Possibility of Developing and Expanding the Regulation of Subsidies through Free Trade Agreements (FTAs): —Analysis Focusing on a Trend in FTAs Concluded by the EU—*

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Abstract

In the absence of progress in the revision of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement), the European Union (EU) is making efforts to develop and disseminate rules on subsidies through free trade agreements (FTAs). What is particularly noteworthy about this initiative is that the EU seeks to link the regulation of subsidies with competition law. The specifics vary depending on the circumstances of counterparties to agreements, but as a general trend, the agreements include a provision that encourages the regulation of subsidies through the framework of State aids or competition law. Among other rules that have been recently introduced are those concerning the expansion of prohibited subsidies, redefinition of permissible subsidies, and the regulation of the scope of subsidies related to trade in services. The fact that the EU has succeeded in introducing those new rules under a substantial number of agreements indicates the possibility that those rules may be adopted on a plurilateral or multilateral basis. On the other hand, in light of the small number of agreements concluded with countries that are expected to be unwilling to accept the rules, it may be too early to reach that conclusion. Even so, how the trend in regional agreements will play out will be one of the key points in the future development of subsidy disciplines.

Keywords: World Trade Organization (WTO), free trade agreements (FTAs), subsidy disciplines, State aids, services subsidies

JEL Classification: F13, K21, K33

I. Introduction

Creating rules that can properly address the distortive effects caused by subsidies has long been a challenge for international trade relations. Since the inception of the General Agreement on Tariffs and Trade (GATT), the relevant rules have consistently expanded. However, even at this juncture, when sophisticated subsidy rules are in place in the form of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) within the World Trade Organization (WTO) framework, there is a perception that these rules are not

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sufficient to effectively deal with the adverse effects of subsidies.

While there is virtual consensus that the current SCM Agreement needs to be improved, the actual amendment of the agreement, at least in the short term, seems unlikely. This is because the Doha Round negotiations have stagnated and there is no apparent momentum to conclude new rules or overhaul the existing agreement under the WTO framework.

Under such circumstances, the European Union (EU) is advancing the creation of new subsidy rules through bilateral or regional trade agreements. So far, the EU has notified the WTO of the conclusion of 40 regional trade agreements (RTAs[1]), excluding the EU itself, in what is the largest number of RTAs to be signed by a party in the world (WTO (2018), p. 1). As a result, the cumulative effect of those agreements may become broadly influential, although the individual trade agreements are effective only among the limited number of concerned parties. Moreover, with regard to subsidies, the EU has established some new rules in most of its trade agreements. Thus, the significance of creating new rules under those bilateral or regional agreements may go beyond the mere conclusion of a trade deal.

Against this backdrop, this paper examines the EU's attempts to create subsidy disciplines through free trade agreements (FTAs) and the extent to which such efforts are materializing. This analysis will help predict how international subsidy disciplines will develop in the future. In addition, it would also have implications for various countries' FTA policies, in particular for those which hardly give any attention to subsidy issues in FTAs.

The reasons why the EU was selected as the subject matter of this study are as follows: First, in contrast to standard FTAs, which generally include only brief provisions that reaffirm the contents of the SCM Agreement, the FTAs concluded by the EU tend to contain more sophisticated rules. This represents its attempt to develop and improve subsidy disciplines. Second, there are various methodologies for regulating subsidies on the basis of related factors such as the nature of the parties to the agreements and the period when negotiations were held. This implies that the EU is strategically pursuing different approaches. Third, a sufficiently large number of the EU's FTAs enable the attainment of a firm conclusion that may not be affected by the extreme outlier. Needless to say, to precisely understand the EU FTAs, it is necessary to do a comparative study of FTAs concluded by other countries, in particular the US, as well as related agreements such as the WTO agreements. Therefore, those FTAs are also examined in this paper where necessary.

Chapter II reviews the shortcomings of the current SCM Agreement as a starting point for the examination of subsidy disciplines under the FTAs. The chapters that follow analyze how the EU is addressing those shortcomings in its FTAs. Specifically, Chapter III focuses on the role of competition laws in subsidy regulation, which can be recognized as one of the important aspects of the EU's FTAs. Chapter IV deals with the demarcation of illegal and legal subsidies, including, for instance, a discussion regarding the expansion of prohibited

[1] According to the terminology of the WTO, "regional trade agreement" or "RTA" contains a broad meaning including free trade agreement (FTA) and economic integration agreement (EIA) (WTO (2019b), p. 2). However, as RTAs may include agreements that are beyond the simple trade agreement, such as the EU itself, this paper will use the term "FTAs," since it is focusing more on the agreements with weaker connections.

subsidies, and Chapter V touches upon subsidies connected to trade in services. Chapter VI summarizes the discussion. The paper focuses on only industrial subsidies since subsidies related to agriculture and fisheries are significantly different in character.

II. Shortcomings of the SCM Agreement and Suggestions for Improvement

While disputes among WTO members over subsidies were not intensive initially, the shortcomings of the SCM Agreement became apparent with the passage of time. It gradually became obvious that the agreement was obsolete (Steger (2010), p. 794), prompting many members or scholars to call for improving the agreement. The following are examples of the contentions raised by scholars:

The first issue relates to the expansion of prohibited subsidies. Under the current SCM Agreement, only two types of subsidies, i.e., export subsidies and local content, or import substitution subsidies, are listed as prohibited subsidies. There have been suggestions to add to the list other types of subsidies like locational subsidies (subsidies provided to attract an investment to a designated place), and subsidies that encourage the exploration, production, or use of certain natural resources including fossil fuels, and other resource-depleting subsidies (Horlick & Clarke (2017), pp. 682-685).

The second relates to the clarification of safe harbors for subsidies that would be categorized as legitimate. Examples are subsidies aimed at tackling environmental issues including climate change, supporting regional developments, aiding research and development, and recovering from natural disasters and war (e.g., Horlick & Clarke (2017), pp. 679-681). The legislative responses may range from the revival of "green light" subsidies that were provided in Article 8 of the SCM Agreement but have now expired (e.g., Bigdeli (2011), p. 20) to the transcription of a provision that corresponds to Article XX of GATT (general exceptions) to the SCM Agreement.

The fact that the SCM Agreement only deals with subsidies pertaining to the trade in goods but not to the trade in services may be pointed out as another shortfall of the current WTO framework. Even though Article XV of the General Agreement on Trade in Services (GATS), acknowledges that "[m]embers recognize that, in certain circumstances, subsidies may have distortive effects on trade in services," it merely states that "[m]embers shall enter into negotiations with a view to developing the necessary multilateral disciplines to avoid such trade-distortive effects." Therefore, the formulation of disciplines that address service subsidies were, from the beginning, left to the discretion of future negotiations.

Moreover, from an institutional perspective, there exist some proposals for the introduction of a neutral organ that may decide the compatibility of subsidies with the relevant rules or can put forward an expeditious resolution to subsidy-related disputes (Horlick & Clarke (2017), pp. 688-689).

Many reform proposals, including those listed above, have not progressed at the WTO. Even the reactivation of Article 8 of the SCM Agreement, which appears to be easier than the creation of a new provision, has not been realized (the difficulty of such is explained in

Espa and Duran (2018), p. 648). With regard to services subsidies, there has been no apparent success although negotiations were held on more than a few times. Even worse, members have not recognized the accurate situation in connection with services subsidies (Poretti (2009), pp. 51-69). As a consequence, the majority view seems to be pessimistic about the realization of "multilateral disciplines" required under Article XV of GATS in the near-term (example is Sauvé and Soprana (2018), p. 617).

In this situation, where there is little hope for the improvement of subsidy disciplines under the multilateral framework, the more plausible option is to create rules under FTAs initially and then "multi-lateralize" such rules through the cumulation of bilateral agreements. As the EU has made progress in this respect, which implies that it provides ample resources for examining such a process, this paper will focus on the EU FTAs.

III. Subsidy Disciplines Relating to Trade in Goods Included in the EU FTAs

III-1. The development of subsidy disciplines relating to trade in goods

Provisions governing subsidy disciplines for goods in the EU FTAs are not uniform and can be divided into seven categories.[2] A chronological analysis reveals a gradual expansion of the scope of subsidy disciplines over time. Therefore, the categorization below has been carried out taking into account the depth of the subsidy disciplines as well as the chronological order of the conclusion of the agreements.[3]

The EU–South Africa Trade, Development and Co-operation Agreement (TDCA)[4] is one of the initial EU FTAs, and falls under the first category of subsidy disciplines.[5] The agreement states that "public aid" favoring certain firms or the production of certain goods in a way that distorts or threatens to distort competition is not compatible with the proper functioning of the agreement.[6] At the same time, it identifies the forms of "public aid" that are

[2] While EU FTAs are often categorized in three (e.g., Papadopoulos (2010), pp. 115-127), this paper divided them in larger numbers of categories by mainly focusing on subsidy disciplines.

[3] In terms of chronological order, the EU–Korea and EU–Singapore FTAs, which were labelled as the fourth category, should not precede the agreements between the EU and Mediterranean countries, the fifth category. However, from the viewpoint of the development of the competition law approach in subsidy regulations, EU–Mediterranean agreements could be placed in the back since they contain sophisticated provisions regarding State aid regulation.

[4] The substantive parts of EU–South Africa TDCA repeals due to the entry into force of the EU–Southern African Development Community (SADC) Economic Partnership Agreement (EPA) which includes South Africa (Protocol 4 of the EU–SADC EPA). However, as the EU–South Africa TDCA is an important agreement in examining subsidy disciplines under the EU FTAs, it is included as one category in this paper.

[5] The EU–Mexico Global Agreement (GA), concluded at the same period, does not contain any additional provisions regarding subsidy matters. Nevertheless, the agreement has been subject to the update negotiations since 2016 and the draft texts of new agreement is now published, after the agreement in principle on the trade part in April 2018. As the published texts are not the final version at the time of writing, this paper partly refers to this agreement when it relates to the other agreement. The EU–Mercosur Trade Agreement, the agreement in principle of which is achieved in June 2019, is also addressed in the same manner in this paper.

[6] Article 41 of the EU–South Africa TDCA. The same provision provides that public aid which "support a specific public policy objective or objectives of either Party" can be assumed as compatible with the proper functioning of the agreement. This sentence is understood as it gives the authorized agency a wide discretion in deciding what can be included as "public policy objective." See Szepesi (2004), p. 4.

deemed to be compatible with the proper functioning of the agreement.[7] According to the agreement, until rules or procedures for the implementation of public aid regulation are established, public aid or subsidies shall be governed by the related provisions of GATT and the SCM Agreement.[8] A party to the agreement, when requested by the other party, has to provide information on aid schemes, individual cases of public aid, or the total amount and the distribution of the aid given.[9]

In contrast, the EU–Chile Association Agreement (AA), which may be assigned to the second category, merely requires a party to annually provide to the other party information on the overall amount of State aid (if possible, the sectoral amount as well), and to provide, upon request from the other party, information on individual cases.[10] The agreement differs substantially from the EU–South Africa TDCA in that it only contains this transparency-related provision with regard to State aid regulation.[11]

The EU–Colombia–Peru–Ecuador FTA and EU–Central America AA represent the third category. These agreements adopt the same expression as the WTO, i.e., "subsidy," rather than "State aid" or "public aid," with the definition coinciding with that adopted in the SCM Agreement.[12] In addition to a provision relating to information-sharing that is similar to the corresponding provision in the EU–Chile AA,[13] these agreements also contain a clause that permits the Trade Committee to periodically review the progress in the implementation of the information-sharing requirement,[14] as well as a provision that explicitly demands that a party exchange information on matters related to subsidies in services upon the request of the other party.[15] These agreements are unlike the EU–South Africa TDCA in that they do not establish rules governing subsidies as such.[16]

Subsequent agreements such as the EU–Korea or EU–Singapore FTAs, which could be categorized as the fourth group, are notable in that they include subsidy disciplines in the chapter on competition.[17] While they incorporate some relevant provisions of the SCM Agreement,[18] they also include a provision that encourages parties to apply competition laws or otherwise to remedy or remove distortions of competition caused by subsidies.[19] Moreover, these agreements include additional provisions that expand the scope of the prohibited

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[7] Annex IX of the EU–South Africa TDCA.
[8] Article 44(1) of the EU–South Africa TDCA.
[9] Article 43 of the EU–South Africa TDCA.
[10] Article 177(3) of the EU–Chile AA.
[11] Recently, the EU and Chile started to renegotiate the existing agreement in order to modernize it.
[12] E.g., Article 344(1) of the EU–Central America AA.
[13] E.g., Article 344(2) of the EU–Central America AA. However, the reporting is required every two years.
[14] E.g., Article 344(4) of the EU–Central America AA.
[15] E.g., Article 344(3) of the EU–Central America AA.
[16] In the agreements assigned to the third category, provisions relating to subsidies are included in the chapter regarding either transparency or trade remedies, and not forming a single independent section like the EU–South Africa TDCA.
[17] However, unlike the agreements between the EU and Mediterranean countries, discussed later, those agreement do not juxtapose subsidy (State aid) disciplines with other elements of competition laws.
[18] Articles 11.10, 11.11, and 11.13 of the EU–Korea FTA; Articles 11.5 to 11.7 of the EU–Singapore FTA.
[19] Article 11.9 of the EU–Korea FTA; Article 11.8(1) of the EU–Singapore FTA. However, in the EU–Singapore FTA, the scope of such provision is to "other subsidies" that does not include prohibited subsidies listed in Article 11.7. The relationship between competition laws and subsidy disciplines is discussed later.

subsidies to include the following[20]: (i) specific subsidies granted under any legal arrangement whereby a government or any public body is responsible for covering debts or liabilities of certain enterprises without any limitation with respect to the amount of those debts and liabilities or the duration of such responsibility; and (ii) subsidies (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices or tax exemptions) to insolvent or ailing enterprises without a credible restructuring plan.[21] There are no similar provisions in the existing SCM Agreement[22] (for details, see *infra* Sections III-2 and IV-1). Like the previous agreements, these agreements also require the parties to improve transparency in the area of subsidies.[23]

Most of the agreements between the EU and Mediterranean countries, concluded at approximately the same period when the EU–Chile AA was finalized, tended to incorporate subsidy disciplines as a concept of "public aid" or "official aid" and deploy them along with the rules for competition matters (the fifth category).[24] Among them, the agreements that contain the most detailed rules require State aid rules to be assessed on the basis of the criteria resulting from the application of EU competition laws.[25] However, even those agreements specify that the rules necessary for the implementation of public aid issues shall be adopted by the Association Council within five years of the entry into force of the individual agreement.[26] Until such rules are adopted, the related provisions of GATT or the WTO agreements shall serve as the applicable rules.[27] Furthermore, when such implementing rules cannot adequately deal with a particular practice that is alleged to be incompatible with the public aid rules contained in the agreement, individual parties are allowed to take "appropriate measures." Such measures may only be adopted in accordance with the procedures and under the conditions laid down by GATT or other relevant instruments.[28] In contrast, for agreements that do not refer to public aid, the SCM Agreement would be the only applicable rule for any matter relating to subsidies.[29]

Among the agreements between the EU and South-eastern or Eastern European coun-

[20] E.g., Article 11.11 of the EU–Korea FTA. This provision will not be applied to subsidies for small and medium-sized enterprises that fulfills the given condition. Note 82 of the EU–Korea FTA.

[21] The dispute settlement procedure under the FTAs may also apply to this type of provision. See e.g., Article 11.14 of the EU–Singapore FTA.

[22] On the other hand, the impact of this provision can be assessed as not serious since the same types of subsidies may be captured even under the SCM Agreement (Ahn (2010), p. 22).

[23] E.g., Article 11.12 of the EU–Korea FTA.

[24] The EU–Algeria and EU–Lebanon AAs are two EU FTAs concluded with the Mediterranean countries that do not mention about State aid/public aid. With regards to the EU–Lebanon AA, however, it can be regarded as the rules necessary for the implantation of public aid issues that may be adopted after the entry into force of the agreement. This is because Article 24(2) of the agreement prescribes that the WTO agreements, including the SCM Agreement, can be invoked until the rules for cooperation and implementation of competition laws on the basis of Article 35(2) are adopted.

[25] Article 53(2) of the EU–Jordan AA. In addition, the Mediterranean countries are temporarily regarded as areas that are identical to those specified in Article 107(3)(a) of the TFEU when assessing State aid/public aid. E.g., Article 53(4)(a) of the EU–Jordan AA. On the other hand, the EU–Egypt and EU–Israel AAs do not contain a provision that explicitly requires the parties to interpret State aid-related provisions in line with EU laws.

[26] Therefore, Article 108 of the TFEU, which provides basic rules for the enforcement of State aid regulation, is not referred in AAs.

[27] E.g., Article 53(3) of the EU–Jordan AA.

[28] E.g., Article 53(6) of the EU–Jordan AA.

[29] E.g., Article 23 of the EU–Algeria AA.

tries, the Stabilization and Association Agreements (SAAs) with Western Balkan countries also deal with subsidy matters under the concept of "State aid" or "public aid." Similar to some of the agreements between the EU and Mediterranean countries, they require the compatibility of a particular practice with the agreement to be assessed on the basis of criteria arising from the application of EU competition rules.[30] On the other hand, contrary to the agreements between the EU and Mediterranean countries, the agreements with the Western Balkans require those countries to establish an operationally independent authority, which would be entrusted with the powers necessary for the full application of State aid rules.[31] These agreements also require the Western Balkan countries to establish a comprehensive inventory of aid schemes and align them with the criteria under the EU competition rules.[32] Moreover, although the EU's agreements with the Western Balkan countries resemble its agreements with the Mediterranean countries in that they also permit parties to adopt "appropriate measures" against a practice that is incompatible with the State aid rule in the agreements, they do not limit the scope of such measures.[33] While the EU's agreements with the Mediterranean countries only envisage the measures stipulated in the WTO agreements, the provisions in the EU's agreements with Western Balkan countries allow flexibility in the operation of "appropriate measures."[34] Because of these differences, the EU–Western Balkan SAAs may be assigned to another category (the sixth group) even though they share some commonalities.[35]

The content of the EU's agreements with Eastern European countries somewhat differs from that of the EU–Western Balkan SAAs. The closest agreement is the EU–Ukraine AA. The commonalities can be found in the following areas: the agreement adopts the expression "State aid,"[36] expects parties to use the criteria arising from the application of EU competition rules as the source of interpretation of the agreement,[37] requires Ukraine to establish an

[30] E.g., Article 73(2) of the EU–Serbia SAA. However, for certain periods after the entry into force of the agreements, the Western Balkan countries are regarded as areas that are identical to those specified in Article 107(3)(a) of the TFEU when assessing State aids. E.g., Article 73(7)(a) of the EU–Serbia SAA.

[31] E.g., Article 73(4) of the EU–Serbia SAA. Such an authority may have the powers to authorize State aid schemes and individual aid grants that are in conformity with the requirements of the agreement, as well as to order the recovery of State aid that has been unlawfully granted.

[32] E.g., Article 73(6) of the EU–Serbia SAA. The aid schemes should be aligned within 4 years from the entry into force of the agreement. On the contrary, the EU–North Macedonia SAA neither requires an establishment of an authority nor demands the alignment of aid schemes.

[33] E.g., Article 73(10) of the EU–Serbia SAA.

[34] EU's agreements with the Western Balkan countries adopt the expression that "[n]othing in this Article shall prejudice or affect in any way the taking … of countervailing measures in accordance with" the WTO agreements. Therefore, using the instruments under the WTO is merely one option. An exemption is Article 69(5) of the EU–North Macedonia SAA. This agreement, as with the EU's agreements with the Mediterranean countries, only permits to adopt "appropriate measures" that is in accordance with the WTO agreements, when the agreements are applicable to the situation.

[35] The fact that the Western Balkan countries are either distributed as candidate countries (Albania, North Macedonia, Montenegro and Serbia) or potential candidates (Bosnia and Herzegovina and Kosovo) can be assumed as one of the reasons that the State aid rules are more robust in the agreements between the EU and those countries compared to the agreements between the EU and the Mediterranean countries.

[36] E.g., Articles 262 of the EU–Ukraine AA (this provision particularly resembles Article 107 of the TFEU).

[37] Article 264 of the EU–Ukraine AA. Furthermore, where a dispute raises a question of interpretation of particular provisions of EU law, the arbitration panel in the association agreement must request the Court of Justice of the European Union to give a ruling on the question. Article 322(2) of the EU–Ukraine AA.

operationally independent authority[38] as well as a comprehensive inventory of aid schemes (along with the alignment of such schemes with the EU State aid rules),[39] and requires the independent authority to govern State aid matters although parties are not denied the right to take appropriate action in accordance with the relevant WTO provisions.[40] The EU–Moldova AA is different in that it neither requires the establishment of a comprehensive inventory of aid schemes[41] nor allows the application of trade remedies against a subsidy based on the WTO agreements. Both the EU–Ukraine and EU–Moldova AAs have a separate section on State aid that is independent from the section dealing with competition policy (titled "Antitrust and Mergers"). Unlike these agreements, the EU–Georgia AA adopts a distinct regulatory approach, despite being an agreement between the EU and an Eastern European country. Therefore, this agreement is discussed later together with the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and other agreements.

The agreements between the EU and African, Caribbean, and Pacific (ACP) countries do not contain provisions focused on subsidies or State aid as such, although they touch on agricultural export subsidies[42] and affirm the rights to rely on countervailing measures based on the WTO agreements.[43]

Due to the influence of the geographical and temporal differences on the negotiations of the aforementioned agreements and those that the EU concluded recently, the content of subsidy rules in the recent agreements significantly varies from that in the earlier deals. CETA, for instance, includes a separate chapter on subsidy-related issues (chapter seven) and embraces provisions relating to the adoption of the definition of "subsidy" laid down in the SCM Agreement,[44] the enhancement of transparency (notification obligation),[45] and the consultation procedure when subsidies (including government support related to trade in services) adversely affect the interests of the other party.[46] However, CETA does not contain a provision on the application of competition laws or otherwise to subsidy issues, which can be found in the EU–Korea FTA. The EU–Kazakhstan Enhanced Partnership and Cooperation Agreement (EPCA) and the EU–Georgia AA both include the term "subsidy"—not "State aid"—in the chapter on competition, but they only contain brief provisions. The provisions included are those embracing the definition of subsidy adopted under the SCM Agreement, calling for transparency in subsidy policies, obligating the exchange of information, and managing the consultation procedure.[47] The EU–Vietnam FTA and the EU–Japan

[38] Article 267(1) of the EU–Ukraine AA.
[39] Article 267(2) of the EU–Ukraine AA.
[40] Articles 265 and 267(1) of the EU–Ukraine AA.
[41] However, both parties of the agreement are required to align their State aid schemes with the agreement's rules. Article 341(3) of the EU–Moldova AA.
[42] E.g., Article 28 of the EU–CARIFORUM EPA.
[43] E.g., Article 23 of the EU–CARIFORUM EPA. It must be noted that the lack of State aid rules in those agreements does not mean that there is no space for State aid rules to be developed under the relationship between the EU and the ACP countries. The West African Economic and Monetary Union (WAEMU), for instance, has introduced the State aid rules. Article 88(c) of the Amended Treaty of the West African Economic and Monetary Union (the Dakar Treaty).
[44] Article 7.1 of the CETA.
[45] Article 7.2 of the CETA.
[46] Article 7.3 of the CETA.

Economic Partnership Agreement (EPA) may be distinguished from CETA, the EU-Kazakhstan EPCA, and the EU-Georgia AA in that they contain detailed provisions regarding the scope of subsidies, i.e., the introduction of provisions to expand the list of prohibited subsidies and to reintroduce "green light" subsidies.[48] However, as neither agreement makes a mention about competition laws or State aid rules, they can be assigned to the seventh category of agreements. Table 1 summarizes the categorization discussed in this chapter.

III-2. The role of competition laws in subsidy regulation

The EU has thus far adopted various approaches to the regulation of subsidies. What is noteworthy about these agreements is that some of them require the application of competition laws or State aid rules to regulate subsidies. This approach could be divided further into two: regulation based on EU State aid rules and regulation based on competition laws enforced by individual parties. The first approach can be found in agreements between the EU and Mediterranean countries, and those between the EU and South-eastern and Eastern European countries, while the second can be seen in the EU–Korea and EU–Singapore FTAs. The significance of these approaches is explored in the following sections.

III-2-1. Trends in FTAs with neighboring countries

As discussed in Section III-1, many of the agreements between the EU and Mediterranean (the fifth category) or South-eastern and Eastern European countries (the sixth category) adopt the expression "State aid" or "public aid," and juxtapose State aid with elements of competition laws such as agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings that are restrictive of competition and the abuse by one or more undertakings of a dominant position. Some agreements go even further by explicitly declaring that competition laws including State aid rules should be assessed on the basis of criteria arising from the application of corresponding EU laws. This sends a strong message that State aid rules adopted by those FTA parties would be operated in harmony with the EU competition laws.

However, these trends do not necessarily mean that the concepts in the EU competition laws would be completely incorporated into the trade agreements. For instance, the EU–Ukraine AA adopts the dual system (Borlini and Dordi (2017), p. 599). On one hand, the AA requires Ukraine to establish an operationally independent authority and entrust this authority with the powers to sanction State aid schemes as well as order the recovery of aid that has been unlawfully granted.[49] On the other hand, it also confirms the rights of FTA parties to apply trade remedies or other appropriate action against a subsidy in accordance with the

[47] Articles 206 to 209 of the EU–Georgia AA; Articles 159 to 161 of the EU–Kazakhstan EPCA. However, EU–Georgia AA does not contain a provision relating to a consultation procedure.

[48] With regards to the expansion of the prohibited subsidies and the reintroduction of "green light" subsidies, see *infra* Chapter IV.

[49] Article 267(1) of the EU–Ukraine AA. The authority to govern State aids is vested to the Antimonopoly Committee of Ukraine (for the overview of Ukraine's State aid regulation, see for example, Stuart and Roginska (2016)).

Table 1 Categories and contents of subsidy disciplines under the EU FTAs

Types	Agreements	Contents
First category	EU–South Africa TDCA	Adoption of the expression “public aid;” the application of the GATT/WTO provisions; exemplification of permissible public aids; introduction of an information provision system
Second category	EU–Chile AA	Adoption of the expression “State aid;” only introducing an information provision system
Third category	EU–Colombia–Peru–Ecuador FTA; EU–Central America AA	Adoption of the expression “subsidy;” the central discipline is an information provision; no substantive provision for subsidies
Fourth category	EU–Korea FTA; EU–Singapore FTA	Adoption of the expression “subsidy;” reference of the SCM Agreement and the addition of prohibited subsidies; best endeavor clause for competition laws; ensuring transparency
Fifth category	EU–Tunisia AA; EU–Palestinian Authority AA; EU–Israel AA; EU–Morocco AA; EU–Jordan AA; EU–Egypt AA	Adoption of the expression “public aid;” juxtaposition with competition laws (some agreements demand considering criteria of EU competition laws); enactment of implementation rules; ensuring transparency
Sixth category	EU–North Macedonia SAA; EU–Albania SAA; EU–Bosnia and Herzegovina SAA; EU–Montenegro SAA; EU–Serbia SAA; EU–Moldova AA; EU–Ukraine AA; EU–Kosovo SAA	Adoption of the expression “State aid” or “public aid;” basing on the criteria of EU competition laws; establishment of operationally independent authority for State aid regulation; ensuring transparency; establishment of comprehensive inventory of aid schemes
Seventh category	EU–Georgia AA; CETA; EU–Kazakhstan EPCA; EU–Vietnam FTA; EU–Japan EPA	Adoption of the expression “subsidy;” incorporation of WTO disciplines; some agreements contain a provision adding prohibited subsidies
Others	EU–Mexico GA; EU–Lebanon AA; EU–Algeria AA; EU–Iraq PCA; Agreements with ACP countries (e.g., EU–CARIFORUM EPA)	No specific provisions regarding subsidies

relevant WTO provisions.[50]

How does this dual structure operate in effect? Under the SAAs and AAs, individual independent authorities—the European Commission in the case of the EU and the national authorities established under the respective agreements in the case of the other parties to the agreements—have the primary responsibility to implement State aid rules under the respective agreements in line with the practices of EU laws. In that process, as two authorities may cooperate in the implementation,[51] an authority can partly intervene and influence the actions of the other party's authority. Moreover, under many agreements, when one party expresses concerns about the infringement of State aid rules, a consultation can be conducted under a framework in which both parties participate, e.g., the Stabilization and Association Council.[52] However, the European Commission is not generally empowered to review any decision made by the national authorities established by the parties to the agreement (Cremona (2003), p. 282). Therefore, if a party to an agreement believes that the other party's State aid regulation is insufficient, it needs to adopt trade remedies under the WTO agreements, which is the secondary structure in the system.[53] Those trade remedies are also available in a situation where the authority set up by the other party does not undertake any action with respect to the State aid in question, since those options are not contingent on any particular action by related authorities (Cremona (2003), p. 283).

In sum, State aid rules included in the agreements with neighboring countries adopt an approach that is primarily based on State aid rules developed under EU laws, but, at the same time, they accommodate a system that complements the implementation of those rules by referring to the mechanism under the WTO agreements. This means that the two systems may not only coexist but also cross-fertilize since the invocation of the WTO system is triggered by the State aid rules underpinned by EU laws.[54] The dual structure adopted in agreements between the EU and Mediterranean or South-eastern and Eastern European countries may be incorporated in agreements with other countries, and in fact, as discussed later, there exists some signals for such a trend. It remains to be seen whether this approach would spread, and, if it does, to what extent.

III-2-2. Trends in FTAs with non-neighboring countries

Among the EU FTAs with non-neighboring countries, the EU–Korea FTA is remarkable in that it has introduced a provision (Article 11.9) that encourages the application of competition laws or otherwise in regulating subsidies. While "subsidy" is defined as that which

[50] Article 265 of the EU–Ukraine AA. In addition, a party may address the impact of subsidies by adopting a countermeasure (suspension of obligation under the agreement) that is generally available when the other party infringes particular obligation of the agreement. E.g., Article 315(2) of the EU–Ukraine AA.

[51] While there is no provision in the SAA that specifically prescribes the cooperative execution of State aid rules, such cooperation can be conducted based on the general consultation clause (e.g., Article 129(2) of the EU–Serbia SAA). See, Cremona (2003), p. 282.

[52] E.g., Article 73(10) of the EU–Serbia SAA.

[53] Such remedies may include the measures other than those provided under the WTO. E.g., Article 73(10) of the EU–Serbia SAA.

[54] Obviously, the development of relationship between two systems depends on how they operate in the real practices.

fulfills the conditions set out in the SCM Agreement,[55] the agreement requires the parties to make their "best endeavors" to remove the distortions of international competition[56] caused by subsidies through the application of competition laws or otherwise.[57] As this provision is placed at the top of the section on subsidies in the form of a "principles" clause, it could be understood that the agreement views as ideal a situation where subsidy-driven distortions of competition are mainly addressed through competition laws or related domestic laws. However, at the same time, the EU–Korea FTA not only embraces the definition under the SCM Agreement, but also confirms the right to take appropriate action under the WTO agreements.[58] In light of these aspects, the FTA maintains a strong connection with the WTO. Nonetheless, Article 11.9 still deserves attention because although the provision only requires the "best endeavors," it provides an opportunity to explore the possibility of tackling the subsidy issue through the competition law-related mechanism in the international context.

The EU–Singapore FTA shares common features with the EU–Korea FTA in that both contain a provision requiring parties to make efforts to apply competition laws or other laws to subsidy matters. The scope of the provisions, however, is slightly different in the two agreements. The application of this provision in the EU–Singapore FTA is limited to "other subsidies" that are not classified as prohibited subsidies, while the EU–Korea FTA does not include a similar restriction.[59] Hence, under the EU–Singapore FTA, only the application of the WTO and the FTA rules are the specified options for addressing issues relating to prohibited subsidies. The EU–Singapore FTA also includes an additional provision that requires the exchange of information when requested as well as the holding of dialogue between parties within two years after the entry into force of the agreement with a view to developing rules applicable to subsidies other than prohibited subsidies.[60]

In contrast to these two agreements, which were grouped into the fourth category (see Table 1 and the previous Chapter), none of the agreements listed in the seventh category contain a provision requiring the application of competition laws or otherwise. Nonetheless, deals such as the EU–Vietnam FTA place the topic of subsidy disciplines in the chapter on competition. This fact is intriguing since the idea of competition laws may provide a context for interpreting the provisions regarding subsidies. One example is the consultation mechanism prescribed in Article 10.8 of the FTA. The second paragraph of that provision stipulates that when a party requesting a consultation considers that the subsidy in question is

[55] Article 11.10 of the EU–Korea FTA.

[56] The provision uses the phrase distortions of competition caused by subsidies "in so far as they affect international trade" rather than "in so far as they affect trade between parties." This indicates, read in conjunction with note 83 in the same section, that the provision includes the distortion of competition in third markets (export markets).

[57] The expression "competition laws or otherwise" signifies that the meaning of this expression is broader than the definition of competition laws under Article 11.2 of the EU–Korea FTA. Even the meaning of "competition laws" in the context of the section on subsidies can be broader since the definition of Article 11.2 does not cover that section.

[58] Article 11.13 of the EU–Korea FTA.

[59] Article 11.8(1) of the EU–Singapore FTA.

[60] Article 11.8(2) of the EU–Singapore FTA. The EU–Ukraine Partnership and Cooperation Agreement (PCA), the predecessor of the AA, as with the EU–Korea and EU–Singapore FTAs, also comprised a provision requiring the application of (instead of "use their best endeavours," it uses the phrase "work to") competition laws or otherwise. Article 49 of the EU–Ukraine PCA.

negatively affecting its trade or investment interests in a disproportionate manner, the other party shall make its "best endeavors" to eliminate or minimize those negative effects caused by the subsidy in question. When this provision is read in conjunction with the fact that this provision is included in the chapter on competition, it becomes possible to construe any act to "eliminate or minimize" any distortive effects as including the application of competition laws or otherwise. Despite the minor differences in expression, the same thing can be said of Article 159 (4) of the EU–Kazakhstan EPCA.[61]

Unlike these agreements, the connections between subsidy disciplines and competition laws in CETA and the EU–Japan EPA seem to be more diluted.[62] In both agreements, subsidy disciplines are constructed independently from the chapter relating to competition, and thereby competition laws can hardly be regarded as a context for interpreting provisions under the chapter on subsidy. An evidence for the weak connection can also be found in Article 12.1 of the EU–Japan EPA, i.e., the principle provision, under which the grant of subsidies should be eschewed when the subsidies "have or could have a significant negative effect on trade or investment between the Parties." The corresponding provision in the EU–Vietnam FTA adopts the phrase "competition and trade" instead of "trade or investment," implying that this agreement is more focused on the competitive aspect even under the subsidy disciplines.[63]

What would be the impact on the parties when a provision that encourages the application of competition laws or otherwise is incorporated in trade agreements? The inclusion of competition laws may imply that a certain authorized institution should supervise the subsidization procedure right from the stage where subsides are granted until the effects of those subsidies become apparent. In such cases, an existing institution or a newly established institution may undertake a surveillance role. The existing authority could be either the competition authority, if there is one, or any other governmental institution that governs the recipient of subsidies. In addition, as the subsidy issues envisaged under the framework of the FTAs are cross-border in nature, such domestic institutions may cooperate with their EU counterpart, i.e. the European Commission. Unfortunately, the competition law-related provisions in the EU–Korea and EU–Singapore FTAs are contained in the clause on "best endeavors," making it difficult to precisely deduce the impact of the provisions. Nonetheless, the introduction of such provisions may be expected to entail the establishment of a system where authorized domestic institutions actively intervene and play a role in the entire process of subsidization.

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[61] See also, Article 156 of the EU–Kazakhstan EPCA. Moreover, the similar provision can be found in new EU–Mexico GA (Article X.10 in the Section for Subsidies, Chapter on Competition). It is interesting to note that the time limit for the elimination of adverse effects is set as one year in this agreement.

[62] Although the date of entry into force of CETA and the EU–Japan EPA is earlier than the EU–Singapore FTA, this Chapter treats the latter agreement as one that established earlier than the former two agreements. This is because the conclusion of negotiations of the EU–Singapore FTA was earlier than the other two agreements. More specifically, as to the EU–Singapore FTA, the goods and services negotiations were concluded in 2012 and invest protection negotiations were concluded in 2014. Ministry of Trade and Industry, Singapore, "The European Union–Singapore Free Trade Agreement," https://www.mti.gov.sg/Improving-Trade/Free-Trade-Agreements/EUSFTA (as of 18 February, 2020)

[63] Article 10.4 of the EU-Vietnam FTA.

Then, what kinds of subsidies fall under the application of competition laws or otherwise? As the aim of the competition law of a particular country is to promote competition within its territory, a subsidy that can be a subject of competition laws should be mainly related to the domestic market.[64] To that extent, two types of subsidies become relevant: (i) a domestic subsidy that distorts the domestic market; and (ii) a subsidy that is granted by a foreign country but distorts the domestic (importing) market. However, even the EU competition law (State aid rules) does not cover the second type of subsidy, as Article 107 of the Treaty on the Functioning of the European Union (TFEU) only covers "aid granted *by a Member State* or *through State resources*."[65] In contrast, the EU State aid rules can be applied to aids that are granted to producers of goods, which are mainly exported to other countries (Bacon (2017), p. 87; Hofmann and Micheau (2016), p. 155).[66] Nonetheless, in general, the competition laws of the subsidizing country are unlikely to be applied when the distortion of competition is mostly occurring at the export (foreign) market (Papadopoulos (2010), pp. 238-241, Anderson et al. (2018), p. 40). In this regard, a situation where a subsidy is granted domestically but affects both the domestic and foreign market (other party's market) can be presumed to be within the applicable boundary of competition laws. Moreover, the same thing can be said of a subsidy that affects the domestic market as well as third country markets or the international market. The fact that Article 11.9 of the EU–Korea FTA adopts the phrase "affect international trade" in lieu of "trade between the parties" in describing the applicable boundary of competition laws[67] indicates that subsidies with broader international effects could fall within the purview of competition laws.

Under the WTO framework, Article 5(c) of the SCM Agreement applies to a subsidy that affects the domestic market (through Article 6.3(a) of the SCM Agreement), and to a subsidy that distorts competition in third country markets (through Article 6.3(b) of the SCM Agreement[68]).[69] Under the WTO's mechanism, however, the *exporting member* should identify the extent of a subsidy and its effects on the respective markets. In addition, for a subsidizing member, as the provisions regarding "green light" subsidies have expired,[70] it is now more difficult to justify a subsidy that has been found to distort trade. This would create

[64] As competition laws govern competitive relationship among private entities, at the first glance, the subsidy rules must be distinguished from competition laws. Nevertheless, competition laws in many countries includes public bodies or governmental institutions under the scope of competition laws insofar as they engage in economic activities. In the case of Japan, the Supreme Court admitted that local governments fall under the "enterprise" in the Antimonopoly Act (AMA). Supreme Court, 14 December 1989, 43 Minshu 2978 (*Tokyo Slaughterhouse*). See also Wakui (2018), p. 48.

[65] Emphasis added. The SCM Agreement can be applied to the circumstance of (ii).

[66] Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-00959, para. 35. See also, Case C-494/06 *Commission v Italy and Wam* [2009] ECRI-3639, para. 62.

[67] Note 83 to Article 11.11 of the EU–Korea FTA explains "international trade of the parties" as comprising both domestic and exports markets. Although this note is not attached to Article 11.9, it must be noted that this provision also uses the phrase "international trade."

[68] Articles 6.3(c) and 6.3(d) of the SCM Agreement would also be applied depending on the effects of subsidies.

[69] When a subsidy is granted contingent upon the use of domestic over imported goods, such subsidy would be identified as a prohibited subsidy under Article 3.1(b) of the SCM Agreement. In a similar vein, when a subsidy policy discriminates the domestic and imported products, such a subsidy will become a subject of Article III of GATT (insofar as the same subsidy does not fulfill the applicable conditions of Article III:(8)(b) of GATT). Even if the subsidy does not fall under any other provisions under the SCM Agreement, theoretically, Article 5(b) of the agreement may be invoked due to the "nullification or impairment of benefits" of an invoking Member.

an incentive to interpret the SCM Agreement in a manner that deviates from the intrinsic meaning of the agreement. The application of competition laws or otherwise, in comparison, enables the domestic specialized body to address the matter based on their expert knowledge. Moreover, as with the case of the EU State aid rules, the compatibility of subsidies/aids can be mostly assessed under the wide-ranging exceptions[71] or be approved conditionally ("conditional decision"),[72] allowing the competitive effects of aids to be examined in a more light-touch fashion.[73] With regard to the enforcement issues, while the SCM Agreement only requires the subsidizing member to remove the adverse effects or withdraw the subsidy,[74] the EU State aid rules encompass various options ranging from *ex ante* investigation of new aids to the adoption of a "recovery decision," which permits recovery of aid from the beneficiary,[75] or on-site monitoring for supervising the compliance of decisions.[76] In light of these elements, which enable the flexible regulation of subsidies, it seems rational for the EU to require the FTA partners (as well as itself) to address subsidy issues under the framework of competition laws or otherwise in preference to the SCM Agreement.[77]

Furthermore, application of competition laws and otherwise to subsidies related to services would complement the lack of related rules under international frameworks. For instance, subsidies that are readily available to hotels providing more services to foreign tourists can be taken as one example of subsidies related to mode 2 of service supply (Geloso Grosso (2008), p. 18).[78] GATS, however, cannot accommodate this situation.[79] Even the newly introduced concept of "non-commercial assistance" under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the Agreement between the United States of America, the United Mexican States, and Canada (USMCA), the details of which are discussed in Chapter V, views the abovementioned form of services subsidies as *not* incompatible with the agreements.[80] Depending on the circumstances, this type of subsi-

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[70] Article 31 of the SCM Agreement.

[71] E.g., Articles 107(2) and 107(3) of the TFEU.

[72] Article 9(4) of the Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9 [hereinafter Procedural Regulation].

[73] E.g., Case 730/79 *Philip Morris* [1980] ECR 2671, paras. 11-12. See also, Rubini (2009), p. 393.

[74] Article 7.8 of the SCM Agreement.

[75] Article 16 of the Procedural Regulation. Under the WTO, there are strong criticisms, from WTO members (WTO (2000), pp. 5-9), against allowing the repayment of granted export subsidies to be included as an implementation method of recommendation by the Dispute Settlement Body, to which the Panel showed an affirmative position. Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, para. 6.39.

[76] Article 27 of the Procedural Regulation.

[77] Admittedly, as the purposes of WTO's subsidy disciplines and EU's State aid rules are different, it is unwise to simply assume those two systems as alternatives. On the other hand, it seems to be natural, from the EU side, to have incentives to regard the State aid rules, which has succeeded in regulating subsidy issues within the EU market, as an alternative or supplement for the subsidy regulation under the WTO.

[78] When a hotel that is providing services to foreign tourists is foreign-owned, the form of supply may also be categorized into mode 3. Therefore, the domestic subsidies provided to hotels can be related to mode 3. See Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R, note 808.

[79] The subsidies would infringe neither the most-favored-nation treatment nor national treatment obligations insofar as they are granted equally to all hotels in a certain territory. However, such subsidies may distort the international competition among services providers since the effects of subsidies would attract, through the provision of a discounted accommodation fee, the foreign tourist that would have travelled different places or their own countries.

dies might fall under the application of competition laws or State aid rules.

In fact, aside from the EU examples, there are cases that attempt to treat subsidy issues under the framework of competition laws or State aid rules. Russia's antimonopoly legislation, the Federal Law on Protection of Competition,[81] requires that a State or municipal preference be granted based on preliminary consent from an antimonopoly body.[82] When the preference is estimated not to be resulting in the elimination or prevention of competition, the Federal Antimonopoly Service decides to approve the granting of assistance.[83] It is reported that this Russian State preference regulation is functioning in a relatively favorable manner (OECD (2011), p. 186).

While the US does not have a framework that directly regulates State and local subsidies (OECD (2011), p. 217), granting of subsidies by State governments may violate the Commerce Clause of the US Constitution. The leading case on this issue is *Cuno v. Daimler-Chrysler, Inc*. In this dispute, the City of Toledo, Ohio, gave DaimlerChrysler various tax credits when the company agreed to build a new vehicle-assembly plant within the city. The tax credits obtained by DaimlerChrysler were claimed to have given a favorable treatment to in-state investment and discriminated against interstate commerce. The US Court of Appeals for the Sixth Circuit ruled that investment tax credit cannot be upheld under the Commerce Clause.[84] However, it must be noted that while there is an established practice in the US that ordinarily questions discriminative State tax policies, it is equally true that subsidies granted in the form of direct payments will not be treated as violations of the Commerce Clause.[85] Therefore, some evaluate this US practice as a "laissez-faire" approach (Sykes (2010), p. 491, Lovdahl-Gormsen (2019), p. 124) and distinguish it from the EU approach. Nevertheless, this does not imply that the competitive perspective has no role to play in US State subsidy policies. For instance, a policy document such as a report of the Federal Trade Commission can serve as a useful foundation for States in deciding their subsidy related policies.[86] This kind of cross-reference may promote the interaction between competition and subsidy policies.

In Japan, there exist cases, albeit limited in number, where the competition law has been applied to actions involving subsidization. A consultation case, published in 2016, involving the Japan Fair Trade Commission (JFTC) is one example. In this case, subsidies were provided by an agricultural cooperative solely to its members who made combined purchases of two products that came under the joint procurement project operated by the cooperative. The JFTC advised the cooperative that this course of action may infringe Article 19 of the Antimonopoly Act[87] (prohibition of unfair trade practices) because it falls under one of the

[80] The non-commercial assistance provided to domestic service providers are deemed not to cause adverse effects on the interests of other parties. E.g., Article 17.6(4) of the CPTPP. In addition, the rules regarding "non-commercial assistance" only applies to the service suppliers that fall under the definition of a state-owned enterprise.

[81] Federal Law no. 135-FZ of July 26, 2006, on Protection of Competition.

[82] Article 19(3) of the Federal Law on Protection of Competition.

[83] Article 20(3) of the Federal Law on Protection of Competition.

[84] *Cuno v. DaimlerChrysler, Inc*., 386 F. 3d 738, 746 (6th Cir. 2004).

[85] See, *New Energy Company of Indiana v. Limbach*, 486 U.S. 269, 278 (1986).

[86] For the example of the US Supreme Court's reference of Federal Trade Commission's report, see, OECD (2011), p. 218.

practices designated as unfair trade practices, namely tie-in sales[88] (Japan Fair Trade Commission (2016), pp 29-30).[89]

In addition, the competitive neutrality framework, a concept that is associated with competition policies may also be used to address subsidy issues. As competitive neutrality frameworks mainly deal with government agencies and state-owned enterprises (SOEs), these entities could also be targeted by subsidy regulations under such frameworks. Although the details of policies differ among countries, such policies are prevalent in countries like Brazil, Australia, Peru, and Norway (OECD (2011), p. 24).

As seen above, there are attempts to address subsidy issues through competition laws or related laws in various ways. This signifies the potential for international subsidy regulation and domestic competition laws to function in a complementary manner.[90] As the provision to promote the application of competition laws or otherwise under EU FTAs still remains as a "best endeavors" clause, the impact of those new rules seems to be modest. Nonetheless, the presence of such guiding principles in FTAs is expected to stimulate discussion on subsidy regulation in the context of the interrelation between international subsidy disciplines and competition laws.

III-2-3. The possible spread of the competition law/State aid rules approach

Will the approach adopted in the existing EU FTAs, i.e. subsidy regulation based on State aid rules, spread further and find a place in the future FTAs? There are some positive indications for such a thing to happen. In the first place, the EU FTA policy is driven by strong pressures from within the EU to introduce State aid rules in trade agreements. This stems from the concern that the competitiveness of EU firms would deteriorate because of the disparities between the internal EU market and outside of it, as a result of which the EU Member State governments and firms are exposed to rigid internal State aid rules whereas competitors located outside the EU are not (Blauberger and Krämer (2013), p. 173). Accordingly, an incentive to impose the same burden on firms outside the EU market is always prevalent.

Neighboring countries that have introduced State aid rules during the course of the conclusion of trade agreements with the EU may also incorporate State aid rules in trade agreements among themselves. Moreover, in the case of agreements between a neighboring country and other countries, a neighbor like Ukraine, which is required by the EU–Ukraine AA to establish an institution for State aid regulation, may have a strong incentive to demand that its trade partners follow the same path. In light of these factors, it is not an exaggeration

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[87] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of April 14, 1947.

[88] Paragraph 10 of the Designation of Unfair Trade Practices, Fair Trade Commission Public Notice No. 15 of June 18, 1962.

[89] For more consultation cases, see for example, "Consultation cases by local governments" published by the JFTC in 2007 (Japan Free Trade Commission (2007), written in Japanese). Some consultation records related to the subsidy issues are also filed in the report. For Japan's mechanism for evaluation of the various ministerial policies, see OECD (2018), pp. 204-205.

[90] Likewise, as undue non-application of competition laws may also be considered as a type of subsidy, the introduction of provision promoting the application of competition laws would have a benefit to restrain such form of governmental supports becomes prevalent.

to say that State aid rules are likely to spread through these "domino effects."[91]

On the other hand, the impetus for promoting State aid rules seems to be weak among parties to agreements that mention neither competition laws nor State aid rules. Not only that, even the trend of referring to competition laws in the context of subsidy regulation in the EU FTAs, which can be found in the EU–Korea and EU–Singapore FTAs, is struggling to maintain its consistency. Agreements that followed those two agreements, such as CETA or the EU–Japan EPA, did not contain similar provisions, making the future development of such a provision unpredictable.[92]

Looking at FTAs concluded by parties other than the EU, it can be seen that there is no apparent example that connects competition laws to subsidy issues. According to Anderson et al., only 26% of all FTAs incorporate subsidy disciplines in their chapter on competition policy, and most of them are EU agreements (Anderson et al. (2018), p. 31). The attempt to connect competition laws with subsidy disciplines is therefore primarily an EU initiative,[93] and therefore, a discussion on the interrelationship between competition laws and subsidy disciplines is not expected to become vigorous all of a sudden. Nevertheless, in light of the current gradual development of subsidy disciplines, the examination of the EU approach cannot be called trivial.

IV. Demarcation of Illegal and Legal Subsidies

IV-1. Expanding the list of prohibited subsidies

As discussed in Chapter II, there have been many proposals to expand the list of prohibited subsidies under the SCM Agreement. In this regard, the previous EU FTAs have added two types of subsidies: (i) subsidies granted under legal arrangements whereby a government or any public body is responsible for guaranteeing debts or liabilities of certain enterprises without any limitation to such guarantee; and (ii) subsidies for restructuring an ailing or insolvent enterprise without the enterprise having prepared a credible restructuring plan. Inclusion of this provision is particularly salient in agreements that were concluded recently, e.g., Article 12.7 of the EU-Japan EPA.[94]

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[91] However, it is pointed out that the incentives for the rigid operation of State aid rules are not necessarily strong with regard to the countries that are not envisioned to join the EU in the short term such as the Mediterranean countries (Papadopoulos (2010), p. 123). Moreover, even for the countries that are showing expectations to join the EU, the operation of related rules is reported as not impressive as prospected (Popović and Caka (2017)). These indicate that the momentum for the spread of State aid rules by countries other than the EU seems to be not energetic so far.

[92] The European Free Trade Association (EFTA), most members of which have adopted State aid rules through the system of the European Economic Area (EEA), contemplates the application of subsidy disciplines under the WTO in their FTAs with other countries. E.g., Article 2.12 of the EFTA–Philippines FTA. The exception was the EFTA-Palestinian Authority FTA (Article 17). See also the draft text of the newly agreed EU–Mercosur Trade Agreement, https://trade.ec.europa.eu/doclib/press/index.cfm?id=2048 (as of 28 February, 2020).

[93] The US FTAs do not contain substantive provisions regarding subsidies, notwithstanding the adoption of some provisions relating to procedural aspects (e.g., Article 10.7 of the Korea–US FTA) or institutions (e.g., Article 10.8 of the Korea–US FTA). However, as mentioned in *supra* note 43, there is an example that models after the EU State aid rules in the African regional community.

The EU-Singapore FTA also includes a similar provision, but it additionally explains that the subsidies are not prohibited when the subsidizing party, upon the request of the complaining party, "has demonstrated that the subsidy in question does not affect trade of the other Party nor will be likely to do so."[95] Therefore, the burden to prove that the subsidies at issue do not have an adverse effect on the complaining party rests with the subsidizing party, and unless the latter succeeds in proving the absence of any adverse effects, those subsidies will be prohibited[96] (Borlini and Dordi (2017), p. 573). In contrast to these FTAs, some agreements like CETA and the EU–Kazakhstan EPCA do not contain such a provision.

The second type of prohibited subsidies, namely subsidies granted to an ailing or insolvent enterprise, was included based on the EU's internal State aid law, *inter alia* the "Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty" published by the European Commission in 2014 (Borlini (2016), p. 157).[97] The EU FTAs are expected to introduce the analytical method adopted under this guideline or its predecessor (Jarosz-Friis et al. (2010), p. 80). In addition, both types of proposed prohibited subsidies comport with those submitted in the Doha Round negotiations by the EU[98] (Borlini (2016), p. 157).[99]

Moreover, the EU presented the same proposal in its new Concept Paper that calls for the modernization of the WTO (European Commission (2018), pp. 4-5), reflecting its attempt to incorporate the same concept in the WTO. Likewise, the joint statement on the fourth EU-Japan-US Trilateral Meeting of the Trade Ministers advocates the establishment of rules that can effectively regulate various subsidies, including the types of prohibited subsidies proposed by the EU.[100] These corroborate the EU's contentious engagement to multi-lateralize the expansion of prohibited subsidies through multiple channels.

Some countries, including the US, are taking a syntonic stance toward the EU on this point. For instance, the USMCA, which was signed in November 2018, contains a provision similar to the one in the aforementioned EU FTAs in the chapter dealing with issues relating to SOEs. The agreement treats subsidies provided to SOEs as "non-commercial assistance" and prohibits the following forms of assistance: (i) loans or loan guarantees provided to an uncreditworthy SOE; (ii) assistance provided to an SOE that is insolvent or on the brink of

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[94] See also Article 11.11 of the EU–Korea FTA and Article 11.7(2) of the EU–Singapore FTA. The EU–Vietnam FTA permits granting these kinds of subsidies under certain conditions (Article 10.5(10)).

[95] Article 11.7(2) of the EU-Singapore FTA.

[96] The chapeau of Article 12.7 of the EU–Japan EPA provides as "subsidies of a Party that have or could have a significant negative effect on trade or investment between the Parties shall be prohibited." This expression suggests that the burden of proof rests with the party that is claiming against the subsidies. Article 11.11 of the EU–Korea FTA adopts the same structure.

[97] Communication from the Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal of the European Union, C249/01 (2014).

[98] WTO Negotiating Group on Rules, *Submission of the European Communities*, TN/RL/GEN/135 (24 April, 2006).

[99] However, those prohibited subsidies added in EU FTAs are not exactly the same with those proposed in the context of the WTO. The US is also proposing the expansion of prohibited subsidies in the WTO negotiations. See WTO Negotiating Group on Rules, *Proposal from the United States*, TN/RL/GEN/146 (5 June, 2007).

[100] Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, https://www.meti.go.jp/press/2018/09/20180925004/20180925004-2.pdf. This proposal was adopted as a formal agreement among three trade ministers in January 2020. See Joint Statement of Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, https://www.meti.go.jp/press/2019/01/20200114007/20200114007-2.pdf.

insolvency and does not have a credible restructuring plan; and (iii) conversion of the outstanding debt of an SOE to equity in circumstances where this would be inconsistent with the usual investment practice of a private investor.[101] These categories more or less overlap with the additional prohibited subsidies indicated by the EU.[102] On the other hand, the categorization of prohibited non-commercial assistance cannot be found in the TPP/CPTPP.

These developments——the EU's Concept Paper for the modernization of the WTO, the joint statement on the trilateral trade ministers meeting, and the USMCA——suggest that the current list of prohibited subsidies under the SCM Agreement be expanded and then incorporated in other trade agreements, and that the expanded list be eventually enshrined in the multilateral system in the future.[103]

IV-2. Enumeration of "green light" subsidies

IV-2-1. The concept of "public policy objectives"

The EU's intent to expand the scope of the so-called "green light" subsidies can be found in its FTA policy.[104] In the case of the EU–Japan EPA, the "principles" provision specifies that the parties recognize that subsidies may be granted "when they are necessary to achieve public policy objectives."[105] This underpins the basic position that subsidies hold some legitimacy in a particular situation. There are many related provisions in the agreement that support the basic understanding embedded in the "principles" provision. The "scope" provision specifies that the chapter regarding subsidies only applies to subsidies that are related to "economic activities."[106] Furthermore, "subsidies granted to enterprises entrusted by the government with the provision of services to the general public for public policy objectives" as well as "subsidies granted to compensate the damage caused by natural disasters or other exceptional occurrences" are excluded from the scope of the same chapter.[107] In addition, the provision regarding prohibited subsidies does not apply to "subsidies granted temporarily to respond to a national or global economic emergency."[108] A "general

[101] Article 22.6(1) of the USMCA. This provision does not apply to non-commercial assistance provided to an SOE engaged in the production of electricity. Likewise, SOEs that are primarily engaged in the construction of general infrastructure are out of the scope of such provision, provided such SOEs fulfil the given conditions. Note 13 of Article 22.6 of the USMCA.

[102] There also exist some differences. While many of the EU proposals prohibit the provision of prescribed subsidies when they are demonstrated that they have a significant negative effect on trade or investment between the parties (see *supra* note 96), the USMCA's non-commercial assistance clause does not entail such a requirement. On the other hand, the USMCA's non-commercial assistance clause does not apply to assistance provided to SOEs primarily engaging in the supply of services (see *infra* Section V-2).

[103] Admittedly, since there exists a number of countries that have expressed opposition to the expansion of prohibited subsidies under the negotiations at the WTO, such trend may not be multi-lateralize readily (e.g. WTO (2011), p. 37). In order to predict whether the rules under the EU FTAs multi-lateralize or not, it seems necessary to wait a little more until the rules in FTAs accumulate further.

[104] To be exact, "green light" subsidies are prescribed as the "non-actionable subsidies" under the SCM Agreement (Article 8.1). Notwithstanding this, for the sake of discussion, the phrase "green light subsidies" is used in a broad sense in this paper to include subsidies that are clearly permitted to grant under the trade agreements, and those that do not fall under the application of the related provisions.

[105] Article 12.1 of the EU–Japan EPA.

[106] Article 12.3(1) of the EU–Japan EPA.

[107] Articles 12.3(2) and 12.3(3) of the EU–Japan EPA.

exceptions" clause is also included in the chapter on subsidies indicating that Article XX of GATT and Article XIV of GATS are to be incorporated into the EPA.[109] The EU–Vietnam and EU–Singapore FTAs adopt a similar structure (Table 2). However, these two agreements slightly differ from the EU–Japan EPA in that they include some of the subsidies listed above as permissible grants—in other words, recognize those subsidies as necessary to achieve public policy objectives—rather than exclude them from the scope of those agreements.[110]

As shown above, the EU's recent FTAs with Asian countries tend to include sophisticated provisions for permissible subsidies.[111] If there is a difference in scope between those provisions and the general exemptions clauses (like the one in GATT), it becomes more likely for the former to be invoked. This underscores the necessity to clarify the precise meaning and content of the "public policy objectives" and related provisions.

While no agreement contains a determinable definition for "public policy objectives," the EU–Vietnam FTA adopts an illustrative list. According to the list, the "public policy objectives" for which subsidies may be granted include: (a) making good the damage caused by natural disasters or exceptional occurrences; (b) promoting the economic development of areas where the standard of living is abnormally low or where there is serious underemployment; (c) remedying a serious disturbance in the economy of one of the parties; (d) facilitating the development of certain economic activities or of certain economic areas, including subsidies for research, development, and innovation purposes, creation of employment, environmental protection, and favoring small and medium-sized enterprises; and (e) promoting culture and heritage conservation.[112] While the EU–Japan EPA only contains provisions corresponding to (a) and (c),[113] the other elements may also be included in the concept of "public policy objectives" in that agreement. In the case of the EU–Singapore FTA, which adopts a slightly different expression than "public policy objectives," namely "objective of public interest," there are two types of permissible subsidies in addition to those contained in the EU–Vietnam FTA. Those are subsidies that have a social character and granted to individual consumers, and subsidies to promote the execution of an important project of regional or bilateral interest.[114]

Moreover, as shown in Table 2, the content of "objective of public interest" under the EU–Singapore FTA is quite analogous to the exceptions listed in the TFEU. Because of this similarity, the interpretation of those provisions seems to develop by taking into account the

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[108] Article 12.3(6) of the EU–Japan EPA.

[109] Article 12.9 of the EU–Japan EPA. While the relationship between Article XX of GATT and the SCM Agreement is an open question in the context of the WTO (see e.g., Coppens (2014), pp. 192-195), the EU–Japan EPA incorporates WTO's general exceptions clauses in the chapter on subsidies by concisely referring to them.

[110] Annex 11-A of the EU–Singapore FTA; Article 10.4 of the EU–Vietnam FTA.

[111] EU's stance materialized in the FTAs is in line with its position supporting the reinstallation of Article 8.1 of the SCM Agreement under the Doha round negotiations (Coppens (2014), p. 36).

[112] Article 10.4(2) of the EU–Vietnam FTA.

[113] More specifically, subsidies classified as category (c) can only escape the application of provision pertaining to prohibited subsidies. Article 12.3(6) of the EU–Japan EPA.

[114] Annex 11-A of the EU–Singapore FTA.

Table 2 Provisions relating to green light subsidies in EU FTAs

	EU–Japan	EU–Vietnam	CETA	EU–Singapore	EU–Kazakhstan	EU–Georgia	EU–Korea	TFEU
Principles	12.1	10.4(1)						
Application to economic activities	12.3(1)	10.5(5)						
Provision of services to the general public	12.3(2)	10.5(4)		11.7(4), Annex 11-A(2)(f)			11.11(b)	106(2)
Natural disasters	12.3(3)	10.4(2)(a)		Annex 11-A(2)(b)				107(2)(b)
Serious disturbance in the economy	12.3(6)	10.4(2)(c), 10.9(3)		11.7(3), Annex 11-A(2)(d)				107(3)(b)
Regional economic development		10.4(2)(b)		Annex 11-A(2)(c)				107(3)(a)
Development of certain economic activities		10.4(2)(d)		Annex 11-A(2)(e)				107(3)(c)
Culture and heritage conservation	12.9	10.4(2)(e)	7.7	Annex 11-A(2)(g)				107(3)(d)
Subsidies with social character				Annex 11-A(2)(a)				107(2)(a)
Important projects				Annex 11-A(2)(h)				107(3)(b)
General exceptions	12.9							
Proportionality					159(3)			
Subsidies to Coal industry				11.7(4)			11.11(b)	

EU practices.[115]

IV-2-2. The concept of "services to the general public"

In the EU FTAs, the chapter regarding subsidies does not apply to subsidies granted to enterprises that have been entrusted by the government with the responsibility of providing "services to the general public" for the achievement of public policy objectives.[116] The expressions used in the agreements are slightly different; the EU–Vietnam FTA adopts the expression "particular tasks of public interest,"[117] whereas the EU–Singapore and EU–Korea FTAs use the term "public service obligation."[118] For the sake of discussion, in this section, the expression "services to the general public" is used to describe the same idea.[119]

The concept of "services to the general public" may have been inspired by the idea of "services of general economic interest" (SGEI) developed under EU law. Article 106 (2) of the TFEU stipulates that "[u]ndertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, *in so far as* the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them…" (Emphasis added).

There is no explicit definition of SGEI under the EU treaties, and EU Member States are believed to have wide discretion in deciding what can be regarded as SGEI. In general, universal services such as telecommunication and postal services are considered as SGEI (Bacon (2017), p. 109; Hancher, et al (2016), p. 252).

However, since Article 106 (2) of the TFEU does not specifically deal with State aid, its relationship with the State aid rule, i.e., Article 107 of the TFEU, became an issue under EU law. The current understanding is as follows (Bacon (2017), pp. 55 and 110; Hancher, et al (2016), pp. 248 and 260): First, before examining whether Article 106 (2) can be applied to compensation (State aid) for a service that might fall under the category of SGEI, it needs to be seen whether such compensation fulfills all of the so-called *Altmark* conditions (the details of which are discussed in the next paragraph). If the compensation for the service at issue satisfies the conditions, the State aid rule no longer applies (it does not constitute State aid). However, even for aid that does not fulfill the *Altmark* conditions, the possibility of application of Article 106 (2), as well as that the compensation is considered to be compatible with the internal market remains. In short, Article 106 (2) becomes relevant in this second step.

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[115] Undoubtedly, due to the difference of the context, the content of "objective of public interest" may not become exactly the same meaning with the corresponding concept developed under EU laws (Borlini (2016), pp. 154-156).

[116] E.g., Article 12.3(2) of the EU–Japan EPA.

[117] Article 10.5(4) of the EU–Vietnam FTA.

[118] Article 11.7(4) of the EU–Singapore FTA; Article 11.11(b) of the EU–Korea FTA.

[119] Moreover, there are also subtle differences in the range of provisions that will be excluded from the application due to such concept. While Article 12.3(2) of the EU–Japan EPA excludes the application of all provisions in the chapter on subsidies, Article 11.11(b) of the EU–Korea FTA only excludes a provision applicable to specific forms of subsidies. See also *infra* note 124.

The *Altmark* conditions, which were established by the EU's Court of Justice in 2003 in the *Altmark* case,[120] are those that a State measure must satisfy in order for that measure to be regarded as appropriate compensation in discharging specified public service obligations. The *Altmark* conditions are composed of four principles: (i) the recipient undertaking actually has clearly defined public service obligations to discharge; (ii) the parameters for the calculation of the compensation are established in advance in an objective and transparent manner; (iii) the compensation is limited to the extent necessary to cover the costs incurred in the discharge of public service obligations; and (iv) where the undertaking is not chosen pursuant to a public procurement procedure, the level of compensation is determined on the basis of an analysis of the costs which a typical undertaking would have incurred in discharging the same obligations.[121] Compensation that fulfills all of these conditions would not constitute State aid.

As explained earlier, compensation may be examined under Article 106 (2) of the TFEU even if the compensation (State aid) does not satisfy the *Altmark* conditions.[122] The application of Article 106 (2) is usually guided by the SGEI Framework[123] and other legislative instruments included in what is called the 2011 SGEI package. However, it is often explained that the adopted standards in the application of Article 106 (2) are similar to the conditions indicated in the *Altmark* case, although the purposes of the two deliberation processes are distinguished (e.g., Bacon (2017), p. 55).

Due to the similarity in wording and objectives between the expression "services of general economic interest" (SGEI) developed under the context of EU law and the expression "services to the general public" included in the trade agreements concluded by the EU, it is likely that the latter expression will be interpreted in accordance with the idea of EU law on the EU side. This would, in turn, imply that the trade partners of EU need to take the EU's stance into account when operating related provisions. Needless to say, as EU law and EU FTAs are distinct from each other, the understanding about public service obligation may develop in different manners depending on the implementation of individual frameworks—even among the EU FTAs, the nuance, scope, or context of "services to the general public" varies.[124] Nevertheless, there lies a possibility that the aforementioned concepts will be developed in accordance with the EU's legal concept.

For the agreements that envisage the subsidy issue within the concept of State aid, it is more likely that compensation for public service obligations would be interpreted in a way

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[120] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

[121] *Id*., paras. 87-94.

[122] *E.g.*, Case T-125/12 *Viasat Broadcasting UK Ltd v. European Commission* EU:T:2015:687, para. 76.

[123] Communication from the Commission, European Union Framework for State Aid in the Form of Public Service Compensation (2011) [2012] OJ C8/15. The Framework covers the areas that fall outside of the scope of the SGEI Decision (Decision 2012/21/EU on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2011] OJ L7/3).

[124] For instance, Article 11.11 of the EU–Korea FTA limits the provision that would be exempted from the application due to the concept of public service obligations as that related to subsidies to insolvent or ailing enterprises without a credible restructuring plan (the second type of prohibited subsidies added in the FTA).

that is harmonious with the EU State aid rules.[125]

IV-2-3. The possible multi-lateralization of EU FTA rules regarding "green light" subsidies

This subsection examines the possibility of multi-lateralization of the "green light" subsidy rules discussed in Section IV-2. Unlike prohibited subsidies, there is no explicit mention of "green light" subsidies either in the EU's Concept Paper or in the series of statements on the EU-Japan-US trilateral meeting of the Trade Ministers. Moreover, although it is a general trend for the EU FTAs to include expansive disciplines with regard to "green light" subsidies, there is a notable exemption, i.e. CETA. In this agreement, there is only one provision that appears to be related to "green light" subsidies and which states that government support with respect to audio-visual services for the EU and to cultural industries for Canada are exempted from the agreement (see Table 2).[126]

One of the reasons why CETA did not incorporate the rules governing "green light" subsidies may be Canada's past practice of excluding subsidy disciplines in its FTAs that supplement the basic rules contained in the SCM Agreement. Considering this practice together with the fact that the US FTAs likewise do not include additional rules regarding subsidies, it is safe to say that the multi-lateralization of rules regarding "green light" subsidies is unlikely, at least in the short term.

Nevertheless, it must be noted that the concept of "public service mandate" is included in the USMCA in the context of requirement of "commercial considerations" in the chapter on SOEs.[127] While the precise meaning and coverage of this provision are not necessarily apparent from its text, there is no reason to deny the potential for this concept to develop in conjunction with the concept of "public policy objectives" or "services to the general public" identified in the EU FTAs. In addition, a similar indication can be found in a different context. As explained, the USMCA introduced rules on "non-commercial assistance." According to Article 22.13 (1) (a) of the agreement, non-commercial assistant rules will not prevent parties from adopting the measures "to respond temporarily to a national or global economic emergency."[128] The EU FTAs contain a similar provision.[129] This example suggests that the convergence of "green light" subsidy disciplines in FTAs might be readily achieved through these kinds of provisions that deal with specific matters (such as economic emergency) rather than through abstract provisions that contain the concept of "public policy objectives."

With respect to agreements concluded by countries other than the US, the CPTPP, like

[125] See, for instance, Articles 262(4) and 264 of the EU–Ukraine AA.
[126] Article 7.7 of CETA. Neither the EU–Kazakhstan EPCA nor the EU–Georgia AA contain provisions focusing green light subsidies.
[127] Article 22.4(1)(a) of the USMCA demands each party to ensure its SOEs act "in accordance with commercial considerations in its purchase or sale of a good or service, except to fulfil the terms of its public service mandate that are not inconsistent with subparagraphs (b) or (c)(ii)".
[128] This provision also covers commercial considerations clause.
[129] E.g., Article 12.3(6) of the EU–Japan EPA.

the USMCA, introduced the same concept (i.e., public service mandate) in the commercial considerations clause for SOEs.[130] This is not strange given the partial overlap of members between the TPP/CPTPP and the USMCA. Nonetheless, the retention of this provision in the CPTPP, even after the withdrawal of the US from the deal, would contribute to the spread of this form of regulatory approach, which could become a standard in international trade disciplines, especially when more countries join the CPTPP.[131] In light of these developments, it can be said that while the introduction of "green light" subsidies can only be found in the context of SOE regulation when it comes to FTAs concluded by parties other than the EU, there are some positive signals that the (re)development of "green light" subsidies can be achieved through the FTAs.[132]

V. Subsidy Disciplines in Trade in Services

V-1. The trend in the agreements concluded by the EU

Under the EU FTAs, there are variations in the regulation of services subsidies. The agreements have chosen to exclude services subsidies from chapters related to trade in services, handle the issue together with subsidies for goods under competition laws or State aid rules, or widen the scope of the SCM Agreement to include services subsidies.

V-1-1. Exempting subsidies related to services

The agreements concluded between the EU and non-neighboring countries tend to distinguish subsidies related to services from those related to goods and exclude the former from the chapters pertaining to trade in services.[133] Those agreements may therefore be said to fall short of the WTO's standards in this aspect.[134] Although it does not contain clear rules for the regulation of services subsidies and has left the relevant rule-making process to the discretion of future negotiations,[135] GATS does not exempt services subsidies altogether. Consequently, some provisions like the national treatment clause[136] can be applied to subsidy policies to the extent that the WTO member is committed to granting national treatment (e.g., Poretti (2008), p. 361).[137] Some FTAs, however, include services subsidies within the

[130] Article 17.4(1)(a) of the CPTPP.
[131] Thailand is showing an interest joining the CPTPP.
[132] In this regard, it is noteworthy that China, in its proposal for the reform of the WTO submitted in March 2019, made a proposal to revive and extend the scope of green light subsidies (WTO (2019a), p. 5).
[133] E.g., Article 159(3) of the EU–Central America AA; Article 60(3) of the EU–CARIFORUM EPA.
[134] Not only the FTAs concluded by the EU, trade agreements as a whole are making "minus commitments" (i.e. retreat from GATS) in service subsidies (Adlung and Miroudot (2012), p. 14).
[135] See *supra* Chapter II.
[136] Article XVII of the GATS.
[137] However, when GATS is applicable to the services subsidies that may infringe the national treatment obligation (in other word, if related Members have undertaken the commitments relating to national treatment), it can alleviate the loophole of FTA rules. On the other hand, an FTA (or economic integration agreement) that horizontally eliminates the application of national treatment obligations to services subsidies may have a potential to be evaluated as inconsistent with Article V:1(b) of GATS which governs the economic integration agreement.

purview of their chapters on subsidies, while exempting them from the chapters related to trade in services. The impact of such practices is discussed in Section V-1-3 below.

V-1-2. Treatment of services subsidies under competition laws and State aid rules

In the agreements that have embraced State aid rules (or related rules), services subsidies are dealt with under such rules. Some agreements are explicit on this issue by stating, in some form, that related provisions apply to services as well.[138] Even agreements that do not explicitly mention the service supply could be applicable to services if those agreements contain provisions founded on the basis of the State aid rules in EU law.[139] This is because the word "undertakings" used in those agreements can be considered to encompass service suppliers in line with Article 107 of the TFEU (e.g., Hancher et al. (2016), p. 53).

In this regard, the EU–Singapore FTA contains a unique provision. As discussed in detail previously, this agreement encourages parties to resolve the distortions of competition caused by subsidies through the application of competition laws or other laws. Intriguingly, the agreement specifies that the subsidies in this context are those "related to trade in goods and services."[140] Moreover, the same agreement not only adopts the definition of "subsidy" in the SCM Agreement, but also expands on this definition by including subsidies granted in relation to the production of services.[141] While the EU–Korea FTA, in the same way, embraces a provision that advocates parties to apply competition laws or otherwise when tackling subsidy issues,[142] it explicitly limits the scope of that provision to subsidies for goods.[143] As discussed in Section III-2-2 above, when competition laws or otherwise are applied to services subsidies, they can administer subsidies that cannot be brought under the current WTO rules. So far, the EU–Singapore FTA is the only agreement, barring the agreements that embrace State aid rules, to clearly describe the relationship between competition laws and services subsidies in the trade agreement.

V-1-3. The expansion of the definition of subsidy under the SCM Agreement to cover service subsidies

While some recently concluded EU FTAs exclude services subsidies from the scope of the chapters relating to trade in services, they grapple with the issues relating services subsidies by expanding the scope of the chapter on subsidy. For instance, Article 8.14 (2) (e) of the EU–Japan EPA precludes the application of the section on cross-border trade in services, leaving such matters to be addressed through the chapter on subsidies. On this basis, Article 12.2 (b) of the agreement's chapter on subsidies declares that it will use, in principle, the definition of subsidies laid down in the SCM Agreement "irrespective of whether the recipients of the subsidy deal in goods or services."[144] A similar trend can be found in other agree-

[138] E.g., Article 266 of the EU–Ukraine AA; Article 339(1) of the EU–Moldova AA.
[139] E.g., Article 75 of the EU–Kosovo SAA; Article 73 of the EU–Moldova SAA.
[140] Article 11.8(1) of the EU–Singapore FTA.
[141] Article 11.5(1) of the EU–Singapore FTA.
[142] Article 11.9 of the EU–Korea FTA.
[143] Article 11.15(1) of the EU–Korea FTA.

ments like the EU–Vietnam FTA, the EU–Georgia AA, and the EU–Kazakhstan EPCA[145] implying that this approach is becoming the norm.[146] When compared to the WTO agreements, which do not provide any definition or contour of services subsidies,[147] these agreements can be seen as going one step further in this aspect. Moreover, it must be noted that as a result of this advancement, the disciplines with regard to prohibited subsidies and "green light" subsidies, discussed in Chapter IV, are likewise applicable to subsidies granted in relation to trade in services.[148]

V-2. Spread of disciplines

Contrary to the trend observed in the EU FTAs, the US FTAs do not expand the subsidy disciplines that mainly cover goods to encompass services subsidies.[149] However, there have been some developments under the SOE regulation in the USMCA. As repeatedly discussed, the USMCA introduces the idea of non-commercial assistance in regulating subsidies provided to SOEs. The provisions pertaining to non-commercial assistance cover recipient SOEs that supply services (either in the form of mode 1 or mode 3).[150] Since the definition of non-commercial assistance is, by and large, formulated based on the definition of "subsidy" under the SCM Agreement,[151] the basic position of the USMCA is that it relies on the definition of "subsidy" under the SCM Agreement even for services subsidies.

Nevertheless, there are also limitations in the disciplines of the USMCA. Basically, as many SOEs are those operating entirely in the service sector or relying on significant services inputs (Stephenson & Hufbauer (2016), p. 306), it is effective and beneficial to introduce rules pertaining to services subsidies under the framework of SOE regulation.[152] On the other hand, due to the non-application of related provisions to assistance granted in relation to domestic supply of services—Article 22.6 (7) stipulates that "[a] service supplied by a state-owned enterprise of a Party within that Party's territory shall be deemed not to cause adverse effects"—any assistance that would displace or impede the incoming services provided by a supplier of the other party (services imports), or any assistance that affects mode 2 services are not to be regulated under the USMCA. Moreover, while the USMCA is expanding the types of prohibited subsidies,[153] the subsidies that are envisaged in this list are

[144] See also Article 12.2(c) of the EU–Japan EPA.
[145] Article 10.5(1) the EU–Vietnam FTA; Article 206(1) of the EU–Georgia AA; Article 159(1) of the EU–Kazakhstan EPCA.
[146] In contrast, CETA does not touch upon the services in its definition clause for "subsidy." Article 7.1(1) of CETA.
[147] See *supra* Chapter II.
[148] Some provisions related to prohibited subsidies and "green light" subsidies clearly indicate that they apply to services subsidies as well. E.g., Article 11.7(2) of the EU–Singapore FTA.
[149] US FTAs basically exclude services subsidies from the application of the chapter on trade in services. E.g., Article 12.1(4)(d) of the Korea–US FTA.
[150] Articles 22.6(4) and 22.6(5) of the USMCA.
[151] Article 22.1 of the USMCA.
[152] Among the services supplied by SOEs, transport and financial services are the areas frequently receiving the export subsidies (Geloso Grosso (2008), p. 16; also see, Stephenson and Hufbauer (2016), p. 305). Therefore, in general, it is effective to regulate services subsidies in these areas under the framework of SOE regulation.
[153] See *supra* Section IV-1.

confined to those provided to SOEs "primarily engaged in the production or sale of goods,"[154] meaning that SOEs primarily supplying services are precluded. The CPTPP has also established non-commercial assistance clauses in a similar manner, partly due to the strong commitment by the US, and accordingly, the agreement applies to state-owned service suppliers to the same extent as the USMCA (Abe and Sekine (2020)).

In the context of subsidy regulation under the USMCA, non-commercial assistance may receive more attention. Yet, a different provision, i.e. Article 22.4 (1) (a) (commercial considerations clause, which requires SOEs to act commercially in their economic activities) has a role to play as well. For instance, when a certain SOE sells particular goods or services at a low price that is commercially irrational, that practice itself may be considered to be inconsistent with the commercial considerations clause. At the same time, the same practice may also be suspected of infringing the non-commercial assistance clause because it may fall under "the provision of goods or the supply of services other than general infrastructure, on terms more favorable than those commercially available."[155] Since there is no basis under the commercial considerations clause to restrict the recipient of goods or services sold by an SOE as a producer of goods,[156] the SOE's sale of goods or services to service suppliers can likewise be captured by the non-commercial consideration clause. Furthermore, when examining the conformity of certain economic activities with the "commercial considerations" standard, the concepts or approaches that were adopted and developed in the application of competition laws or related laws can be referred to. This is in contrast to the non-commercial assistance clause where the "adverse effects" caused by the assistance needs to be examined in line with, or at least after taking into account, the corresponding concepts under the SCM Agreement. In sum, the commercial considerations clause seems to be more flexible and can encompass ideas from different areas of laws including competition law if deemed necessary.

To summarize, it can be pointed out that the EU's approach, which attempts to regulate services subsidies through competition law-related frameworks, has not achieved strong momentum at the worldwide level so far. On the other hand, the trend of expanding the current definition and disciplines of goods subsidies under the WTO to cover service sectors is gaining ground. Nevertheless, depending on the interpretation and operation of the commercial considerations clause included in several trade agreements such as the USMCA and the CPTPP, the competitive policy perspective may be espoused in the regulatory process for subsidies. This could serve as the first step in the collaboration between subsidy regulations and competition policies. The issue of how these different concepts under various frame-

[154] Article 22.6(1) of the USMCA.

[155] Articles 22.1 and 22.6(5) of the USMCA. See also, Article 1.1(a)(1)(iii) of the SCM Agreement. However, as the definition clause of "non-commercial assistance" in the USMCA (i.e., Paragraph (a)(iii) of explanation regarding "non-commercial assistance" in Article 22.1) includes "the purchase of goods" but not "the purchase of services," non-commercial high price purchase of services by SOEs may not be regarded as "non-commercial assistance." For the similar discussions in the context of the SCM Agreement, see Coppens (2014), pp. 44-45. Due to these elements, the coverage of the commercial considerations clause seems to be wider than the non-commercial assistance rules.

[156] Article 22.4(1)(a) of the USMCA.

works interrelate with each other deserves continued attention, and academic research needs to keep track of and analyze these phenomena.

VI. Conclusion

This paper followed the EU's progress in developing subsidy disciplines through its FTAs in a situation where the deficiencies and insufficiencies of the SCM Agreement are becoming pronounced but the overhaul of the agreement is unlikely (at least in the short term). As a result of this analysis, the following points were observed:

First, as a general conclusion, the EU FTAs are more likely to take an approach that relies on State aid rules or competition laws (including related laws) in regulating subsidies. This tendency is apparent in agreements with neighboring countries, *inter alia* Western Balkan countries, and this observation is not surprising since they are planning to join the EU. However, beyond that, the EU adopts an approach that mixes State aid rules or competition laws with WTO rules, which is evident in its agreements with Mediterranean and Eastern European countries, which are not necessarily contemplating to join in the near future although they have some strong economic ties with the EU. This method is worth considering even in subsidy policies of countries other than neighboring countries. Indeed, the EU–Korea and EU–Singapore FTAs refer to competition laws in moderation, signaling the permeation of the competitive perspective in subsidy policy beyond neighboring countries. On the other hand, it is also true that the latest agreements, like the EU–Vietnam FTA and EU–Japan EPA, do not refer to competition laws or related laws, and hence, some uncertainties remain with respect to how this approach will evolve in the future.

Second, the EU, through its FTAs, is continuously seeking to expand the list of prohibited subsidies, reintroduce "green light" subsidies, and establish rules to cover services subsidies. These demands are generally accepted by the other parties to the agreements, and hence, these may be multi-lateralized or pluri-lateralized in the future. At the same time, however, as many emerging or developing countries, which do not always favor the EU's position, have not yet concluded a trade agreement with the EU, it might be too positive to assert that the EU's idea will multi-lateralize.[157] However, the fact that influential countries are materializing those disciplines in their FTAs could propel the overall trend in that direction.

The litmus test for the future success of EU's State aid rules/competition laws approach would be the incorporation of this element in the so-called region-to-region agreements. Regional communities may have stronger incentives to introduce State aid regulations akin to the EU's system due to the successful experiences of the EU. The West African Economic and Monetary Union (UEMOA or WAEMU) is an example (Papadopoulos (2010), p. 183).[158] Though the State aid rules/competition laws approach is not yet widely spread, there

[157] However, see information contained in *supra* note 132.
[158] See also *supra* note 43.

are indications that its feasibility is being considered in the context of subsidy regulations. Thus, this approach has the potential to become more widespread in the future. Attention must be paid constantly to the development and operation of the subsidy disciplines established in the EU FTAs.

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