* note 95, at 593; Borlini & Dordi, *supra* note 79, at 596–602.

¹³⁰See 2020 Joint Statement, *supra* note 57.

¹³¹The measures to counteract the unfair practices usually take the form of *extra import duty* for the subsidization received by the foreign competitors to eliminate the injury.

602 authorities grant financial support to undertakings in the EU, either directly or through their
 603 parent companies outside the EU. Likewise, neither EU antitrust rules¹³² nor EU merger control
 604 rules¹³³ specifically take into account whether an economic operator may have benefited from
 605 foreign subsidies (even if in principle it could form part of the assessment) and they do not allow
 606 the Commission (or Member States) to intervene and decide solely or even mainly on this basis.
 607 Also, the existing EU legal framework in the field of *public procurement* does not specifically
 608 address distortions to the EU procurement markets caused by foreign subsidies.¹³⁴ Finally, if it
 609 is true that the EU Regulation establishing a framework for the screening of *foreign direct invest-*
 610 *ments* into the EU¹³⁵ undoubtedly constitutes an important tool to address risks to security or
 611 public order brought by foreign investments that target the EU's or Member States' critical assets;
 612 it is, nonetheless, true that the same Regulation does not specifically tackle the issue of distortions
 613 caused by foreign subsidies.

614 In June 2020, the Commission adopted a *White paper on levelling the playing field as regards*
 615 *foreign subsidies*,¹³⁶ to start a public debate on the topic of distortive foreign subsidies and further
 616 propose a possible solution at the EU level.¹³⁷ This initiative, which was conceived as part of the
 617 new updated “industrial strategy for Europe,”¹³⁸ moves from the assumption that openness to
 618 trade and investment, while part of resilience of the economy, must go hand-in-hand with fairness
 619 and predictable rules. Therefore, the *ratio* for adopting new unilateral tools to combat unfair trad-
 620 ing practices is that a strong, open, and competitive single market would enable both Europeans
 621 and foreign companies to compete on merit *only in as far as a level playing field in the internal*
 622 *market is ensured*.¹³⁹

623 This is not the first time that the EU is trying “to export” its rules and standards to other coun-
 624 tries: This has already happened with its competition law and state aid rules,¹⁴⁰ data and privacy

¹³²TFEU, *supra* note 18, at art. 101–102.

¹³³See Council Regulation (EC) 139/2004 of Jan. 20, 2004, on the control of concentrations between undertakings, 2004 O.J. (L 24), 1 [hereinafter EUMR].

¹³⁴See Commission Directive 2014/24/EU, 2014 O.J. (L 94) 65.

¹³⁵Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 O.J. (L 79I) 1.

¹³⁶*White Paper on leveling the playing field as regards foreign subsidies*, COM (2020) 253 final (June 17, 2020) [hereinafter White Paper]. According to the Commission, trade openness in the current global economic environment is being challenged by state sponsored unfair trading practices, which according to the Commission “disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity . . .” Such unfair practices typically include “shielding industries from competition through selective market opening, licensing and other investment restrictions, as well as providing subsidies which undermine the level playing field to both state-owned and private sector companies. The distortive economic effects of such practices are relevant in any affected sector, whether strategic or otherwise . . .” The impact assessment underpinning the proposal was published by the Commission’s Regulatory Scrutiny Board, which issued a positive opinion with reservations on March 5, 2021 which was published with the proposed amendments in Annex 1.

¹³⁷See *Amendments adopted by the European Parliament on 4 May 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market* COM(2021)0223 – C9-0167/2021 – 2021/0114(COD) (Dec. 6, 2022) [hereinafter *Proposal for a regulation*]; see also Justyna Smela Wolski, *Legal Basis of the Proposal for a Regulation on Foreign Subsidies Distorting the Internal Market*, 21 EUR. STATE AID L. Q. 153, 153–172 (2022) (highlighting the Proposal does not fulfill the requirements regarding the use of Article 114 TFEU established in the Court’s case law despite its self-proclaimed goal of removing “distortions within the internal market” and that Article 352 TFEU would be a more plausible option).

¹³⁸See *A new industrial strategy for Europe* COM(2020) 102 final (March 10, 2020).

¹³⁹European Commission Memoranda SWD/2021/99 final, *Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market*, at 62 (May 5, 2021); Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, 20 WORLD TRADE REV. 343, 343–366 (2021) (discussing the growing concerns over foreign subsidies).

¹⁴⁰See Michael Blauburger & Rilke Krämer, *European competition vs. global competitiveness: transferring EU rules on state aid and public procurement beyond Europe*, 13 J. OF INDUS., COMPETITION & TRADE 186 (2013).

625 rules (under the recent General Data Protection Regulation [GDPR]).¹⁴¹ In light of the success of
 626 these EU foreign policy instruments, which proved able to force other countries and multinational
 627 companies to adopt EU rules and enter risk free into the large internal market,¹⁴² EU policymakers
 628 have shown their increased willingness to further leverage access to the market also regarding
 629 foreign subsidies.

630 *1. Key Elements of the Regulation*

631 On June 30, 2022, the EU institutions reached a political agreement on a new regulation on foreign
 632 subsidies (FSR).¹⁴³ The agreement was built on the principle of economic sovereignty¹⁴⁴ and
 633 extremely rapidly – and this is easily understandable due to the broader and complex situation
 634 of the European economy, heavily affected first by the Covid-19 pandemic and more recently by
 635 the effects of the various economic sanctions adopted against Russia. It focuses on two main
 636 issues: Identifying distortive foreign subsidies and remedying the distortions they cause. The
 637 new regime clearly borrows elements from State aid, merger control, antitrust and trade defense
 638 by creating a new hybrid investigation tool. The Regulation will be formally adopted after the
 639 linguistic review and it is expected to enter into force by the end of 2022, which would mean that
 640 it will be applicable by mid-2023.

641 *1. Investigation of Financial Contributions*

642 As to the scope of the new Regulation, the Commission will have the power to investigate financial
 643 contributions granted by non-EU governments (public authorities) to undertakings engaging in
 644 an economic activity in the EU by means of three tools:

- 645 • for *M&A* transactions, the regulation introduces a *notification-base (ex-ante) tool* where the
 646 acquired company, one of the merging parties or the joint venture generates an EU turnover
 647 of at least €500 million and the transaction involves a foreign financial contribution of at least
 648 €50 million;¹⁴⁵
- 649 • for *bids in public procurements*, the same *notification-base (ex-ante) tool* gives the
 650 Commission the power to investigate financial contribution by a non-EU government, where
 651 the estimated contract value is at least €250 million, and the bid involves a foreign financial
 652 contribution of at least €4 million per third country;¹⁴⁶
- 653 • for *all other market situations*, the Commission possesses a *general tool* to investigate: It can
 654 start a review by its own initiative (*ex-officio*) or it can request an ad-hoc notification
 655 for smaller concentrations and public procurement procedure if it suspects the existence

¹⁴¹2016 O.J. (L 119) 1.

¹⁴²See ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 121 (2020) (noting that the EU rules on Data and Privacy have now become the “gold standard worldwide”).

¹⁴³Council of the EU Press release, *Foreign subsidies distorting the internal market: provisional political agreement between the Council and the European Parliament* (June 30, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/foreign-subsidies-regulation-political-agreement/>; see also Jay Modrall, *The EU Anti-Subsidy Regulation Enters Trilogue Negotiations – New Obligations for Multinationals Coming into Focus*, KLUWER COMPETITION L. BLOG (May 10, 2022), <http://competitionlawblog.kluwercompetitionlaw.com/2022/05/10/the-eu-anti-subsidy-regulation-enters-trilogue-negotiations-new-obligations-for-multinationals-coming-into-focus/>.

¹⁴⁴Council of the EU Press Release, *supra* note 143 (“Economic sovereignty depends on two key principles: investment and protection. The agreement reached on this new instrument will make it possible to combat unfair competition from countries that grant massive subsidies to their industry. This is a major step towards protecting our economic interests . . .”).

¹⁴⁵*Proposal for a regulation, supra* note 137, at art. 18.

¹⁴⁶*Id.*, at art. 27.

656 of distortive subsidies. This would cover market situations such as greenfield investments
 657 and public procurements below the thresholds.¹⁴⁷

658

659 Pending the Commission's review in the case of one of the two mentioned notification-based
 660 tools, the concentrations cannot be completed and the investigation bidder cannot be awarded
 661 the contract.

662 According to article 47 ("Transitional provisions"), the Regulation will apply to foreign sub-
 663 sidies granted in the *five years* prior to the date of its application where such foreign subsidies
 664 distort the internal market after the start of application of the Regulation. It shall also apply
 665 to foreign financial contributions granted in the *three years* prior to the date of its application
 666 where such foreign financial contributions were granted to an undertaking notifying a concen-
 667 tration or notifying financial contributions in the context of a *public procurement procedure* pur-
 668 suant to this Regulation. Conversely, it shall not apply to concentrations for which the agreement
 669 was concluded, the public bid was announced, or a controlling interest was acquired before the
 670 date of application of the Regulation and to public procurement procedures initiated before the
 671 date of application of the Regulation.¹⁴⁸

672 2. Foreign Subsidies and Financial Contributions

673 The concept of *foreign subsidy* and, by extension, the scope of the proposed Regulation, is very
 674 broad. It covers not only *direct financial contributions* (subsidies in the narrow sense) but all kinds
 675 of transfers of funds or liabilities (including capital injections, loans, loan guarantees, fiscal incen-
 676 tives, debt forgiveness, debt to equity swaps, etc.). It also covers the forgoing of revenue that is
 677 otherwise due (e.g., tax exemptions) and the provision of goods and services or the purchase
 678 of goods or services.¹⁴⁹ Like EU state aid law, the notion encompasses any *economic advantage*
 679 that the beneficiary would not be able to obtain under normal market conditions (the subsidy
 680 must confer a benefit to the company). Similar to the notion of State aid, the advantage must
 681 also be *selective*—granted only to an individual undertaking[s] or industry[ies]—directly or indi-
 682 rectly attributable to the State—the public authorities of the third country—and liable to distort
 683 competition in the internal market.

684 If a foreign contribution constitutes a foreign subsidy, the Commission shall further assess
 685 whether it "distorts the internal market." Article 3 of the proposed regulation contains a non-
 686 exhaustive list of indicators for this assessment, such as, among others, the amount and nature
 687 of the subsidy; the situation of the undertaking and the markets concerned; and the purpose and
 688 conditions attached to the foreign subsidy as well as its use on the internal market.

689 In addition, the Regulation sets out the categories of foreign subsidies that are considered either
 690 "most likely" or "unlikely" to distort the internal market. The former includes subsidies granted to
 691 ailing undertakings, subsidies granted in the form of unlimited guarantees, foreign subsidies ena-
 692 bling an undertaking to submit an unduly advantageous tender, foreign subsidies directly facili-
 693 tating a transaction, or an export financing measure that is not in line with the OECD
 694 Arrangement on officially supported export credits. A foreign subsidy is considered "unlikely"
 695 to distort the internal market if its total amount does not exceed €5 million over any consecutive
 696 period of three financial years.¹⁵⁰

¹⁴⁷*Id.*, at art. 7.

¹⁴⁸Contracts in the fields of defense and security and cases of extreme urgency are excluded from the notification-based tool obligation, but they are excluded from the financial contribution information and from the Commission's *ex officio* investigation powers.

¹⁴⁹*Proposal for a regulation*, *supra* note 137, at art. 2.

¹⁵⁰*Id.*, at art. 3.2 and 4.

3. *The Balancing Test and the Commission's Power under the Regulation*

The FSR contains in any case a sort of *escape clause*.¹⁵¹ In case the Commission finds that a foreign subsidy actually distorts (or has the potential to distort) the internal market, it shall further assess whether the distortive effects may be counterbalanced or possibly even outweighed by positive effects “on the development of the relevant economic activity.”¹⁵² The outcome of this “balancing test” shall be taken into account by the Commission when deciding whether to impose *redressive measures* or to accept *commitments*,¹⁵³ and the nature and level of those redressive measures or commitments.¹⁵⁴ Commitments and redressive measures should in any case fully and effectively remedy the distortion caused by the foreign subsidy in the internal market. Unfortunately, the current text seems to leave to the Commission an unlimited discretion in weighing the positive and negative effects of a foreign subsidy and in deciding what it deems to be appropriate. It is likely that the Commission will use the balancing test in a way that would ensure the equal treatment of recipients of foreign subsidies on the one hand, and recipients of State Aid granted by EU Member States on the other hand. However, this is not guaranteed, and a significant risk remains that foreign subsidies and their recipients may be held to stricter standards than the ones applicable under EU State Aid law.

The proposal for FSR gives the European Commission broad powers.¹⁵⁵ It would have extensive investigative powers to gather all necessary information, similar to those in anti-trust investigations. Furthermore, the Commission will have the power to carry out fact-finding visits at the undertaking, and, subject to agreement by the undertaking and the third country concerned, at the premises of the undertaking in the third country. It will have the power to launch market investigations; to impose *interim measures*; to accept commitments or impose redressive measures (such as reducing capacity/market presence, divestments, repayments of foreign subsidies, ordering the dissolution of a transaction, requiring the undertaking to adapt its governance structure, ordering the publication of R&D results, ordering the companies to refrain from making certain investments, etc.); and to approve or block deals. Finally, the regulation also provides the Commission with *punitive fiscal powers* (fines and periodic penalty payments) for failure to supply the requested information in a timely manner or for supplying incomplete, incorrect, or misleading information.¹⁵⁶

In order to ensure uniform application of the regulation throughout the EU, the Commission will be exclusively competent in enforcing the regulation. Member States will be kept regularly informed and will be involved, through the advisory procedure, in decisions adopted under the regulation.

II. *Impact on Business, Burden and Legal Uncertainties*

Even if the new regulation targets all companies—including EU-based companies—that have received support from third countries for any economic activity in the EU, it is not a secret that

¹⁵¹Jay Modrall, *The Anti-Subsidy Regulation: European Parliament and Council Clinch Last-Minute Deal*, KLUWER COMPETITION L. BLOG (July 11, 2022), <http://competitionlawblog.kluwercompetitionlaw.com/2022/07/11/the-anti-subsidy-regulation-european-parliament-and-council-clinch-last-minute-deal/>.

¹⁵²See Morris Schonberg, *Substantive Assessment Issues and Open Questions*, 21 EUR. STATE AID L. Q. 143, 143–152 (2022) (discussing the key substantive assessments that the European Commission will need to consider when investigating foreign subsidies under the Regulation).

¹⁵³*Proposal for a regulation, supra* note 137, at art. 6. According to the Preamble, recital 16: “The balancing may also lead to the conclusion that no redressive measures should be imposed. Categories of foreign subsidies that are deemed most likely to distort the internal market are less likely to have more positive than negative effects.”

¹⁵⁴*Id.*, at art. 5.

¹⁵⁵Smela Wolski, *supra* note 137 (exploring the possible legal basis of FSR and arguing that the Proposal does not fulfil the requirements regarding the use of Article 114 TFEU established in the Court’s case law despite its self-proclaimed goal of removing “distortions within the internal market” and that Article 352 TFEU would be a more plausible option).

¹⁵⁶*Proposal for a regulation, supra* note 137, at art. 9–15.

733 the FRS has been conceived, in particular, keeping in mind Chinese SOEs engaging in M&A or
 734 bidding for government contracts in the EU.¹⁵⁷ The China Chamber of Commerce to the EU
 735 reacted to the FSR proposal stating that a new foreign subsidy regulation and other policies affect-
 736 ing Chinese companies “may further erode Chinese business confidence and create an unfair busi-
 737 ness environment for Chinese firms.”¹⁵⁸ Also the American Chamber of Commerce to the EU as
 738 well as groups representing Japanese, Korean and other businesses in Europe expressed concerns
 739 about how the regulation might affect their members in a recent joint statement.¹⁵⁹

740 So far, the EU has been vague in saying which companies or sectors it will target, but a recent
 741 study enlightened which sectors will likely be in the spotlight.¹⁶⁰ Examples include food and agri-
 742 culture, healthcare, and transport, which benefit from special incentives and legal regimes in many
 743 jurisdictions. Following the necessity to rapidly reduce its dependence on China and Russia, tech-
 744 nology and energy have also become an absolute top priority for the EU. Special attention would
 745 be paid to basic metal companies, like the steel and aluminum industries that have struggled to
 746 survive since the imposition of President Trump’s unilateral tariffs. The metal industry—heavily
 747 subsidized by China—has, indeed, a strategic importance for crucial supply chains such as semi-
 748 conductors, batteries, and renewable energies. In line with the *Global Gateway*, set out in
 749 December 2021 by the European Commission and the EU High Representative to counter
 750 China’s infrastructure initiative *Belt and Road, infrastructure* is also expected to be at the front
 751 and center of FSR.¹⁶¹

752 Among the pros of FSR, the decision to adopt an *ex-ante* approach in the case of large con-
 753 centrations and public procurement procedures will ensure the systematic identification of dis-
 754 tortive foreign subsidies so that measures can be decided *before* the transactions are closed. This
 755 will give legal certainty to the undertakings concerned. Nonetheless, the current proposal also
 756 raises concerns. First, there is the risk that the new regulation might negatively affect trade
 757 and investment flows. Many domestic and foreign companies doing business within the EU inter-
 758 nal market will face a significant increase in costs and administrative burdens. This is because the
 759 FSR adds an additional layer of complexity to an already complicated regulatory landscape appli-
 760 cable to companies involved in mergers and acquisitions and public procurement in Europe,
 761 including those based in Europe and the U.S. multinationals. M&A transactions, for example,
 762 would be subject in the future to three different regulatory procedures – merger control, FDI
 763 screening and foreign subsidy control – with different filing requirements and timetables.
 764 They will need to design and implement new compliance procedures,¹⁶² which could be costly
 765 and time-consuming. Also, the very broad definition of financial contributions, as well as the deci-
 766 sion not to introduce into the FSR a *de minimis* exclusion for calculating financial contributions,
 767 in addition to the ample discretion the Commission has in running the balancing test between

¹⁵⁷The EU concerns for state subsidies in China dated back to the EU antidumping and anti-subsidies investigations. See *Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations*, SWD(2017) 483 final 2 (December 20, 2017),.

¹⁵⁸Kim Mackrael, *EU Targets Foreign Subsidies, Aiming at China but Worrying U.S. Companies, Proposed legislation focuses mainly on state-backed companies*, WSJ (July 1, 2022), <https://www.wsj.com/articles/eu-targets-foreign-subsidies-aiming-at-china-but-worrying-u-s-companies-11656661297>.

¹⁵⁹Jay Mordall, “Anti-Subsidy” Regulation – A New Big Stick in the EU Regulatory Arsenal, KLUWER COMPETITION L. BLOG (May 6, 2021), <http://competitionlawblog.kluwercompetitionlaw.com/2021/05/06/anti-subsidy-regulation-a-new-big-stick-in-the-eu-regulatory-arsenal/>.

¹⁶⁰Simon Van Dorpe, *5 industries that need to watch foreign subsidies rules*, POLITICO (July 14, 2022), <https://www.politico.eu/article/five-industrie-need-watch-foreign-subsidies-rules/>.

¹⁶¹*The Global Gateway*, JOIN(2021) 30 final (Dec. 1, 2021).

¹⁶²This is because the merger control systems both at the EU (EUMR) and national level, as well as the national rules of foreign trade law and investment control, will continue to apply. See *supra* note 133.

768 positive and negative effects of the foreign subsidies, contribute to creating what could be easily
769 perceived as a significant legal uncertainty.¹⁶³

770 Further, it must be checked whether the EU will be effectively able to collect evidence on for-
771 eign subsidies outside Europe to impose effective redressive measures.¹⁶⁴ Because these measures
772 could only be adopted after a “full investigation,” there is a realist possibility that alleged offenders
773 be incentivized to frustrate and delay it.¹⁶⁵ If the *deterrent effect* of the EU unilateral measures fails,
774 companies might decide that it is more convenient for them to accept no-cooperation fines or
775 periodic penalty payments rather than disclosing all data. This conclusion underscores the impor-
776 tance of EU subsequent unilateral *sanctions*, which should be in principle heavy enough to create
777 real pressure on parties—companies and foreign countries—to cooperate. The issue, obviously, is
778 not only economic but political. Ultimately, the strength of EU measures would depend, on the
779 one hand, on the EU’s willingness to employ them, and, on the other hand, on the perception
780 among foreign countries. In sum, the presence of this new regulation does not seem enough
781 in itself to *dissuade* foreign states from subsidizing their companies. Because the degree of
782 State intervention in the economy is one of the major pillars of social and economic policies,
783 it is simply unrealistic to expect that foreign countries would easily accept, and import, external
784 economic models, especially when they would run contrary to their national economic traditions.
785 In other words, the effectiveness of FRS hinges on many factors beyond the European control.

786 F. Conclusions

787 This contribution has attempted to sketch out some of the key legal and policy issues that are
788 likely to determine the development of the EU’s Trade policy concerning rules on State inter-
789 vention in the market, specifically on the role of subsidies and SOEs. The focus of our analysis
790 has been on the relaxation of the usual State aid regime under Articles 107 and 108 TFEU to give
791 Member States more flexibility in supporting their economies and strengthen EU industrial
792 policy; the likelihood of EU proposals resulting in any substantial change to international trade
793 law on subsidies and SOEs at the multilateral (WTO) level; a systemic horizontal investigation
794 into the relevant trade rules promoted by the EU in its most recent practice of PTAs; and,
795 finally, the EU pursuing stronger protection of its companies with its recently announced
796 new regulation on foreign subsidies, on the basis of which the European Commission can inves-
797 tigate foreign subsidies and impose remedies.

798 At first sight, it may seem that the current evolution of EU trade policy approach to the legal
799 regulation of subsidies and SOEs is inconsistent. On the one hand, the EU trade agenda empha-
800 sizes the importance of multilateralism and the rules-based international order, with a number
801 of significant proposals for reforming the WTO and establishing new rules to avoid competitive
802 distortions. On the other, the same goal is approached through a very aggressive unilateral trade
803 strategy. In the middle of this apparently contradictory stance, the EU Commission is currently
804 negotiating a number of PTAs thereby making partners—well beyond the circle of those

¹⁶³Raymond Lujá, *Countering State Aid Beyond the European Union*, 20 EUR. STATE AID L. Q. 187, 187–199 (2021) (recommending, inter alia, to clarify the concepts of “undertaking” and “interim measures,” to limit notification to selective subsidies in the context of tenders, and to restrict the retroactive effect of the notification requirement in light of the administrative burden involved. Further suggestions to increase consistency and legal certainty have been included as well).

¹⁶⁴Jakub Kociubiński, *The Proposed Regulation on Foreign Subsidies Distorting the Internal Market: The Way Forward or Dead End?*, 6 EUR. COMPETITION & REGUL. L. REV. 56, 56–68 (2022) (“neither administrative bodies, nor other companies acting as intermediaries between the government and the alleged beneficiary, or beneficiaries themselves, when they are not active on the Internal Market, cannot be directly bound by any obligations to disclose financial data, or by the accounting standards, stemming from the European law.”)

¹⁶⁵*White Paper*, *supra* note 136, at 2.1.

805 countries that can traditionally be defined “European”— accept rules along the lines of
 806 European competition law.

807 At a closer look, both the unilateral and the multilateral approaches, with a very active agenda
 808 of bilateral negotiations in the middle, share, however, a common goal: the rationale is to redress
 809 the perceived *regulatory gaps* left by current EU competition law and trade defense rules. In brief,
 810 about the regulation of State intervention in the market, the EU trade policy’s different manifes-
 811 tations and normative initiatives we have examined move from the premise that a level playing
 812 field is a legitimate aspiration; indeed, a very important one in these peculiarly challenging times
 813 characterized by outstanding public support measures to deal with the economic impact of Covid-
 814 19 and the global economic crises following the recent European war between Russia and Ukraine.

815 This resulting more focused approach shows that the unilateral, bilateral, and multilateral
 816 approaches are indeed strictly intertwined. As observed earlier, the bilateral agenda is perceived
 817 by the EU Commission as a tool for tackling issues that are not ready for multilateral discussion,
 818 and thus PTAs are, in essence, an instrument to pave the way for the next level of multilateral
 819 liberalization. On the other hand, albeit not being a very *creative* way to tackle the potential dis-
 820 tortions of competition by foreign-backed companies active in the EU, a unilateral posture
 821 remains the only feasible policy choice with respect to the limitations posed by international poli-
 822 tics towards obtaining a political global consensus regarding a modernization of subsidies and
 823 SOEs rules at the multilateral (WTO) level.

824 Unilateral measures like those envisaged in the new FSR pose, however, a number of legal and
 825 policy challenges.¹⁶⁶ Among other things, the EU must consider the possibility of *reciprocal*
 826 responses eventually leading to a *retaliatory spiral*, especially in case the new Regulation will
 827 be perceived as a “protectionist” instrument. This could happen, for example, in the case the
 828 EU’s redressive measures go beyond what is strictly necessary to redress market distortions caused
 829 by foreign-backed companies, and tilt the level playing field. This event could lead to *another* trade
 830 conflict escalation, with each party punishing the other for actions perceived as hurtful. The ulti-
 831 mate question is whether this risk is in some way acceptable or desirable. It has been observed that
 832 unilateral actions, or their threatened use, have often played a critical role in the development of
 833 international norms. In our opinion, unilateral solutions should be seen in any case as a second-
 834 best choice in the absence of an (effective) multilateral system.¹⁶⁷

835 In contrast to the Trump Administration’s ample and unjustified use of simple traditional uni-
 836 lateral trade measures, which eventually led to exacerbating the current global trade environ-
 837 ment,¹⁶⁸ it is thus possible to interpret the new EU FSR as a “political signal” sent to the

¹⁶⁶It is, perhaps, worthy to mention that the proposed regulation on foreign subsidies is just one of the many autonomous legal tools recently proposed by the Commission to combat unfair trade practices and pursue its interests where needed. On 8 December 2021, the European Commission published its *Proposal for a Regulation on the protection of the European Union and its Member States from economic coercion by third countries*, whose aim is to effectively protect the European Union and its Member States from coercive third-country measures affecting trade and investment. COM(2021) 775 final (Dec. 8, 2021). On 29 August 2022, the *Regulation (EU) 2022/1031 of the European Parliament and of the Council on the access of third-country economic operators, goods and services to the Union’s public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI)* has come into force. 2022 O.J. (L 173) 1 [hereinafter IPI]. The IPI will enable the Commission to impose measures limiting non-EU companies’ access to the EU public procurement market if these companies’ governments do not offer similar access to EU businesses.

¹⁶⁷Victor Crochet & Marcus Gustafsson, *Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law*, 20 *WORLD TRADE REV.* 343, 343–366 (2021) (investigating 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).

¹⁶⁸See NERINA BOSCHIERO, *THE US TRADE POLICY, CHINA AND THE WTO* (2022).

838 world. Article 40 (7) of the FSR explicitly stipulates that international agreements concluded by
839 the EU with foreign countries will take the *precedence* over the proposed regulation, where it iden-
840 tifies a pattern of distortive practices. Such *dialogue* should in principle be able to bring about a
841 change in distortive subsidy practices and to restore fair competition within the EU, thus
842 preventing it from adopting unilateral redressive measures. Is this not a strong signal from the
843 EU to third countries that bilateral or multilateral trade agreements remain the best solution to
844 reach a fair, predictable and consensual regime, able to guarantee legal certainty and foreign
845 investments?¹⁶⁹

846 **Competing interests.** None

847 **Funding statement.** None

¹⁶⁹Hoekman & Nelson *supra* note 4, at 12.