"We are all just prisoners here, of our own device":
regulating transnational subsidies between domestic and international law

KCL CEL Lecture, 26 November 2025

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'Mirrors on the ceiling
The pink champagne on ice, and she said
"We are all just prisoners here
Of our own device"
And in the master's chambers
They gathered for the feast
They stab it with their steely knives
But they just can't kill the beast'
(Hotel California, The Eagles, 1977)

Abstract: Transnational subsidies, that is subsidies across jurisdictions, are a phenomenon of our times and are difficult to square within the four corners of the WTO rule-book. This talk will first investigate the different approaches of the EU and the US in regulating transnational subsidies. In so doing, it will explore the different (or similar?) approaches to international law across the Atlantic. The lecture will then conclude with the analysis of the issues before the WTO Panel in *EU – CV/AD on Steel products from Indonesia* (DS 616) which recently published its report. We will comment on the Panel's findings and implications, on what the Panel did and on what it should have done. Ultimately, the lecture is about the different shapes international law can take - domestically and internationally.

1. Introduction: the lecture and its topic

"Does the law regulate so-called trans-national subsidies?" This is the main question of the lecture.

Why this title? This is one verse of *Hotel California* of The Eagles. The song talks about the demise of the American, better the Californian dream. The characters have built their own prison. They have lost their freedom. Our case is not that depressing but I like the image of creating "our own device" of which we are "prisoners". What "own device" are we talking

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Special thanks go to the Centre of European Law that kindly invited me to deliver this lecture on 26 November 2025 and allowed me to return to my UK Alma Mater. The questions of Federico Ortino, my discussant, and of the audience were simply excellent and could only be tamed by the end of the allotted time. I thank all for having sharpened my thinking on the topic. As usual, any mistake rests with me, and only me.

about here? Every legal actor has to work within the four corners of its own legal-political device, made of specific legal, political, historical etc factors.

Now, the issue different legal systems have to handle may be the same – or very similar – but the process and the final regulation may not necessarily be the same. Being a lawyer, what mostly interests me is how the law is used within this process.

In our case, at least three legal actors (the EU, the US and a WTO Panel) have dealt with the complex legal and policy issue of the possible regulation of transnational subsidies. I said at least three because for one of them – the EU – we in fact can identify different actors and approaches: in particular, the EU Commission and then the EU courts. My contention is that each of these actors has adopted a different approach, although the outcomes are not necessarily different (at least for the time being). We could respectively tag these legal actors as the guardian (of the law), the policy-maker and the leader.

Ultimately, this lecture is a good case study of the law in our times. First, we have a novel legal issue highly charged geopolitically. Secondly, we have laws that are old, designed in a different world, with different issues in mind. Thirdly, we perhaps have a "new wine in old bottles" scenario. Fourthly, it is a case-study about diversity, and in particular about how international law can take various shapes, domestically and internationally.

But what is precisely the legal issue? Why is it really an issue?

2. The issue of transnational subsidies

We are talking of 'new' forms of subsidies. Subsidies that are cross-border or trans-national, that is that are not provided within the jurisdiction but in another jurisdiction.

Cross-border support may be given to facilitate investment, activity or production abroad. In some cases, this foreign financial support benefits producers of goods which are then exported to third countries. This type of cross-border support has become a key policy issue in international trade especially after the coming into effect of the New Silk Road or Belt and Road initiative by China. This massive investment and infrastructure strategy has involved significant transfers of economic resources from Chinese entities to many other economic operators in other countries.

Now, the laws that we have, both international and domestic, were crafted with different types of government intervention in mind, that is traditional 'within jurisdiction' support. Utopia supports Utopian companies within Utopia; not Utopia provides financial support to companies outside its borders. This is true for WTO subsidy laws in all their successive iterations (the 1947 General Agreement on Tariffs and Trade, GATT; the 1979 Tokyo Round Subsidy Code; the 1995 WTO Agreement on Subsidies and Countervailing Measures, ASCM) but also for domestic countervailing duty laws, that is the domestic laws that regulate the imposition of countervailing duties on subsidised imports.

In sum: we have a new trade problem and we have trade laws that are largely old and silent on this trade problem.[2]

There are two WTO law provisions that are relevant for us. (Domestic laws are largely modelled on WTO law.)

Article 1 of the WTO ASCM provides for definition of subsidy whereby a subsidy shall be deemed to exist if "there is a financial contribution by a government or any public body *within the territory of a Member*".[3] This provision then provides an exhaustive list of forms of financial contribution. Under Article 2, the WTO ASCM also requires that a subsidy, as defined above, must be "specific to an enterprise or industry or group of enterprises or industries … *within the jurisdiction of the granting authority*".[4]

What can we make of this language? Does it cover transnational support? From a legal point of view, the main issue is that both international and domestic laws are largely *silent* about transnational subsidies. When I say "silent" I mean two things. First, that it is clear that they cover traditional forms of 'within-the-jurisdiction' support. Secondly, that it is not clear that they also cover transnational support.

What do we make of silence now? Can we easily construe our instruments to cover this new type of measure? There is no easy answer to this not easy question.

It is known that WTO Dispute Settlement has *generally* been averse towards liberal interpretations. This has been masterly summed up by Claus Dieter Ehlermann when he characterised the ley attitude of the Appellate Body as one of "circumspection".[5] The difficulties in approaching unclear text have been masterfully expounded by another Appellate Body Member, Thomas Graham, in a famous speech at Hofstra University.[6] This speech is a list of candid questions about "what are we going to do – as AB Members – if we face silence, lacunae in the law? What is our responsibility? What is our power? What are the limitations we face?"

I believe the history of the negotiations is highly relevant in this respect. Subsidies – of whatever type – are very controversial. So are the rules governing them. The WTO subsidy disciplines represent a difficult and hard-fought compromise. One of the specific points of contention was exactly to determine which forms of support should be covered and regulated, and which should not. The field was so controversial that, in the end, the agreement does not include, as usual, a preamble stating what are the objectives of the rules. I would suggest that these historical considerations are very important in our case.

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[2] Incidentally, in many decades I have been working in the area, the possibility that countries would subsidies entities outside the jurisdiction, and hence that we could have a regulatory issue, is really something that came out only in recent years.

[3] Emphasis added.

[4] Emphasis added.

[5] Claus Dieter Ehlermann, "Six Years on the Bench of the 'World Trade Court' Some Personal Experiences as Member of the Appellate Body of the World Trade Organization" (2002) 36(4) Journal of World Trade, 605 – 639.

[6] Thomas R. Graham, "Present at the Creation" (2013) 12(2) Journal of International Business and Law 317-325.

After these few words of introduction, let's see how these actors have approached this issue we are examining.

3. The EU: the guardian of the law

If the EU has a geopolitical power, this has to be genuinely found in its norm generation. This takes place through the famous "Brussels effect" (although very recently the EU seems to be retreating through its various simplification measures: you read 'simplification' but the meaning is 'deregulation')[7] and also through the wide network of agreements and deals concluded by the EU with other countries through the decades.[8]

Within this normative focus, one overarching factor is the attachment to the rule of law. The reliance on the rule of law in the EU, and in its Member States, especially the founding Members, can also be explained historically. The rule of law is the best antidote against the worst excesses that led to dictatorships, protectionism, autarky and eventually two World Wars. European integration itself is justified by the need to ensure peace and prosperity. And European integration has taken place first of all through international treaties, that is international law.

So – this is the conclusion of this reasoning - the rule of law and international law are surely the foundations of European integration and its process.

Against this background, one can thus easily appreciate why Article 3(5) TEU ensures that the EU will "strictly observe international law". But why "strictly"? Wouldn't it have been enough to simply say: "the EU observes international law"? What does "strictly" add up to this?

It is known that the EU institutions painstakingly refer to international law sources in the recitals and operative provisions of their legal acts. At the same, however, it is a matter of empirics – i.e. one that concerns the actual content of decisions – that the EU and its legal actors have their own vision of international law and its rights and obligations. In the eyes of the EU, this is partly justified by the fact that its legal system is "autonomous" from both international law and the domestic systems of its Member States. Moreover, if international law commitments are not eventually upheld internally, this may derive from the fact that, in the instant case, these commitments do not have direct effect (and the denial of direct effect to international law is a disease common to many jurisdictions).

But, once again, what does "strict" observance mean? Does it mean that the EU will always and unconditionally follow international law? That would be laudably idealistic since practice tells us that, for endless reasons, such a high standard is very difficult to abide by.

Or could it mean "we now best"? To be sure, international law is not a 'fact'. As any law, it has to be interpreted and construed. And there may nuances, differences, etc in this process.

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[7] The simplification agenda and the various 'Omnibus' acts adopted by the Commission can be found at https://commission.europa.eu/law/law-making-process/better-regulation/simplification-and-implementation_en.
[8] https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en.

So could "strictly" mean: we are going to adopt the "only and correct interpretation", which may be at variance with that taken by others, including perhaps those international organisations that are specifically in charge of certain rules?

There are various lines in the case-law where the ECJ has provided its own 'take' on international law. For example, highlighting the special nature of its legal order to the extent that it was not obliged to follow UN Security Council Resolutions (*Kadi*),[9] or, as already noted, by dissecting and distinguishing the requirements for direct effect of international law in the EU order,[10] or, in some cases, even performing an interpretative act on the basis of the prevailing rules of interpretation of international law can coming to, to say the least, curious conclusions. I am referring for example to the *Front Polisario* / *Western Sahara* saga.[11]

In the 2016 *Front Polisario* and in the 2018 *Western Sahara* cases the issue was whether the agreement between Morocco and the EU was illegal inasmuch as it regulate Western Sahara territories, which would have breached the principle of self-determination of the people of Western Sahara.

The ECJ is such a strong believer that the EU is always committed to the strict observance of international law that it incurs into the logical fallacy that a) the EU could not have agreed to this in a treaty because b) this would be contrary to international law. In other words, since for the ECJ it is unthinkable for the EU to breach international law, the agreement between Morocco and the EU *could not* regulate Western Sahara territories. Hence, it *did not* regulate these territories. Hence, there is no issue of legality of the Morocco – EU agreement.

In conclusion, many of the interpretations of international law carried out by the ECJ are not necessarily one and the same with those that the international institutions of provenance, or indeed other legal actors, may have agreed to. For various legal and political reasons, they represent the EU view on certain distinct issues of international law.

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[9] See Joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, European Court Reports 2008 I-06351, ECLI:EU:C:2008:461. For analysis taking two different takes see Joris Larik, 'The Kadi saga as tale of "strict observance" of international law: obligations under the UN Charter, targeted sanctions and judicial review in the European Union (2014) *Netherlands International Law Review* 23-42; Piet Eeckhout, "Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC", EJIL Talk!, February 25, 2004, available at: https://www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/ .

[10] See Piet Eeckhout, *EU External Relations Law*, second edition, OUP, 2011, chapter 9; Jan Wouters, Frank Hoffmeister, Geert De Baere, and Thomas Ramopoulos, The Law of EU External Relations, third edition, OUP, 2021, Chapter 11; Ramses A Wessel and Joris Larik *EU External Relations*, second edition, Hart Publishing, 2020, chapter 5. For a very recent issue, i.e. the effect of the EU-UK TCA in the EU legal order, see the call for coherence put forward in the Opinion of Advocate General Andrea Biondi in Case C-413/24, *Vlaams Gewest v P&O North Sea Ferries Limited, P&O Ferries Limited*, delivered on 26 June 2025.

[11] See Case C-104/16 P, *Council of the European Union v. Front Polisario*, Judgment of the Court (Grand Chamber) of 21 December 2016, EU:C:2016:973; Case C-266/16, *The Queen, on the Application of Western Sahara Campaign UK* v. *Commissioners for Her Majesty's Revenue and Customs, Secretary of State, Food and Rural Affairs*, Judgment of the Court (Grand Chamber) of 27 February 2018, EU:C:2018:18. For a thoughtful analysis of the two decisions, see Eva Kassoti, "The Council v. Front Polisario Case:
The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)", European papers, Vol. 2, 2017, No 1, pp. 23-42; Eva Kassoti, "The ECJ and the art of treaty interpretation:1 *Western Sahara Campaign UK"* (2019) Common Market Law Review, 209–236.

Many of these interpretations have inevitably also found critics. This is also what has happened also in these transnational subsidy cases. Both the Commission and the Courts, each in its own distinctive way, have come out with interpretations of international and WTO law that are not necessarily orthodox.

So, what did the EU legal actors do?

Since April 2019 the European Commission started to receive complaints about financial contributions granted by the Chinese government and benefiting producers in other countries, most notably in Egypt and Indonesia. In both cases the Commission determined cross-border financial contributions amounted to countervailable subsidies and imposed tariffs on products coming from Egypt (glass fibre) and Indonesia (steel).

While the steel regulations (Indonesia) were challenged before the WTO Dispute Settlement (and provide the final chapter of our story with the opportunity for a WTO Panel to provide its view), the glass fibre regulations (Egypt) were challenged before the EU General Court and, on appeal, the European Court of Justice.

The EU Commission had to determine whether the applicable legal definitions of subsidy can cover so-called transnational subsidies. In so doing, it had to interpret and apply Article 3(1)(a) EU Basic Anti-Subsidy Regulation which reads:

> a subsidy shall be deemed to exist if: 1(a) there is a financial contribution by a government in the country of origin or export' (see also Article 2(a) on definitions of country of origin or export)

This EU law provision replicates its WTO model (Article 1.1(a)(1) WTO ASCM) which reads

> a subsidy shall be deemed to exist if … there is a financial contribution by a government or any public body within the territory of a Member.

The important legal language here is "by the government" (which can be found in both the relevant EU and WTO provisions).

The EU Commission focused on this language and construed it through public international law, and in particular to Article 11 of the Draft Articles on State Responsibility of the International Law Commission. Article 11 permits to "attribute" to a State conduct of another actor "if and to the extent that the State acknowledges and adopts the conduct in question as its own." This means that Indonesia and Egypt could respectively be considered accountable under EU and WTO trade laws for having "pro-actively sought or induced" (Indonesia), or "acknowledged and adopted" (Egypt) as its own subsidies granted by another country (China) for the benefit of producers within their own territory.

What does it all mean?

That, through the rules of attribution of international law, the Commission managed to broaden the notion of 'government' under the relevant provisions to include not only the country originally providing the financial contribution (i.e. China) but also the country of export (i.e. Indonesia and Egypt).

Now – this legal strategy is extremely ambitious and high-risk. Even more so because the Commission is 100% relying on this legal re-construction only. It does not even try to follow the usual, traditional path of exploring whether the ordinary meaning and the context of the legal provisions, all set within the object and purpose of the laws, enable covering these new forms of transnational subsidies. It is all about using the international law rules of State attribution to interpret trade laws.

To be sure, this is not new, especially in the WTO case-law of the Appellate Body (if you wish, the world trade court). But this approach (think of the momentous decision interpreting the expression "public body") has been harshly criticised by many and is arguably one of the technical mistakes that have eventually led to the US pulling the plug of the Appellate Body.

As noted, the regulations concerning glass-fibre products coming from Egypt were challenged before the Court of Justice. Now – all actors – General Court, Advocate General and European Court of Justice - fully confirmed the Commission's determinations and concluded that not only were they in line with EU law but was also clearly permissible under WTO subsidy law.

What is mostly surprising is the legal reasoning used by the three adjudicators. It is very brief and sweeping. Interestingly, they all dodge the difficult and ambitious use of the rules on responsibility to construe substantive disciplines, and focus on the traditional literal, contextual and purposive rules of interpretation of Article 31(1) of the VCLT interpretation. In so doing, they come out with surprising findings. We don't have time to focus on them in detail here.

Let me make two remarks here.

First, one interesting argument that sneaks through at the end of the legal reasoning of these decisions is policy-oriented. The General Court notes

> *it cannot be accepted that* an economic and legal construct such as that of the SETC-Zone, conceived in close collaboration between the Government of China and the Government of Egypt at the highest level, *is not covered by the basic anti-subsidy regulation, without this undermining that regulation's effectiveness or its purpose and objectives.*[12]

The Advocate General similarly supported an unwarrantedly broad take to EU and WTO anti-subsidy rules to cover "any scenario" in which a subsidy issue comes out.[13] Going to the very final paragraphs of the European Court of Justice decision, one can find a similar policy –

[12] Para 58, emphasis added.
[13] Para 37 of the Opinion.

apprehension. The Court of Justice suggests that the broader interpretation of subsidy laws (one that permits to include transnational subsidies).

> [t]akes account of the increased internationalisation of undertakings participating in world trade and of the support, sometimes decisive, from which they may benefit in that context, in the form of financial contributions which are granted as a result of assistance or the action of the governments of several member countries of the WTO.[14]

In all this reasoning, a policy concern, a policy desire becomes legal reality. Policy considerations sneak through legal interpretation, which may not be warranted: the answer depends on how responsive the regulatory framework is.

The second observation. As we are about to see, the General Court, Advocate General and ECJ, all come out with readings of WTO law that are different from those of the WTO Panel. This is normal. Different courts may come to different interpretations. But what is ironic is to see how sure and self-confident the EU judicial actors are in construing WTO rules that are silent on a truly controversial issue and to see how cautious and deferential the WTO adjudicator, if you wish the original interpreter of WTO law, is in speaking on the very same issues.

One now really wonder whether, in this case, this stern "guardian of the law" is, however, "strictly observing international law".[15]

4. **The US: the policy-maker**

If the EU as an actor can be tagged "the guardian" or even "the (stern) guardian (of the law)", surely the US appears as the "policy-maker".

What do I mean by this? In the US approach what matters is the analysis and solution of the problem. What comes out is a pragmatic concept of law, a policy-oriented version of the legal process.

I can immediately think of a quote from the famous American jurist (and associate Justice to the Supreme Court) Benjamin Cardozo

> Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. *If they do not function, they are*

[14] Para 98 of the Decision.

[15] Commenting on the *Front Polisario* decision mentioned above, Jed Odermatt notes: "The CJEU may thus appear to be committed to "the strict observance and the development of international law" as required by the Treaty on the European Union, but upon closer inspection it has actually employed these principles to avoid enquiring into the legal ramifications the EU's policy toward Western Sahara." (2017) *American Journal of International Law*, 731-738, at 737-738. What we arguably see in the transnational subsidy case is either a very dubious application of the rules of attribution of international law to the specific WTO law on subsidies (the EU Commission), or a very quick and frankly targeted reading of both EU and WTO subsidy rules (the General Court and the ECJ).

> *diseased. If they are diseased, they need not propagate their kind. Sometimes they are cut out and extirpated altogether.*[16]

This is exactly what happened in the case of transnational subsidies in the US. There was a rule, that rule did "not function" anymore, hence it became "diseased". Consequently, it was "cut out and extirpated" from the rule-book.

But to appreciate this story fully we need to go back in the past, to the early 1980s. At that time the US were the exclusive users of countervailing duties, that is they were the only ones that protected their market from subsidised imports by imposing an extra-tariff on them. What was the rest of the world doing? Attempting in any possible way, to constrain the power of the US. (This is largely the story of the Uruguay Round negotiations that focused on creating a new agreement subsidies and countervailing measures and where the biggest effort and feat was to come to a balanced legal definition of subsidy!)[17]

For various reasons, in the early 1980s there was a dramatic surge of applications for protection with the Import Administration of the Department of Commerce. In 1982 only they received 217 different antidumping and countervailing duty applications, which is a huge number by any standard – and in any time. Importantly, some of these petitions included claims that

> World Bank loans to Brazil, Japanese war reparations to Korea, US Marshall plan aid to European countries, West German aid to West Berlin … constituted countervailable subsidies.[18]

These were the first attempts to react to surely exotic forms of transnational or cross-border subsidies! Surely, the current context is different. Gary Horlick, at the time the head of the Import Administration, says:

> I had no intention of opening that particular can of worms, with the political explosiveness involved (the US at the time was the largest single donor of overseas development assistance) *so we decided not to treat as countervailable those subsidies given by a government outside its territory.*[19]

Hence, as first important act in the US story, the DOC made a policy choice: transnational subsidies should not be countervailed. This was called "the transnational subsidy rule", an administrative rule crafted by the DOC. The relevant statute, which incorporated the results of the Tokyo Round of international trade negotiations of 1979, was silent on the issue. (Recall that at the time we did not even have a legal definition of subsidy internationally or domestically.) This rule passed through the decades. The 1995 Uruguay Round Agreement

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[16] Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, 1921, pp. 98-99 (emphasis added).
[17] See Panel Report, *US – Measures Treating Export Restraints as Subsidies* (WT/DS194). In the literature, see Michael Cartland, Gérard Depayre, Jan Woznowski, "Is Something Going Wrong in the WTO Dispute Settlement?" (2012) 46(5) Journal of World Trade 979 – 1015.
[18] Gary Horlick, 'An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures' (2013) 8(9) Global Trade and Customs Journal, 298.
[19] Ibid (emphasis added).

Act (URAA), the statute that replaced the 1979 Trade Agreements Act (TAA) does not speak to the issue of transnational subsidies either. But implementing regulation continued to prohibit the countervail of transnational subsidies.[20]

Fast forward to 9 May 2023 when a proposal to amend this long-standing rule was followed by a public consultation.[21] The final act in this policy process comes out in March 2024 when the transnational subsidy rule is amended, enabling countervailing transnational subsidies.[22] The first investigations and determinations follow with duties imposed on imports coming from various countries. In late August 2025 this an appeal was lodged with the Court of International Trade (CIT).[23] So, we are now awaiting the CIT to decide and then, quite probably, other courts to intervene on the topic.

Now, certainly, this very attentive audience has realised that something is missing in this legal story, especially if we compare it with the approach previously taken by the various EU actors. Curiously, there is *no reference to international or WTO law*. It is a policy process wholly confined to the US system and US law.

There may be various reasons for this. I would like to dispose of immediately of the cynical argument whereby the US does not really care about international law. Especially if put this way, this explanation would be too simplistic.

I rather think there are three other possible reasons, not necessarily excluding each other.

First of all, the transnational subsidy issue has always been framed in the US as an administrative law, if you wish, second level issue. It has always followed that track without really engaging with statute level. That happened since the beginning when in the early 1980s the DOC introduced the "transnational subsidy rule". International law can thus be seen as distant.

But perhaps, the main reason is that reference to WTO law would not really add anything to the process. Complainants don't really have an incentive in arguing a WTO law point on transnational subsidies because this has always being silent (in the sense explained above) on the issue. Frankly, rather than supporting a challenge, a reference to pretty vague WTO law arguments might undermine it. Confirmation of this point – it does not make any sense to rely on utterly vague evidence – comes out from the fact that, in other areas of trade law, US law does engage with WTO law.

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[20] See 19 USCFR § 351.527.

[21] Department of Commerce, International Trade Administration,19 CFR Part 351 [Docket No. 230424-0112] RIN 0625-AB23, available in the Federal Register at https://www.govinfo.gov/content/pkg/FR-2023-05-09/pdf/2023-09052.pdf .

[22] Department of Commerce, International Trade Administration 19 CFR Part 351 [Docket No. 240307-0075] RIN 0625-AB23, available in the Federal Register at https://www.govinfo.gov/content/pkg/FR-2024-03-25/pdf/2024-05509.pdf .

[23] See David LaRoss, "Cambodia asks CIT to bar AD/CVD probes for 'transnational' subsidies", Inside US Trade, August, 26, 2025. In fact, there are several cases before the CIT that involve solar panels coming from various Asian countries (Cambodia, Malaysia, Thailand, Vietnam).

Partly connected to the lack of added value of a WTO law point, there is perhaps another more general point, connected to the so far prevailing Supreme Court case-law on the effect of international law on the activity of the agencies. Till last year 1984 *Chevron* decision gave significant discretion to administrative authorities in their determination.[24] This was construed to limit the old 1804 *Charming Betsy* canon that guided judges to find an interpretation of US law aligning with international law whenever it is feasible to do so.[25]

Last year, the *Loper Bright* decision overturned *Chevron*.[26] This ruling is expected to lead to less flexibility for federal agencies in various areas and to more challenges to regulations, perhaps also with arguments that the determinations of the agencies are not in line with the US international law obligations.[27] The jury is out on this last point. Perhaps, the Court of International Trade may provide some light on this.

Whatever it may be, it is interesting that the US authorities did not feel it necessary to engage in complex interpretations of legal provisions that are silent on the issue, that are extremely controversial because they are the compromise of different negotiating position and resulted in a balanced outcome. That said, the whole issue was dealt with through an open and transparent policy process, where the economic and legal issue was approached head-on, and, using Cardozo's words, the old "diseased" law was "cut out and extirpated".

If we now compare the EU and US approaches, whereas in the EU policy consideration sneaks through legal interpretation (and lead to controversial readings of the law), in the US the policy concern leads to reforming the law (which resorting to any legal acrobatics).

5. The WTO Panel: the leader

As previously said, the Regulations of the EU Commission imposing CVDs on Indonesian steel on the theory that they benefited from Chinese-and-Indonesian subsidies were not challenged in Luxembourg but in Geneva, through the WTO Dispute Settlement.

Few weeks ago, on October 2, the Panel issued its long-awaited report.[28] Note that, in principle, this is not simply just another interpretation. This is the official (though not authoritative)[29] interpretation of WTO law inasmuch as it comes from an organ of the WTO. Though, strictly speaking, not necessarily binding on all other Members, it certainly offers the best possible guidance on the issue.

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[24] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).
[25] *Murray* v. *The Charming Betsey*, 6 U.S. 64 (1804).
[26] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
[27] See Michael Jacobson and Stephen Finan, "The Charming Betsy Canon: Time to Ride the Tide of Loper Bright", *Harvard International Law Journal*, March 28, 2025.
[28] Panel Report, *European Union — Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia* (WT/DS616/R), October 2, 2025.
[29] Under Article IX:2 of the WTO Agreement, authoritative interpretations can only come from the Ministerial Conference and the General Council. Authoritative interpretations require three-fourths majority of WTO members and are "binding on all members" (Appellate Body Report, *US – Measures Affecting the Production and Sale of Clove Cigarettes* (WT/DS/406/AB/R), para. 250). This on paper promising route to rejuvenate the law without formal treaty amendment has never been used in the more than thirty years of existence of the WTO.

Now – what was the *conclusion* reached by the WTO Panel? What was its general *approach* to the issue? In sum, the Panel found that, in the specific circumstances of the case, the EU Commission got it wrong. In terms of approach, the Panel report is – at least on its face - extremely cautious and avoids coming out with too general and sweeping statements not necessary to offer a positive solution to the dispute. The end result, however, is that it essentially leaves the door open to the regulation of transnational subsidies through WTO subsidy laws and shows deference to the choices that WTO Members will decide to make in their own systems.

More specifically, what did the Panel say?

You may recall the imaginative and bold construction of the law carried out by the EU Commission. They construed EU and WTO language "by the government" through public international law (which may represent "relevant context" to that wording under Article 31(1) VCLT) and in particular the rule of attribution of Article 11 of the Draft Articles on State Responsibility. In the specific case, that meant that, according to the Commission, Indonesia could be held accountable of Chinese financial contributions because it had "pro-actively sought" or "induced" China to provide these monies to Indonesian companies.

The Panel rephrased the various questions put by Indonesia to one: whether the language "by the government" could include, under WTO law, government-to-government attribution in the specific form of the inducement test of the Commission.

There are three main messages coming out from the report: first, caution; secondly, orthodoxy; thirdly, the danger of a fatal attraction.

The first message of the Panel is 'caution'.

Both Australia and Canada had importantly asked the Panel to be particularly cautious, highlighting the systemic importance of the case. "The SCM Agreement is silent on the issue of transnational subsidies" "The Panel should not endorse an interpretation of the SCM Agreement that unduly constrains WTO Members from taking action against trade-distortive subsidies that circumvent the disciplines in the SCM Agreement" "The Panel need not evaluate broad claims regarding the proper interpretation of Article 1.1(a)(1), including whether only actions of governments or public bodies, and actions of private bodies entrusted or directed by a government of one Member, can be attributed to 'government' under the SCM Agreement" The Panel should "limit its consideration to the narrow question of whether the Commission's particular means of attributing the financial contribution at issue here to Indonesia is permissible under Article 1.1(a)(1)"

The Panel fully endorsed this approach. It was at pain in clarifying in various parts of the report that: "we need not to address …", "we don't have to answer …", "we don't express an opinion on …"

Crucially, though, they did not exclude "the possibility that such attribution may be permissible in some factual circumstances" (and they repeated this point twice in the space of

few lines in para. 7.59)[30] but they hastened to underline (once again) that they did not have to answer this question to give a "positive resolution" to the case (that clarification was rehearsed again – twice - at the end of the reasoning in paras. 7.86 and 7.90).

The second message was 'orthodoxy'.

The Panel's legal interpretation of WTO law is a 100% orthodox (and arguably correct) The Panel underlined how the definition of subsidy finds its deep rationale in the negotiators' intention to cover only certain forms of governmental interventions, and cannot be stretched without any limit. The definition of subsidy has a "closed nature", it is essentially a "closed list".

Hence, in sum, reading the report, the strong impression is that if we were focusing on WTO subsidy laws only, the answer to our original question – can we cover/regulate transnational subsidies – would be: "no, we can't!". To potentially cover them reference had to be made to a public international law argument.

And here we have the crucial twist to the story. The Panel surrendered to a "fatal temptation and attraction", that of using public international law to solve the issue.

The reasoning is concluded with the analysis of the fundamental argument used by the EU Commission in regulating transnational subsidies, i.e. the use of Article 11 of the Draft Articles on State Responsibility). The Panel crucially finds

> we express no opinion on the extent to which Article 11 of the ILC Articles on State Responsibility provides guidance on whether Article 1.1(a)(1) of the SCM Agreement can be interpreted to permit state-to-state attribution *in general*. Our assessment is confined to examining the extent to which Article 11 sheds light on whether Article 1.1(a)(1) permits state-to-state attribution *through the specific manner* in which the Commission sought to establish the attribution at issue, namely on the basis of alleged government-to-government inducement.[31]

As said, the Panel eventually concluded that this type of state-to-state attribution is not possible, hence the Commission was wrong. But, crucially, the fact itself of accepting the possibility of using Article 11 leaves the door open to the use of other state-to-state tests of attribution that are more in line with the language of "acknowledging and adopting". I am not commenting here in detail on whether, from a legal perspective, this reference to the rules on responsibility to construe the rules on subsidies is warranted, which is a big issue (and is in my view ultimately wrong).

[30] I have heard people suggesting the use of this language should not really be read to mean what it says. According to these views, it would be very difficult for a WTO Panel to find state-to-state attribution. I am not that sure.

[31] Panel Report, para. 7.101, emphasis added.

The Panel's approach was ingenious and to a large extent (but for the final twist) correct. It was not for them to decide controversial systemic issue (esp. w/o AB and with Indonesia not a party to MPIA), they kept the door open for future analysis, and gave Members policy space.

The WTO Panel, faced with an almost impossible mission (intractable legal and policy issue, serious risk of making one party happy, and one unhappy), has arbitrated a solution, a Solomon's solution. A solution that has safeguarded orthodoxy in the construction of WTO law – and thus respected the negotiated balance of the compromise underlying subsidy disciplines (first part of the reasoning). But, at the same time, ventured into dangerous territory by referring once again to secondary rules of international law (second part of the reasoning).

The practical, policy result is deference towards what governments will want to do – you can now continue not countervailing transnational subsidies, or you can do it and, under certain circumstances, this will be permissible under a novel, re-engineered interpretation of WTO subsidy laws via public international law.

As noted, however, the irony though is that the adjudicator that should have been more self-assured about its ideas and conclusions was, comparatively, the more cautious of the three. As said, this is understandable, but it is also a sign of our turbulent, messy, ambivalent times. The Panel was "prisoner of its own device" or perhaps of a "device" that it simply found.

6. Conclusions

The guardian, the policy-maker, the leader. The *stern* guardian, the *unconcerned* policy-maker, the *recalcitrant* leader. This review has shown a great degree of convergence towards the same outcome but, perhaps, the most interesting feature is given by the variations in the legal analysis and process.

The EU lost the battle but, arguably, won the war (among the various EU actors, the absolute winner is the EU Commission with its more ambitious/high-risk position). Despite this result, they curiously appealed the report into the void. Rumours suggest that there may be new cases concerning EU action on transnational subsidies. If this is correct, it may well be anticipated that, perhaps not formally, but certainly informal ways, the Indonesia Panel Report will produce normative effects.

The US followed its own track, which is leading to the same outcome. An interesting question is whether the recent *Loper Bright* decision will change anything in this case. In other words: If reference is made to international law, will it necessarily be the WTO Panel decision (as it is highly likely)? Will US Courts be as bold as the EU Courts and come out with their own interpretations?

But, perhaps, the real convergence will come out from the necessities of geopolitics. If it is now China that is massively and strategically investing abroad, and attracting transnational subsidies claim, it will soon be others' turn – all the major players are following suit with

massive investment abroad.[32] It is perhaps just a matter of time before their action will too attract transnational subsidy claims.

[32] One good example in point is the G7 Partnership for Global Infrastructure and Investment (PGII).