



University of Antwerp
| Faculty of Law

How to avoid a global subsidies race? The EU Foreign Subsidies Regulation

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RE-GLOBE

REFORMING THE GLOBAL ECONOMIC GOVERNANCE:
THE EU FOR SDGS IN INTERNATIONAL ECONOMIC LAW

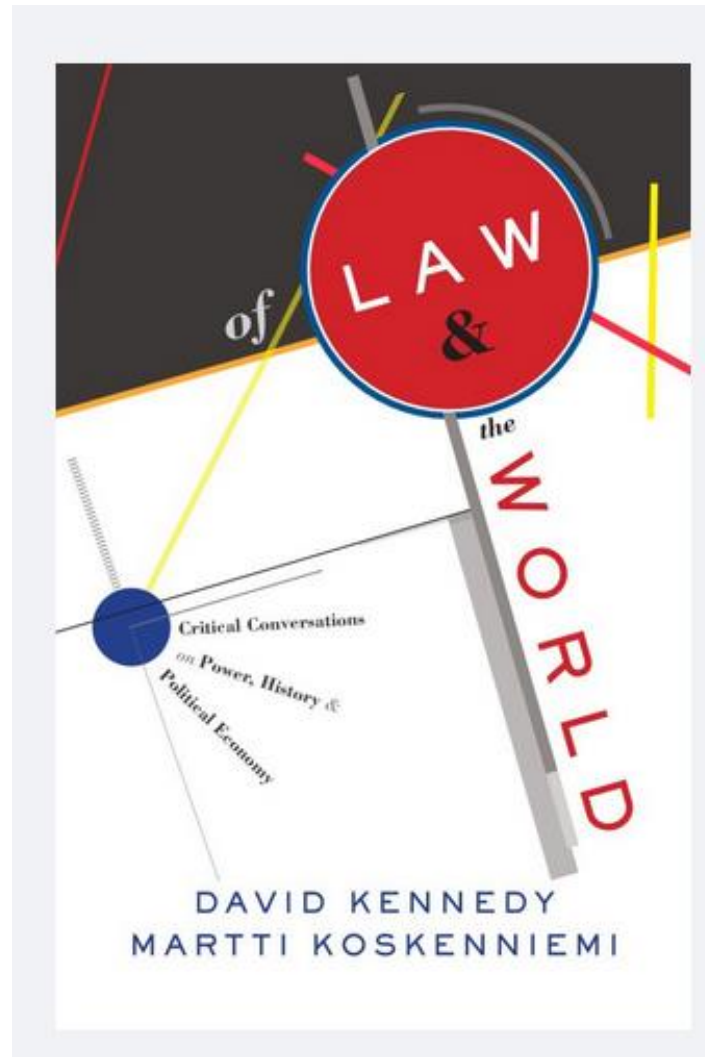


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Programme of the seminar

- 1. Laying down the context: subsidies in the globalised economy, WTO rules on subsidies**
- 2. The European case: State aid and the internal market**
- 3. The WTO crisis and the EU 'open strategic autonomy'**
- 4. How to deal with foreign subsidies: the Foreign Subsidy Regulation**
- 5. How to deal with foreign subsidisation: other tools**
- 6. The Hamletic dilemma: to subsidise or not?**

A reading recommendation



What is a subsidy?

What is a subsidy?

The definition in the Agreement on Subsidies and Countervailing Measures
ASCM – cumulative elements:

a) Financial contribution by a government or any public body (Art 1.1(a)(1) ASCM)

b) which confers a benefit (Art 1.1 (b) ASCM)

c) to a specific recipient (Art 2 ASCM)

- Is it exhaustive?
- What type of trade flows fall in the scope of the ASCM?
- Are there economic sectors which are regulated by other WTO agreements?

What is a subsidy?

Definition of ‘subsidy’ is a sensitive issue. Some other definitions:

- *‘a financial unrequited (i.e., without an equivalent contribution in return) contribution using public resources, directly or indirectly, which confers a benefit on the recipient over its competitors’ - OECD, 2022.*
- *‘A subsidy must:*
 - 1. involve an action or a commitment to action by a public body under certain circumstances.*
 - 2. involve the actual or potential outlay of a public body’s resources.*
 - 3. must confer an advantage on a firm.*
 - 4. must be selective in some meaningful respect’ – Evenett and Fritz, 2021.*

What is a subsidy? – Art. 1 ASCM

Article 1

Definition of a Subsidy

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
 - (i) a government practice involves a **direct transfer of funds** (e.g. grants, loans, and equity infusion), **potential direct transfers of funds or liabilities** (e.g. loan guarantees);
 - (ii) government revenue that is otherwise due is foregone or not collected (e.g. **fiscal incentives such as tax credits**)¹;
 - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
 - (iv) a government makes payments to a **funding mechanism, or entrusts or directs a private body** to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, **in no real sense, differs from practices normally followed by governments**;

What is a subsidy? The example of the US Inflation Reduction Act (IRA)

- 'Largest single investment in climate measures in United States history' (no cap?)
- Mostly tax credits from the US Federal Government
- Objective: green transition to achieve Paris goals
- Certain IRA benefits have local-content requirements (LCRs, 'Made in America')

Biden signs Inflation Reduction Act into law

By Maegan Vazquez and Donald Judd, CNN
Updated 10:29 PM EDT, Tue August 16, 2022



Mandel Ngan/AFP/Getty Images

US President Joe Biden speaks during a signing ceremony for H.R. 5376, the Inflation Reduction Act of 2022, in the State Dining Room of the White House in Washington, DC, on August 16, 2022. (Photo by MANDEL NGAN / AFP) (Photo by MANDEL NGAN/AFP via Getty Images)

(CNN) — President Joe Biden signed a sweeping \$750 billion health care, tax and climate bill into law at the White House on Tuesday — marking a major victory for his administration and the Democratic Party ahead of the midterm elections.

Biden said during a signing ceremony in the State Dining Room that the legislation, called the Inflation Reduction Act, is "one of the most significant laws in our history."

What is a subsidy? Opportunities and risks

| Opportunities | Risks |
|--|--|
| Correct market failures | Distort the market (internally and externally) |
| Achieve public policy goals | Pursue particular interests or create damages |
| Develop strategic sectors and technologies | Dependency or rent-seeking behaviour |
| Promote economic growth | Waste public money |

Opportunities and risks: the example of the US IRA

| Opportunities | IRA case | Risks | IRA case |
|--|--|--|---|
| Correct market failures | <i>Fossil fuels are cheaper but do not account to damages to environment</i> | Distort the market (internally and externally) | <i>It would be cheaper to buy batteries from China. Companies will prefer the US to invest over other jurisdictions</i> |
| Achieve public policy goals | <i>Fight climate change</i> | Pursue particular interests or create damages | <i>Made in America requirements are protectionist measures.</i> |
| Develop strategic sectors and technologies | <i>Electric batteries: US is behind China</i> | Dependency or rent-seeking behaviour | <i>Will companies keep on investing in these technologies if Trump wins the elections and cancel the programme?</i> |
| Promote economic growth | <i>Reduce inflation and restart after COVID</i> | Waste public money | <i>The US public debt is too high.</i> |

The ASCM framework on (industrial) subsidies: categories

Subsidies are not all prohibited by the ASCM. Three categories:

1. **Prohibited subsidies** (Art. 3): subsidies contingent upon (1) export performance and/or (2) use of domestic over imported goods.
2. **Actionable subsidies** (Art. 5): subsidies that cause adverse effects to the interest of other Members. The adverse effects may be:
 - (A) *injury* to the domestic industry of another Member producing *like product*;
 - (B) nullification or impairment of benefits enjoyed under the GATT;
 - (C) *serious prejudice* to the interests of another Member.
3. **Non-actionable subsidies** (Art. 8): category temporary applicable, now expired.

The ASCM framework on (industrial) subsidies: remedies

- 1. Prohibited subsidies -> Panel/AB must recommend withdrawal without delay in a certain time period.
In case of non-compliance: DSB must authorise retaliation *at level of amount of subsidy***
- 2. Actionable subsidies -> Panel/AB must recommend violating Member to take appropriate steps to remove adverse effects of the subsidy and/or withdraw the subsidy within 6 months.
In case of non-compliance: DSB must authorise retaliation *at level of degree and nature of adverse effects***

The ASCM framework on (industrial) subsidies: remedies

1. Prohibited subsidies -> Panel/AB must recommend withdrawal without delay in a certain time period.
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 2. Actionable subsidies -> Panel/AB must recommend violating Member to take appropriate steps to remove adverse effects of the subsidy and/or withdraw the subsidy within 6 months.
In case of non-compliance: DSB must authorise retaliation *at level of degree and nature of adverse effects*.
- Unilateral action against specific subsidies that cause injury to domestic industry through Countervailing Duties. They allow an anti-subsidy investigation and ASCM rules.

The WTO framework on (industrial) subsidies: criticism

- Debate at the WTO level on industrial subsidies, agriculture, fisheries subsidies.

The criticism to the ASCM:

- Limited scope: no services
- Definition of *public body*: what about state-owned enterprises and state-linked enterprises?
- Burden of proof
- Notification and transparency

Is it possible to reform? Trilateral cooperation: EU, US, Japan.

State aid in the EU internal market

The European internal market and the stance towards subsidisation

- Long term scepticism towards State aid: Spaak report (1956, essential document to the establishment of the EEC) outlines the principle that (Member) State aid should be prohibited, unless authorised by the European Commission (*ex ante* control).
- Principle was enshrined in the Treaty of Rome (Art. 92(1), now in Art. 107 TFEU).
- Essential to the establishment of an internal market based on liberalisation and (fair) competition, while Member States retain control over industrial policy.

State aid in the EU legal system: art. 107(1) TFEU

1. *Any aid granted by a Member State or through State resources in any form whatsoever*
2. *which distorts or threatens to distort competition*
3. *by favouring certain undertakings or the production of certain goods shall,*
4. *in so far as it affects trade between Member States, be incompatible with the internal market.*

EU notion of State aid and ASCM notion of subsidy

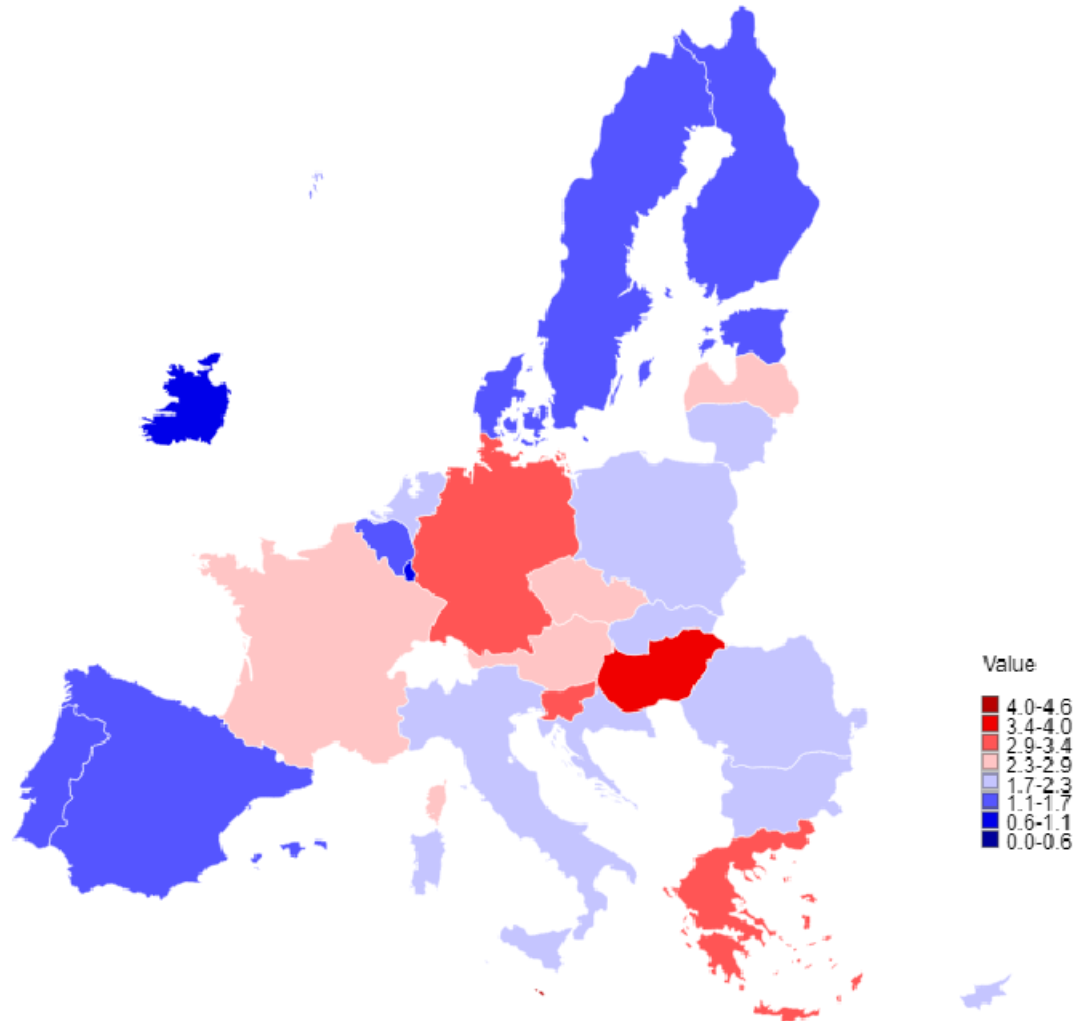
| ASCM | TFEU 107 |
|---|---|
| Financial contribution\benefit | Any aid |
| by a government or any public body | granted by a Member State or through State resources in any form whatsoever |
| to a specific recipient | by favouring certain undertakings or the production of certain goods shall |
| Prohibited: export/import. Actionable: adverse effects to the interest of other Members | in so far as it affects trade between Member States |
| injury | which <i>distorts</i> or threatens to distort competition |

State aid in the EU legal system: art. 107(3) TFEU

The following may be considered to be compatible with the internal market:

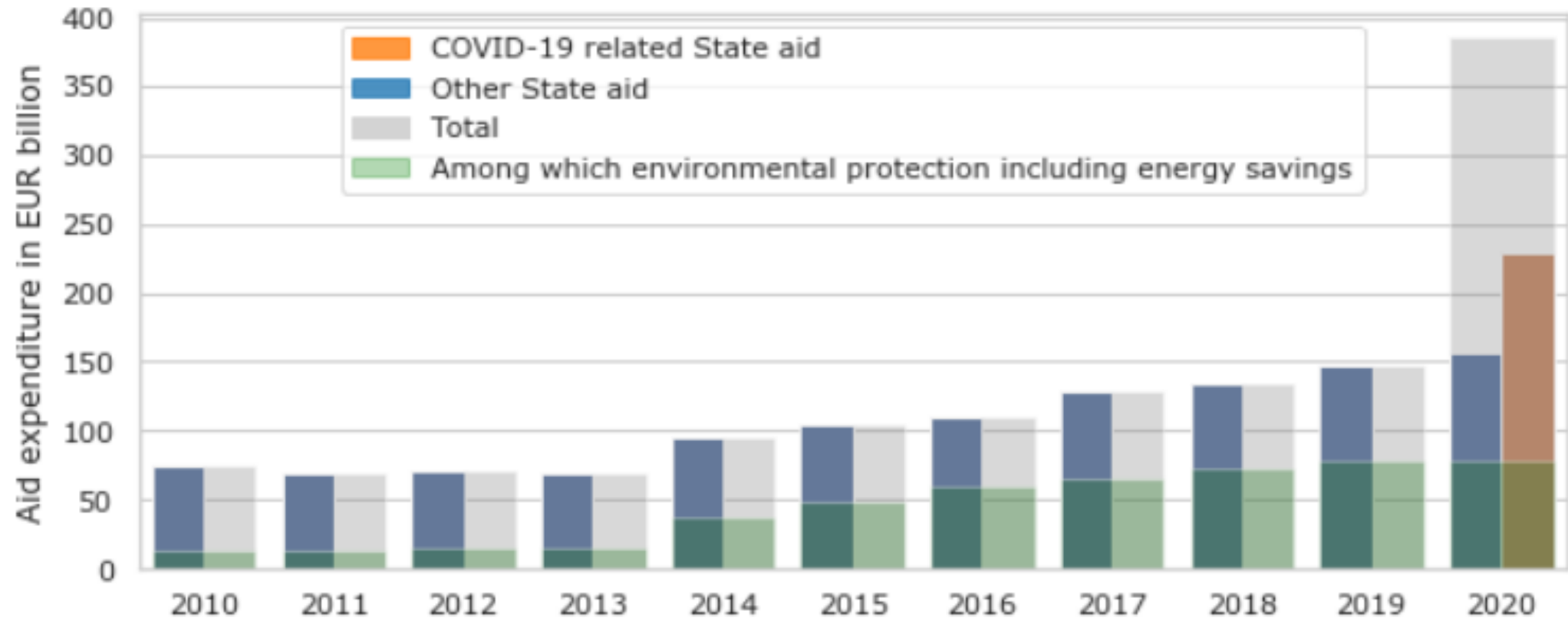
- a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;*
- b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;*
- c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;*
- d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;*
- e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.*

Total State Aid expenditure GDP%



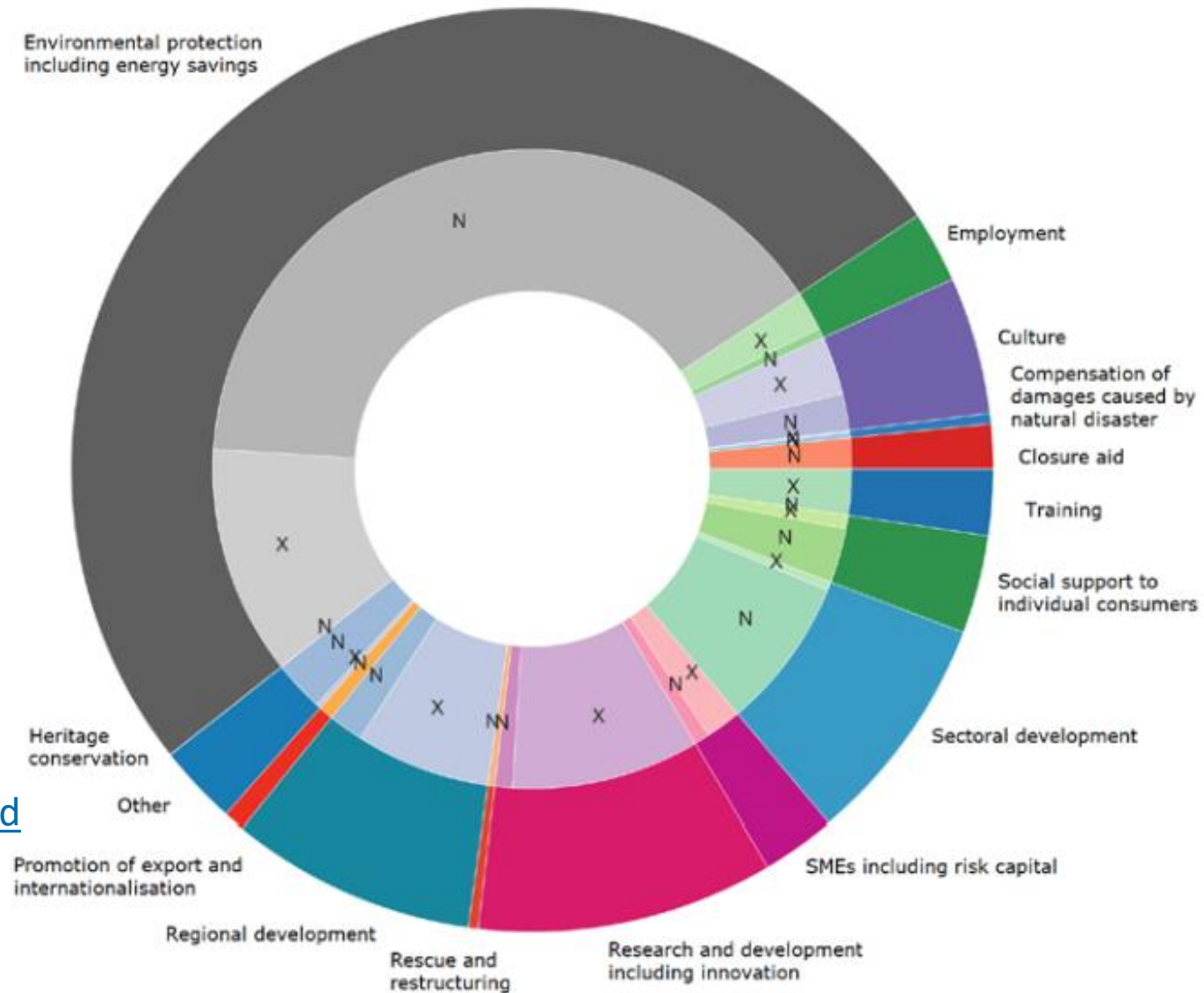
Source: [State Aid Scoreboard 2022](#)

Evolution of State Aid



Source: [State Aid Scoreboard 2021](#)

State aid by policy objective



Source: [State Aid Scoreboard](#)

2020

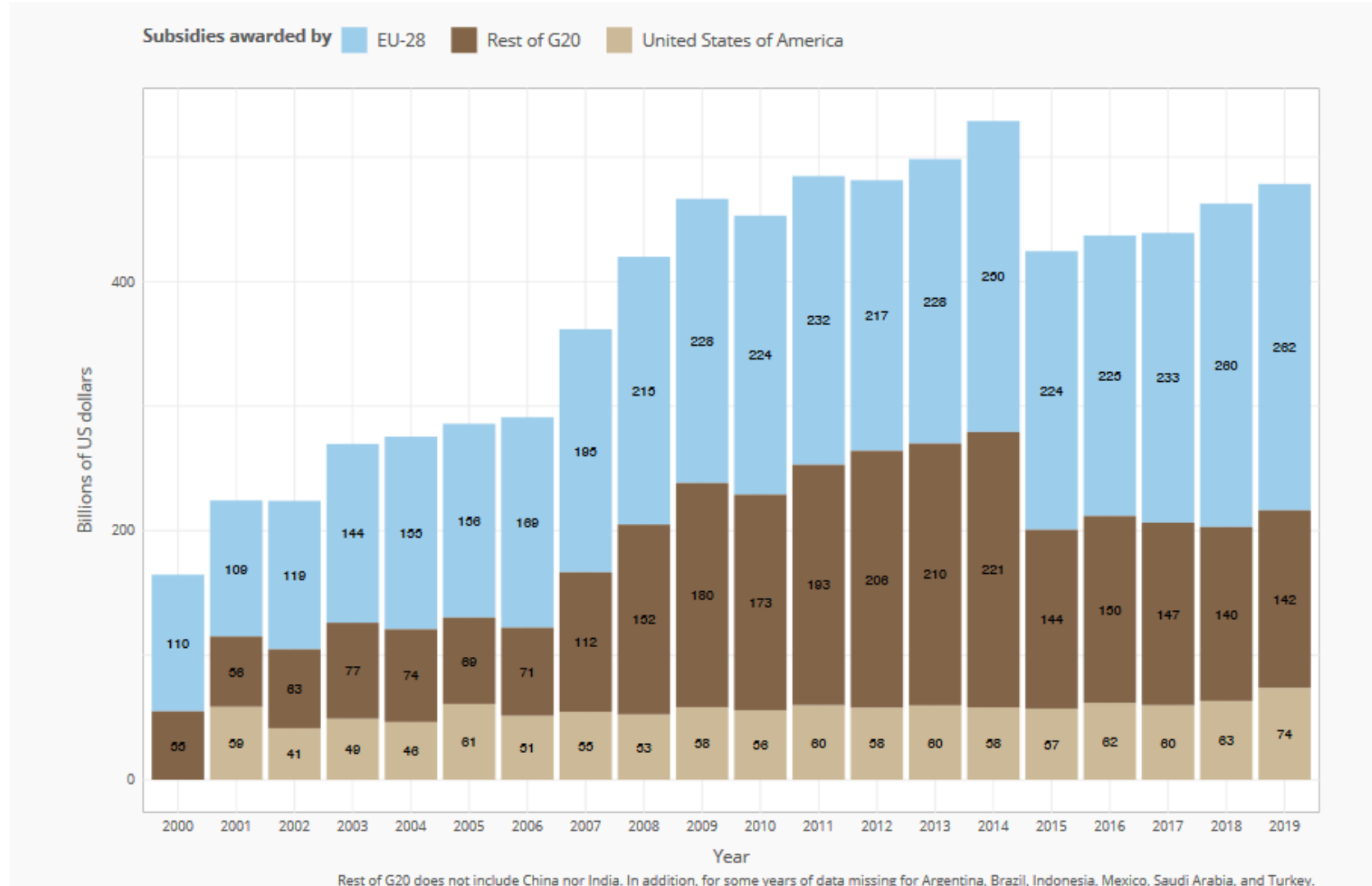
Some further context: the crisis of the WTO and the EU open strategic autonomy

The crisis of the WTO: cause or symptom?

- WTO in crisis already before the US pulled the plug of the AB
- Several reasons (and explanations) behind the crisis:
 1. US-China relations in the WTO context: from Clinton to Biden. At the core: economic systems did not converge. It was not ‘the end of History’: coexistence between market economies and economies with strong State interventions.
 2. US-China rivalry is political first, economic second.
 3. The US is no more the ‘hegemon’, we live in a multipolar world now.
 4. The transatlantic partnership is not working anymore?
- The ‘**multilateral**, **rule-based**, trade system’: it cannot be multilateral if it is not rule-based and vice versa.

Increasing subsidisation in the global economy

IMF records rising payments of subsidies to companies by G20 governments

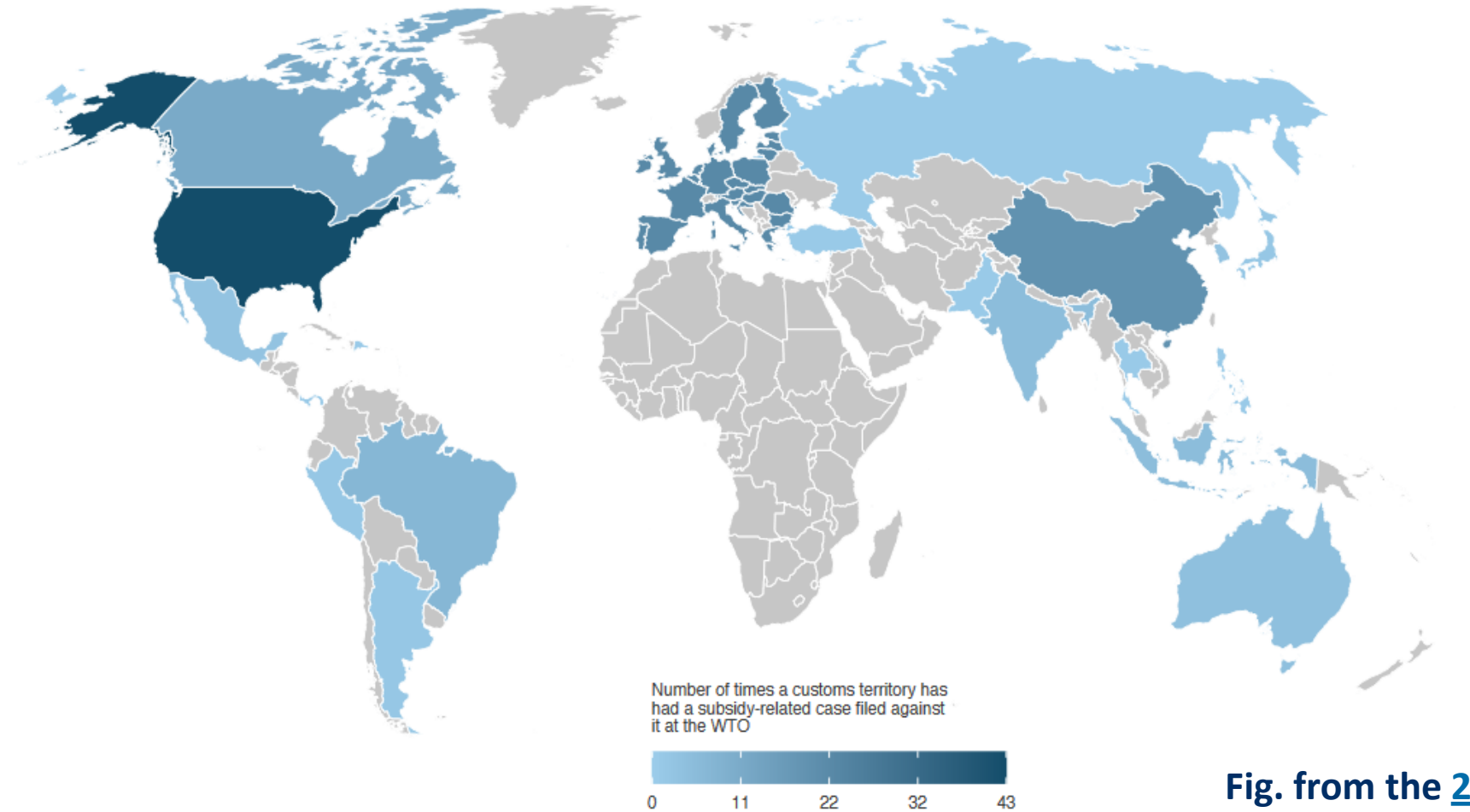


Source: International Monetary Fund.

Fig. from the [28th Global Trade Alert Report](#)

Increasing subsidisation in the global economy

China, the European Union and the United States are most frequently accused of breaking WTO subsidy rules



Source: Assembled from WTO dispute settlement cases involving the ASCM.

Fig. from the [28th Global Trade Alert Report](#)



EU commitment to the WTO (and what it represents)

From the [Mission Letter](#) of EC President Ursula von der Leyen to Commissioner for Trade Phil Hogan (December 2019):

- *Europe's place is at the heart of the **rules-based multilateral system**. We must now also be at the heart of efforts to **update** and upgrade it for the modern economy. Open and fair trade must be based on **global rules that are effective, enforceable** and create a level playing field for all.*

EU commitment to the WTO (and what it represents)

From the [Mission Letter](#) of EC President Ursula von der Leyen to Commissioner for Trade Phil Hogan (December 2019):

- *A top priority will be to lead the reform of the World Trade Organization, notably on the issues of subsidies, forced transfer of technologies and dispute settlement.*
- *In addition, I want you to look at how we can strengthen our trade toolbox. This should include upgrading the EU's Enforcement Regulation to allow us to use sanctions when others adopt illegal measures and simultaneously block the WTO dispute settlement process. You should work with the Executive Vice-President for a Europe fit for the Digital Age (Margrethe Vestager) to address the distortive effects of foreign subsidies in the internal market.*

An autonomous of EU trade policy

The crisis of the WTO pushed the 'geopolitical Commission' to outline 'an open, sustainable and assertive EU trade policy' in 2021.

- **Goals: 'open strategic autonomy' and level playing field.**
- **Development of new trade tools (and domestic tools with trade effects).**
- **Autonomous trade tools: the EU enforces rules and principles accepted by its trade partners in multilateral or bilateral agreements, but autonomously.**

The EU unilateral answer to 'aggressive' subsidisation: the Foreign Subsidy Regulation (FSR, Regulation 2022/2560).

How to handle foreign subsidies without the WTO? The EU FSR case

The FSR: 'legislative train'

- EC White Paper (2020): problem definition and blueprint of the future Regulation
- Support of Member States (also from 'free market champions like DE and NL) and European Institutions. Dutch non-paper: 'the third-best option'.
- Text approved at the end of 2022

The FSR as the answer to a *regulatory gap*:

- State aid rules (for Member States) do not have an equivalent that covers entirely subsidies from third countries
- The ASCM (and its related EU tool, the Basic Anti-Subsidy Regulation) covers only trade in goods
- The ASCM is unsatisfactory: Members do not notify nor comply
- WTO dispute settlement does not work anymore

The FSR in a nutshell

Three procedures:

- 1. Commission can start *ex officio* investigations into a foreign subsidy and its distortive effects (Articles 9 to 18);**
- 2. Undertakings must notify the Commission of any foreign subsidies when they engage in a concentration subject to certain turnover thresholds (Articles 19 to 26);**
- 3. Undertakings are required to notify the Commission of any foreign subsidies they received when they participate in certain public procurement tenders (Articles 27 to 33).**

The FSR in a nutshell - notion of subsidy

| ASCM | TFEU 107 | FSR (art. 3) |
|--|---|--|
| Financial contribution\benefit | Any aid | Financial contribution ... which confers a benefit |
| by a government or any public body | granted by a Member State or through State resources in any form whatsoever | third country |
| to a specific recipient | by favouring certain undertakings or the production of certain goods shall | which is limited, in law or in fact, to one or more undertakings or industries |
| Prohibited: export/import. Actionable: adverse effects to the interest of other Members | in so far as it affects trade between Member States | To an undertaking engaging in an economic activity in the internal market |
| injury | which <i>distorts</i> or threatens to distort competition | Distortion (art. 4) |

The FSR in a nutshell

- **A distortion in the internal market occurs based on the parameters described in Art. 4, which the Commission has to identify case by case.**
- **There are some presumptions that may lead to consider a subsidy non-distortive, unlikely or most likely to distort the internal market.**
- **Art. 6: even when the foreign subsidy negatively affects competition, the Commission may balance those negative effects with its positive effects.**

The FSR in a nutshell – relationship with WTO law

- Included subsidies given through a ‘private entity whose actions can be attributed to the third country, taking into account all relevant circumstances’ – Art. 3(2)

Rules on Countervailing Duties:

- FSR decision follows an investigation
- No overlapping with ASCM (Prohibition of double remedies ex Article 19.3 ASCM; no other actions can be taken against the subsidy of another Member ex Article 32.1 ASCM, *i.e.* only one form of remedy may be imposed with regard to any particular subsidy, either multilateral or autonomous)
- Non-discriminatory: Commission states it enforces FSR ‘country-blind’

Other tools to tackle the effects of foreign subsidisation

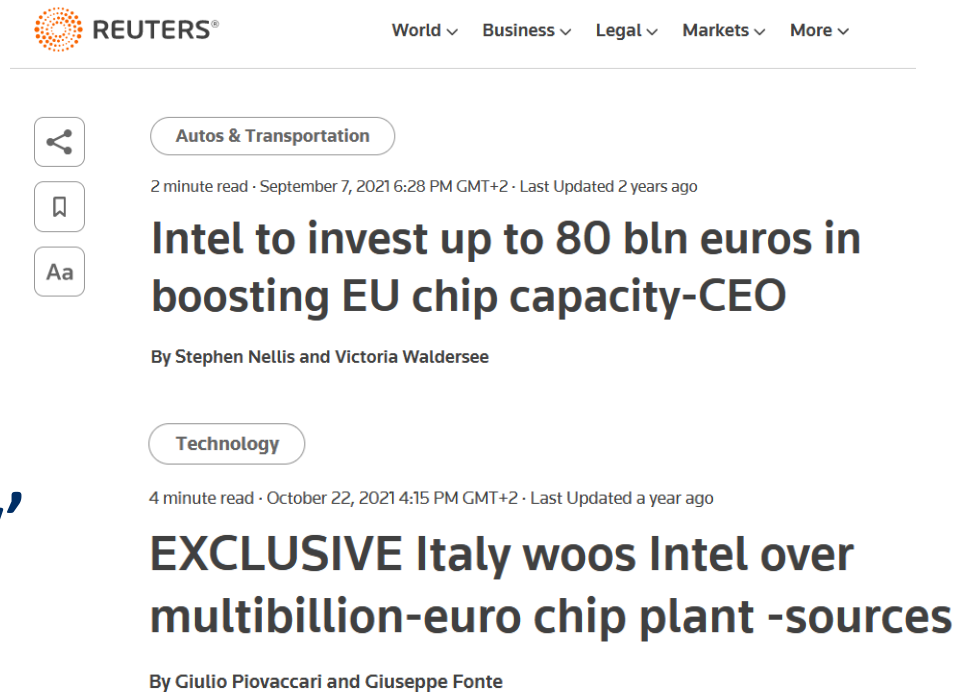
EU fighting subsidisation: other tools than FSR

- Countervailing duties under the ASCM and the BASR
- More used when it comes to imported goods: anti-dumping
- Promoting WTO reform: trilateral cooperation (but what to do while the WTO is blocked?)
- Competition provisions in Free Trade Agreements

Read more in [Blockx and Mattiolo, 2023](#)

Industrial policy in the age of crises: economy is a matter of national security

- Spreading of national security concerns in other policies area than defence ([Aresu, 2022](#))...
- ...to counter the ‘weaponisation of everything’ ([Galeotti, 2022](#)) (energy, data), but also as a convenient justification (trade)
- ‘national security’, ‘digital sovereignty’
- Cooperation between State apparats and companies ([‘political capitalism’](#)): the case of semiconductors



The screenshot shows the Reuters website interface. At the top, the Reuters logo is on the left, and navigation links for 'World', 'Business', 'Legal', 'Markets', and 'More' are on the right. Below the navigation bar, there are three utility icons: a share icon, a bookmark icon, and a font size icon labeled 'Aa'. The main content area features two article teasers. The first is under the 'Autos & Transportation' category, with a sub-headline 'Intel to invest up to 80 bln euros in boosting EU chip capacity-CEO' and a byline 'By Stephen Nellis and Victoria Waldersee'. The second is under the 'Technology' category, with a sub-headline 'EXCLUSIVE Italy woos Intel over multibillion-euro chip plant -sources' and a byline 'By Giulio Piovaccari and Giuseppe Fonte'.

The EU and the US IRA

- US IRA is shifting the paradigm on subsidisation even more
- EU reaction: quite worried!
- Using the FSR? An option not explored in the public debate (2022 is not 2019... US is not China for the EU)
- EU looks for a cooperative approach: joint task force to settle the differences...
- No tangible results of the task force, so calls for EU's own subsidisation increase. Who controls that?

3 minute read · December 5, 2022 12:34 PM GMT+1 · Last Updated 3 months ago

Explainer: Why the U.S. Inflation Reduction Act has Europe up in arms

By Leigh Thomas

The EU and the US IRA

- Transformation of the **State aid Temporary Crisis Framework** into the **Temporary Crisis and Transition Framework**
- Relaxation of State aid rules, more flexibility to national governments
- New tool: state aid ‘matching’ the subsidy granted by a third country to ‘prevent that investments are unfairly diverted to the highest bidder outside Europe’

BUT this strategy is controversial, both *inside* and *outside* the EU

The debate over the further State aid in the EU

1 minute read · January 30, 2023 4:28 PM GMT+1 · Last Updated a month ago

Italy's Meloni says caution needed on relaxing EU rules on state aid

Reuters



- Different policy cultures between MSs
- Inequalities between MSs: countries with can subsidise more (they handle industrial policy).
- Vestager: while the current crisis is extraordinary and temporary, the risks ‘to competition and the integrity of the Single Market [...]’ represented by these derogations to the long-standing competition rules ‘are not temporary’

EU intrinsic limits

- EU-funded solutions?
- Can the EU win a subsidy war against the US?

The EU using subsidisation: other tools

- **Agricultural subsidies: Common Agricultural Policy (CAP)**
- **State aid rules: strategic enforcement and exceptions in 107(3) TFEU**
- **NextGenerationEU and other coordinated initiatives ('Chips for Europe Initiative')**

The Hamletic question: to subsidise or not?

Facing narratives: is globalisation really dead?

INTERNATIONALE
POLITIK Quarterly

COVER SECTION

Jan 04, 2023

“Reports of Globalization’s Death Are Greatly Exaggerated”

What is the role of the EU in the system of world trade? Can it hold its own between the United States and China? Yes, as long as its internal market remains attractive, says Sabine Weyand, the European Commission’s Director-General for Trade.

Sabine Weyand



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Interview with Sabine Weyand

What the EU should do?

- On one side, need to *protect* its economy from aggressive external subsidies through *autonomous action*...
- ...on the other, to remain the champion of the '*multilateral, rules-based, trade system*' - (is the FSR compatible with the WTO? See [Nagy, 2023](#))

- On one side, to remain loyal to its long-standing aversion to subsidisation...
- ...on the other, to experiment with new forms of industrial policy

What possible outcomes for the future of EU industry and technology in a multipolar world?

Book by Defraigne *et al.*, 2022: [EU Industrial Policy in the Multipolar Economy](#). Three scenarios:

- 1. *EU as Junior Partner in a Continuing Transatlantic Alliance***
- 2. *Finlandisation of the EU***
- 3. *EU as a Global Power with Strategic Autonomy in a Multipolar World***

