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The EU's Emerging Regime on Extraterritorial Subsidies: Extending the Scope of EU State Aid Law


相關文獻

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Abstract

WTO law and WTO members' commercial policy on subsidies were shaped by the western societal paradigm of the post-war period and have grown increasingly outdated and deficient. They are heavily product-centered and tend to be oblivious of service subsidies, they address domestic subsidies and disregard extraterritorial subsidies, and rest on a societal paradigm based on the autonomy of economic operators and a clear separation between the private and the public sector. This paper presents the EU's endeavor to react to the foregoing challenges by introducing a regime on extraterritorial subsidies. First, it presents the system error featuring WTO law and EU commercial policy. Second, it demonstrates that, in fact, the EU simply extends its already existing state aid law to extraterritorial subsidies. Third, it presents the key features of the emerging EU regime on extraterritorial subsidies. Fourth, it provides a general assessment of the EU approach.

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1. Introduction

State aids (subsidies) are a central question of every trading system, as they may significantly distort competition in the market.[1] If producers of different states compete with each other in the same market, a subsidized company may have a significant competitive advantage over its competitors, whose only source of revenue is the market. Suppose that Ruritanian producers have an average production cost of €100 and receive a production subsidy of €20 per product, while Butanian producers have an average production cost of €90 but receive no state aid. In this scenario, Butanian producers should be more successful in the market, because they are more cost-effective and can, therefore, sell their products at a lower price: their cost price is €90, in contrast to Ruritanian producers' €100 cost price. As a result of the subsidy, however, this €10 competitive advantage is not only eroded but reversed. The €20 subsidy afforded to Ruritanian producers makes their cost price €80 and gives them an edge over Butanian producers.

WTO law and WTO members' national commercial policy regimes all address subsidies as a case of unfair trade and provide for rules in the form of prohibitions and unilateral counter-veiling measures. Their approach and conceptions were molded, however, in the post-war period and can be traced back to as early as the GATT 1947. Although, at the time of its creation, this was a state-of-the-art toolkit tailored to the characteristics of international trade, the developments of the last couple of decades made it outdated and deficient.

First, the traditional toolkit against subsidies is heavily product-centered and ignores service subsidies, even though trade in services became equally important as trade in goods and service subsidies became widely used.

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[1] It is worth noting that, although an important issue, not all trading systems ban state subsidies. Interestingly, in the United States, state subsidies are, in principle, not prohibited. The Dormant Commerce Clause prohibits state protectionism, but it does not rule out the direct subsidization of the domestic industry. *See e.g. New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988).

Second, the traditional toolkit addresses domestic subsidies and disregards extraterritorial subsidies, although the latter became widespread and entail the very same distortive effects as domestic ones. Domestic subsidies, the most traditional category, are financial contributions granted to recipients who are located in the territory of the granting state. Foreign and transnational subsidies, as coined by this paper, are extraterritorial state aids. Foreign subsidies are financial contributions provided to recipients located in a foreign country concerning activities to be pursued in that country. For instance, if the Chinese government grants a favorable (non-market-based) loan to a company established in the EU (a subsidiary of a Chinese company) to submit a bid to a European public tender or to carry out an infrastructure project in one of the Member States, this will be a foreign subsidy. The term "transnational subsidy" refers to three-country scenarios where the granting authority, the recipient company and the economic impact are in different states: country "A" grants a financial contribution to a company located in country "B", which, in turn, sells its products or services in country "C".[2]

Third, the traditional toolkit rests on a societal paradigm based on the free market, the autonomy of economic operators and a clear separation between the private and the public sector, where private enterprises cannot be aligned to serve foreign policy aims. Nonetheless, the last two decades have seen the accession to the WTO of government-dominated economies (China in 2001, Saudi Arabia in 2005, Viet Nam in 2007 and Russia in 2012), which raises serious paradigmatical challenges. "Government-dominated economies", as coined by this paper, are not planned economies but market-based economic systems where the government has a decisive formal and informal influence over market operators and informal governmental rules play a central role. Furthermore, these systems have a higher tendency to subsidize economic activities[3] and quite often this occurs via state-owned enterprises.

These traits challenge the system of WTO in various way. Some of these issues are simply not caught in the net of WTO law at all, while others, although covered by WTO rules, emerge with such a high intensity that WTO law cannot handle them effectively.

This paper presents how the EU tries to react to the above challenges by introducing a regime that addresses the above deficiencies of the traditional approach to trade-distorting state practices. First, it presents the system error featuring WTO law and EU commercial policy and the deficiencies

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2 Cf. White Paper, p. 47 ("a foreign subsidy is a financial contribution benefitting directly or indirectly an undertaking in the EU, offering goods or services, or engaging in investments").

3 Chu Yeong Lim, Jiwei Wang, Cheng (Colin) Zeng, China's "Mercantilist" Government Subsidies, the Cost of Debt and Firm Performance, 86 Journal of Banking & Finance 37-52 (2018); Tom Hancock & Yizhen Jia, China paid record $22bn in corporate subsidies in 2018 (Financial Times, May 27, 2019), available at https://www.ft.com/content/e2916586-8048-11e9-b592-5fe435b57a3b.

they have in the light of the above phenomena of international trade. Second, it demonstrates that, in fact, the EU is not introducing a new regime against extraterritorial subsidies but simply extends its already existing state aid law, which currently applies solely to subsidies granted by EU member states but not to extraterritorial subsidies. In this sense, the emerging EU regime does away with an existing asymmetry where EU member states are prohibited from subsidizing but non-EU governments are not. Third, it presents the key features of the emerging EU regime on extraterritorial subsidies. Fourth, it provides a general assessment of the EU approach.

2. Extraterritorial state aids: a system deficiency

WTO law contains a detailed regime on subsidies, which served both as a framework and a role model for national commercial policies. Under WTO law, any financial contribution which confers an advantage and which is granted by (or under the control of) a member state or a public body may constitute a subsidy. A state subsidy may be prohibited if it is specific (it is given to a particular company or a particular group of companies). WTO law distinguishes between two categories of state aid.[4] Export subsidies and import substitution (or local content) subsidies are "prohibited subsidies:" they are specifically prohibited by Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). "Actionable subsidies" (such as production aid) are not prohibited but can be challenged, if they injure another member state's domestic industry or have a serious adverse effect on the interests of another member state. The rules on subsidies may be enforced either through WTO dispute settlement or through the unilateral imposition of countervailing duties. First, the adversely affected member state may sue and the Dispute Settlement Body may pronounce the subsidy illegal and call the member state to bring its law in conformity with the WTO standards. Second, the adversely affected member state may unilaterally impose countervailing duties to remove the competitive advantage generated by the foreign subsidy.

The above regime features three major shortcomings. First, it addresses subsidies only in relation to goods, service subsidies are not subject to any discipline. It has to be stressed that in WTO law "services" encompass a wide range of activities and the definition goes way beyond the meaning in EU law.[5] Notably, services, in addition to cross-border provision and consumption, also

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[4] Initially, Article 8 of the SCM Agreement also set out non-actionable subsidies (that is, *per se* lawful subsidies). This category was in force for five years, until 31 December 1999, and, according to Article 31, could be extended by consensus of the SCM Committee. No such consensus had, however, been reached.

[5] Article 57 TFEU ("Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.").

include the commercial and physical presence of foreign undertakings.[6] In EU internal market law, some of these scenarios may come under the rules of freedom of establishment[7] and free movement of capital. Second, it is doubtful if extraterritorial subsidies[8] are covered by this regime at all. Third, WTO law gives significant room to hidden state aid (provided by state-owned enterprises via favorable contractual terms), which remain largely under the radar.

WTO law contains a comprehensive regime on subsidies in respect to trade in goods. The GATT prohibits only export subsidies for non-primary products, in Article XVI(4), and authorizes member states, in Article VI, to impose countervailing duties. Article XVI GATT, although confirming that export subsidies "may have harmful effects for other contracting parties", confines itself to obliging member states who engage in subsidization to notify other members and be ready to enter into discussion with the affected ones. Special rules are set out for agricultural subsidies (Agreement on Agriculture).[9]

Article VI GATT confines member states possibilities to provide product subsidies and empowers members that are hit negatively by such subsidies to adopt countervailing measures. The SCM Agreement contains a specification of these provisions. Nonetheless, these rules apply only to product subsidies, that is, aid provided to manufacturers. Furthermore, it is questionable if they apply to extraterritorial subsidies. The beneficiary of an extraterritorial subsidy may be located in the country where the goods are sold or in a third country where the goods are produced and from where they are exported. It is uncertain, if the GATT's regime and the accompanied SCM Agreement applies merely to subsidies provided to manufacturers located in the territory of the providing state.

The SCM Agreement has a broad scope of application owing to its wide definition of subsidies; still, it is doubtful if it applies to extraterritorial subsidies. Article 1 of the SCM Agreement defines "subsidy" as "a financial contribution by a government or any public body *within the territory of a Member* (referred to in this Agreement as 'government')."[10] Furthermore, Article 2.1. of the SCM

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6 Article I(2) GATS ("For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.") & XXVIII GATS.

7 Article 49 TFEU ("Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.").

8 Marc Benitah, The WTO law of subsidies: a comprehensive approach 605 (Wolters Kluwer, 2019).

9 *See* Lorand Bartels, The Relationship between the WTO Agreement on Agriculture and the SCM Agreement: An Analysis of Hierarchy Rules in the WTO Legal System, 50 Journal of World Trade 7-20 (2016).

10 Emphasis added.

Agreement makes a similar implicit reference: "[i]n order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises') *within the jurisdiction of the granting authority*, the following principles shall apply…".[11] As to Article 1 one may forcefully argue that the phrase "within the territory of a Member" is related to the term "public body" and not the term "subsidy", that is, this phrase simply confirms that solely subsidies provided by public bodies located "within the territory of a Member" are relevant. This is reinforced by the fact that in the brackets the text provides a shorthand for "a government or any public body." If the phrase "within the territory of a Member" were aimed to provide a territorial confinement for the payment of the subsidy, it would be after the brackets. Furthermore, less convincingly, but one may still argue in respect to Article 2 that the phrase "within the jurisdiction of the granting authority" may embrace not only territorial but also personal jurisdiction, thus extending the scope of this provision to recipients located outside the territory of the member state concerned. Finally, Article 2.1. inserts the phrase "within the jurisdiction" into the definition of specificity but, at the same time, Article 2.3. provides that *per se* prohibited subsidies (that is, export and local content subsidies) are legally presumed to be specific, hence, they do not come under the definition set out in Article 2.1.[12] So it may be argued that at least transnational export and local content subsidies are caught in the net of the SCM Agreement, in addition to the prohibition of Article XVI(4) GATT on export subsidies for non-primary products.

A further loophole of the SCM Agreement is the status of benefits provided by state-owned enterprises.[13] Although a state-owned enterprise may be regarded as a "public body", this can be established only on a case-by-case basis. In *United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body[14] held that a public body is "an entity that possesses, exercises or is vested with governmental authority"[15] and "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body",[16] hence, the determination is subject to a rather demanding case-by-case analysis.

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11 Victor Crochet & Vineet Hegde, China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement. Leuven Centre for Global Governance Studies Working Paper No 220, February 2020.

12 Victor Crochet & Vineet Hegde, China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement. Leuven Centre for Global Governance Studies Working Paper No 220, February 2020.

13 *See* Ting-Wei Chiang, Chinese state-owned enterprises and WTO's Anti-Subsidy Regime, 49 Georgetown Journal of International Law 845 (2018).

14 Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WTO Doc. WT/DS379/AB/R (adopted on 11 March 2011).

15 Para 317.

16 Para 320.

The status and autonomy of state-owned enterprises is obviously not uniform in the member states, which feature extremely huge differences. The presumption in favor of independence introduced by the Appellate Body may be a realistic assumption in some member states but, in others, it may appear to be naive and repugnant to the reality. This presumption is apparently based on the WTO's original paradigm (western constitutional democracies) and turns a blind eye to the realities of government-dominated economies.

No disciplines are in place concerning services (at least as to the export-oriented aspects of service subsidies, as the national treatment obligation may apply to subsidies and, hence, require member states to treat foreign and domestic enterprises located in their territory alike). While Article XV GATS contains an inbuilt mandate to negotiate and work out a regime on service subsidies, it establishes no discipline, aside from the duty of consultation with the members adversely affected.

The EU's domestic rules on subsidies feature the same gaps as WTO law. The rules on subsidies authorize the EU to react, usually by means of a counter-veiling duty, to unfair competition generated by products subsidized by a foreign government.[17] Nonetheless, this regime applies only to products and does not cover services, investments and the establishment and operation of undertakings in the EU. Furthermore, these instruments do not apply to extra-territorial subsidies. The depth of the problem is revealed by a recent decision of the European Commission, where the EU adopted countervailing duties on imports from certain Chinese enterprises located in Egypt for their receiving subsidies from the Chinese government. Lead by the desire to ensure a firm legal basis, the Commission argued that the Chinese subsidies granted to Chines enterprises located in Egypt could, on the basis of general international law, be regarded as subsidies provided by Egypt itself, hence, the regime on countervailing measures applied.[18]

EU law contains various other instruments, which are not part of the trade policy regime but may be applied to subsidies. A closer look, however, reveals that these instruments are not capable of addressing the issue either. The EU's FDI Screening Regulation[19] applies to foreign direct

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[17] Regulation 2016/1036 on protection against dumped imports from countries not members of the European Union, [2016] OJ L 176/21. Regulation 2016/1037 on protection against subsidised imports from countries not members of the European Union, [2016] OJ L 176/55.

[18] Commission Regulation 2020/776 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt, [2020] OJ L 189/1, para 699; Commission Regulation 2020/870 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt, [2020] OJ L 201/10.

[19] Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union,

investments and tackles the security and public order risks entailed by them but does not specifically address the distortions caused by them. Articles 107 and 108 TFEU exhaustively regulate state aid, but they cover solely subsidies granted by EU Member States and do not apply to subsidies granted by non-EU countries. EU antitrust and merger control rules authorize the European Commission and national competition authorities to intervene where the practices of market operators distort competition, but they do not specifically authorize them to intervene in response to an extraterritorial subsidy or to take that into account.

All in all, service subsidies and extraterritorial subsidies are not effectively caught in the net of either WTO law, or domestic EU rules. In addition, non-EU countries may effectively use state-owned enterprises to evade even the existing prohibitions. EU law contains strict rules on state aid. Although these apply exclusively to EU Member States, they offer a model for the treatment of subsidies granted by non-EU countries.

3. EU state aid law: a role model

Article 107(1) TFEU pronounces as incompatible with the common market any aid granted by a member state or through member state resources in any form whatsoever, if that distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods. As a jurisdictional requirement, the prohibition applies only insofar the state aid affects trade between Member States. Articles 107-109 TFEU contain the primary rules on state aid. They define the purview of the prohibition and set out various exceptions. They also authorize the Council to adopt implementing legislation. This power has been largely delegated to the European Commission, which has adopted block exemption regulations, which also set out various exceptions to the prohibition of state aid.

The prohibition enshrined in Article 107(1) TFEU may be boiled down to four substantive elements: advantage (benefit), state origin, selectivity and distortion of competition.

3.1. Advantage

The advantage has to be conceived widely and, besides direct subsidies, embraces any economically relevant advantage (tax concessions, preferential loans etc.). As a rule of thumb, any benefit accruing from a transaction on non-market terms may qualify as an advantage up-to the extend the undertaking enjoys terms that are more favorable than those available in the market.[20] Accordingly, the provision of access to infrastructure on favorable terms, the sale of products below

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[2019] OJ L 79/1.

[20] Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3913.

the market price, the purchase of products above the market price, loans on preferential terms, credit guarantees, takeovers not in compliance with the market economy investor principle, tax exceptions and allowances may all amount to a state aid.

As a general principle, member states are required to act as a "market economy operator."[21] They have to behave as a market buyer when buying services, as a market seller when providing services and as a market investor when lending, financing and investing. Any advantage emerging from a departure from this principle may amount to an advantage and, hence, a state aid. This is particularly the case where the contract was not awarded in a competitive public tender.[22]

In *Magyar Villamos Művek*, the Commission found that the long-term power purchase agreements (PPAs) concluded by the incumbent electricity company (MVM) contained hidden state aid.[23] MVM, as a state-owned company, entered into long-term contracts with power plants in Hungary and committed to purchase the electricity from them at a fixed price.

> *"[I]n order to conclude on the existence of an advantage, it should be verified if under the conditions prevailing when Hungary acceded to the European Union, a market operator would have granted a similar guarantee to the generators as that enshrined in the PPAs, namely a purchase obligation by MVM of the capacities reserved in the PPAs (corresponding to a substantial part and in many cases to the entirety of the available capacities of the power plant), a guaranteed minimum quantity of generated power, over a period of 15 to 27 years corresponding to the typical expected lifetime of the assets concerned or their depreciation, at a price which covers the fixed and variable costs (including fuel costs) of the power plant."*[24]

The Commission considered that the PPAs contained conditions that the power plants could not have obtained under normal market conditions and, hence, the resulting advantages constituted implicit state aid.[25]

In *P&O European Ferries*, the Court of Justice of the European Union (CJEU) ruled that it is

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21 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262/1, paras 73-114.

22 According to the Commission's practice, the use of public tenders is one way for a Member State to avoid the application of state aid rules, as the use of such procedures is a means to demonstrate that the Member State did not intend to favour a selected undertaking. Erika Szyszczak, The Regulation of the State in Competitive Markets in the EU 191 (Hart Publishing, Oxford, 2007).

23 Commission decision on State aid granted by Hungary in the framework of long-term power purchase agreements, C (2008) 2223 final.

24 Para 177.

25 Para 217.

not a market transaction, if the state buys goods or services that it does not actually need, even if it pays a market price.[26]

In *France Télécom*,[27] the CJEU attributed an extremely broad meaning to the term "advantage." It ruled that the declaration of the French minister for economic affairs made to assist France Télécom constituted a state aid, although it was not legally binding, created no legal obligation and no payment was made on the basis of it.

France Télécom was in financial difficulties and, in a public statement, the minister promised to take the appropriate measures, if necessary. As a result of this statement, the company's shares were not downgraded and their price soared. It was established that the minister's public statement played a decisive role in changing the market trend. Subsequently, French authorities also publicly offered a substantial shareholder loan, which was, however, finally not accepted by the company.

The CJEU found both of the above to be prohibited state aid, since they conferred an advantage on France Télécom.

> *"In particular, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking, and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to be aid."*[28]

Services, goods, raw materials or infrastructure provided free of charge or at a discount by the state or a public body may also constitute a state aid.

In *Van Der Kooy*[29], the Dutch gas supplier, which was 50% state-owned, provided horticultural producers a preferential gas tariff. The CJEU found the discount to be a state aid. It held that it it amounts to a state aid, if a state-controlled undertaking, upon the influence of the state, sets a tariff that favors certain energy consumers and, unlike a market economy operator, foregoes the higher profits that it could otherwise achieve.[30] The discount would not constitute a state aid, if it were justified by objective considerations based on market economy criteria.[31]

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[26] Joined Cases T-116/01 & T-118/01 *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2957, para 117; Case C-442/03 P *P&O European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845. *See* Erika Szyszczak, The Regulation of the State in Competitive Markets in the EU 191 (Hart Publishing, Oxford, 2007).

[27] Joined Cases C-399/10 and C-401/10 *France Télécom*, ECLI:EU:C:2013:175.

[28] Para 101.

[29] Joined Cases 67, 68 & 70/85 *Kwekerij Gebroeders Van Der Kooy BV and Others v Commission* [1988] ECR 219.

[30] Para 28.

[31] Para 30. For an economically justified advantage in the gas sector, *see* Case C-56/93 *Belgium v Commission*

In *La Poste*,[32] the applicant claimed that the French post provided infrastructural, logistical and commercial assistance (infrastructure, provision of staff, advertising, "channeling" of customers) to its subsidiary, which operated express mail services. The CJEU ruled that these free services constituted state aid, because they reduced the expenses of the undertaking.

> *"The aim of [Article 107 TFEU] is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (...). The concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect."*[33]

3.2. State origin

An aid falls within the scope of Article 107(1) TFEU only if it originates, directly or indirectly, from state resources. If the aid can be traced back, directly or indirectly, to the public budget, the requirement of state origin is met. If, however, the transfer's burden is not borne by the budget but, for instance, by the consumers, this condition is not met. Put it another way, Article 107(1) TFEU applies to public redistribution carried out by means of the public budget but does not apply to redistribution carried out by direct transfers between different stakeholders. For example, minimum prices transfer wealth from the buyers, who are compelled to pay a higher price, to the sellers, who charge a supra-competitive price. The difference between the would-be market price and the price floor is a transfer of wealth by means of direct redistribution. Still, this does not qualify as a state aid.[34]

In *Sloman Neptun*,[35] the CJEU held that "[t]he distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the

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[1996] ECR 723.

32 Case C-39/94 *Syndicat francais de l'Express international (SFEI) and Others v La Poste and Others* [1996] ECR I-3547.

33 Para 58.

34 Case 82/77 *Openbaar Ministerie of the Netherlands v Van Tiggele* [1978] ECR 25, paras 23-25.

35 Joined Cases C-72/91 & C-73/91 *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECR I-887.

State."[36]

The state origin of benefits granted by state-owned enterprises is subject to a case-by-case analysis. In the earlier case-law, the CJEU considered these benefits to be imputable to the state, if the state had control over the undertaking.[37] Nonetheless, in *France v Commission*[38] the Court held that, besides the state control, additional criteria have to be examined.[39] The key issue is if the state effectively exercised control over the decision. The power to influence the decisions of the public undertaking does not necessarily imply that this power was actually exercised. Even if the state has control and decisive influence over the undertaking by reason of being the majority shareholder, it cannot automatically be presumed that it effectively exercised that control and influence. It must be inquired whether the public authorities were involved, in one way or another, in the adoption of the measure,[40] although it is not required that public authorities be specifically involved in the decision-making,[41] This inquiry should extend to the following circumstances: the undertaking could not have taken the decision without taking into account the requirements of the public authorities,[42] it had to take into account guidelines or directives issued by a public body,[43] the undertaking's integration into the structures of public administration, the nature and exercise of its activities in normal competition with private operators, the legal status of the undertaking (whether it is governed by public law or by ordinary company law), the intensity of the public authority's supervision of the management of the undertaking, and any other circumstances which demonstrate the involvement or lack of involvement of public authorities in the decision-making, taking into account the scope and content of the measure and the conditions which it contains.[44] It should be stressed, however, that the position to control or exercise decisive influence remains an important criterion in attributing an aid to the state.[45]

The state origin of the advantage does not imply that there is a corresponding (direct or indirect) burden on the state budget. In *France Télécom*, the CJEU held that the requirement of state origin (granted by a Member State or through State resources) does not presuppose that the measure

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36 Para 19.

37 *See* Joined Cases 67, 68 & 70/85 *Van der Kooy* [1988] ECR 219, paras 35-38.

38 Case C-482/99 *France v Commission* [2002] ECR I-4397.

39 *See* Wolf Sauter & Harm Schepel: State and Market in European Union Law 194-196 (Cambridge University Press, 2009).

40 Para 52.

41 Para 53.

42 Joined Cases 67, 68 and 70/85 *Van der Kooy* [1988] ECR 219, para 37.

43 Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paras 11-12; Case C-305/89 *Italy v Commission* [1991] ECR I-1603, paras 13-14.

44 Para 55-56.

45 Para 57.

constitute a financial burden for the state. The relevant test is not the transfer of state resource but the generation of an advantage.[46]

3.3. Selectivity

Selectivity is akin to WTO law's requirement of specificity. Accordingly, general economic stimulus measures are not caught in the net of Article 107 TFEU. A measure is selective, if it favors certain undertakings or the production of certain goods, that is, it favors specific undertakings, categories of undertakings or sectors.

In *Magyar Villamos Művek*,[47] the Commission pointed out, as regards the criterion of selectivity, that long-term power purchase agreements were concluded with certain undertakings in a specific economic sector.[48]

In *CETM v Commission*,[49] the CJEU held that the selectivity requirement is met, if the measure does not identify specific beneficiaries but lays down objective criteria on the basis of which aid may be provided to an indefinite number of beneficiaries who are not individually identified, provided that, owing to the criteria governing its application, the measure "procures an advantage for certain undertakings or the production of certain goods, to the exclusion of others."[50]

3.4. Distortion of competition and effect on inter-state trade

Although Article 107(1) TFEU only applies to aid that affects trade between Member States, the latter condition is interpreted in practice broadly. For trade between Member States to be affected, there does not need to be a cross-border element, it is sufficient, for example, if the aid is capable of affecting market entry. This is the case where the aid affects a sector where there is inter-state trade. In *Altmark,* the CJEU held that the local or regional character of a service does not, in any way, exclude the existence of an effect on inter-state trade.[51]

Specific guidance on the condition that trade between Member States is affected is provided in the Commission Regulation on *de minimis* aid.[52] According to the latter, aid that fulfils the

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46 Para 100.

47 2009/609/EC: Commission Decision of 4 June 2008 on the State aid C 41/05 awarded by Hungary through Power Purchase Agreements (notified under document C (2008) 2223), [2009] OJ L 225/53.

48 Para 277.

49 Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paras 40 & 52.

50 Para 40.

51 Case C-280/00 *Altmark* [2003] ECR I-7747, paras 78-82.

52 Commission Regulation 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, [2013] OJ L 352/1. The Regulation's period of application was extended by Commission Regulation 2020/972 amending Regulation (EU) No 1407/2013 as

conditions laid down in the Regulation is considered to be *de minimis* and not to meet the criteria of Article 107(1) TFEU and, therefore, not to be subject to the notification requirement.[53] As a general rule, if the aid does not exceed EUR 200 000 over three fiscal years, or EUR 100 000 in the road transport sector, it is considered to be *de minimis*.[54]

Where aid is not considered to be *de minimis*, its market context has to be examined. However, the Commission does not need to examine the market effects of the aid in the same detail as in antitrust cases.

In *CETM*, the CJEU held that in certain cases the circumstances in which aid is granted may in themselves show that the measure is liable to affect inter-state trade and distort or threaten to distort competition. In such a case, the Commission must identify these circumstances,[55] but is not required to examine the actual situation in the market concerned, establish the market shares of the recipient undertakings, the position of the undertakings and the pattern of inter-state trade.[56] In this case, the aid involved indirect discrimination[57] and it was, therefore, not necessary to demonstrate in detail that it affected inter-state trade and distorted competition. In case of unlawful (unnotified) aid, the Commission is not obliged to demonstrate the actual effects on competition and inter-state trade. Imposing such an obligation would ultimately favor the member state granting the aid in breach of the obligation to obtain authorization to the detriment of those member states that comply with the duty to notify.[58]

It is worth pointing out here that operating aid, which is intended to contribute to the operation costs of an undertaking (and not, for example, to investment costs or development), is usually automatically declared anti-competitive by the Commission, without looking into the effects on competition.

4. Extension of the EU state aid regime to extraterritorial state aid

Given that the EU state aid rules do not apply to subsidies granted by non-EU countries, the European Commission proposed to adopt a regulatory package that extends their scope and adjusts them to the characteristics of international trade. On 17 June 2020, the Commission issued the White

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regards its prolongation and amending Regulation (EU) No 651/2014 as regards its prolongation and relevant adjustments, [2020] OJ L 215/3, until 31 December 2023.

53 Article 2.

54 Article 3.

55 Para 100.

56 Para 102.

57 Para 78.

58 Para 103.

Paper on Levelling the Playing Field as Regards Foreign Subsidies. In May 2021, it converted the White Paper into a draft regulation.[59] The proposal was well received in both houses of the EU legislative (the Council and the European Parliament)[60] and is expected to be adopted in the near future.

Commercial policy is, in essence, an exclusive EU competence. Article 207 TFEU contains a very wide, seemingly all-embracing authorization, which creates an exclusive EU competence over all the four channels of international trade. Initially, the scope of Article 113 ECT, the predecessor of Article 207 TFEU, was uncertain, as it referred only to goods and tariffs, and it was questionable whether the EU competence extended to other channels of international trade, such as services. Article 113 ECT was renumbered to Article 133 by the Treaty of Amsterdam and complemented with paragraph (5), which authorized the Council to extend, unanimously, the application of Article 133 to services and intellectual property. Finally, the Treaty of Lisbon, via Article 207 TFEU, extended the common commercial policy all four channels of international economic relations: goods, services, intellectual property, and investment.

In Opinion 2/15,[61] the CJEU held that the mere fact that an act "is liable to have implications for trade (…) is not enough for it to be concluded that the act must be classified as falling in the common commercial policy." Only that act falls in the common commercial policy that "relates specifically to…trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it."[62] In the context of the EU–Singapore Free Trade Agreement, the CJEU found that the rules on non-direct investment and investor-state dispute settlement did not come under exclusive EU competence.[63]

The exclusive competence over trade in services covers all the four modes of supply identified by the GATS: cross-border provision of services, consumption abroad, commercial presence, and physical presence.[64] Nonetheless, as long as the EU does not preempt Member State law by way of legislation, and the latter does not go counter to the EU's international commitments, Member States

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59 Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market COM (2021) 223 final.

60 European Parliament legislative resolution of 10 November 2022 on the proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM (2021) 0223 – C9-0167/2021 – 2021/0114 (COD)).

61 Opinion 2/15, ECLI:EU:C:2017:376. For an analysis, *see* Balázs Horváthy, Opinion 2/15 of the European Court of Justice and the new principles of competence allocation in external relations: A solid footing for the future?, in Investment Arbitration and National Interest 121-136 (Csongor István Nagy ed., Council on International Law and Policy, Indianapolis, 2018).

62 Opinion 2/15, para 36.

63 *See also* Opinion 1/17, ECLI:EU:C:2019:341.

64 *See* Opinion 1/08, ECLI:EU:C:2009:739, paras 4, 118 & 119; Opinion 2/15, para 54.

have a wide playing field to develop an independent regulatory policy, which may extend to service standards, licensing requirements, recognition of certificates and diplomas, and government contracts. Contrary to goods, trade in services is not subject to a comprehensive EU program.

The proposed regime on distortive subsidies aims to address the danger posed by "state sponsored unfair trading practices."[65] Non-EU subsidies may promote foreign undertakings' existing activities in the EU, enable them to underbid their non-subsidized competitors at public tenders, and help them acquire EU companies. The White Paper identified the major gaps in the international disciplines (and EU law mechanisms) on subsidies, and proposed a set of rules to neutralize unfair trade practices and ensure a level playing field in international trade and the EU internal market.

The proposed measures are made up of three layers. A set of measures of general application is proposed to cover all foreign service subsidies granted to economic operators established or active in the EU market (Module 1), which are meant to offset both product and service subsidies. Besides, the proposal sets out two special regimes governing foreign subsidies provided in the context of acquisitions of EU targets (Module 2) and bids in public procurement in the EU (Module 3). The term "acquisition" covers not only take-overs (where decisive control is obtained), but also the acquisition of non-controlling minority rights or shareholdings, and other transactions that result in "material influence" being acquired in an EU undertaking. As noted above, in the parlance of GATS, commercial presence is a mode of service supply; hence, subsidies granted in the context of acquisitions may qualify as service subsidies. The decisive trigger in all three modules is that the subsidy is foreign – that is, it is provided by a third country. The proposed measures are modelled after EU state aid rules, which apply solely to state aids granted by Member States[66] and, hence, do not cover subsidies provided by foreign governments. The term "subsidy" must be conceived broadly; in the context of acquisitions, in addition to the benefits explicitly linked to the transaction, it also covers indirectly related aids (e.g., measures that enhance the acquirer's financial strength and, thus, facilitate the acquisition).

The operation of Module 1 is based on *ex post* investigations, while Modules 2 and 3 create an *ex ante* system and a duty of notification. Hence, the measures to be adopted because of the investigation slightly differ as to the three modules. Nonetheless, they are all "redressive measures"

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65 p. 4.

66 According to Article 107(1) TFEU: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

aimed to obviate the repercussions of the foreign subsidy, and could range from structural remedies and behavioral measures to repayment.

The investigation extends to three core issues: existence of a subsidy, distortion in the internal market, and the subsidy's redeeming virtue – "the positive impact that the supported economic activity or investment might have within the EU or on a public policy interest recognized by the EU."[67] If a distortive subsidy has a redeeming virtue, the distortion and the positive effects must be balanced. The EU's public policy objectives include, for instance, the creation of jobs, climate neutrality goals, environmental protection, digital transformation, security, public order, public safety, and resilience.

Although the emerging regime on service and take-over subsidies is expected to introduce some limitations, Member States have a wide sphere in which to develop an independent regulatory policy.

5. Conclusions

The emerging EU regime on distortive subsidies must pass the test of WTO law. Countervailing measures adopted in response to extraterritorial subsidies may amount to *de facto* discrimination or a restriction on market access. Of course, in relation to the GATS, national treatment and market access are relevant only if a member state made the corresponding commitments under its schedule.

It is submitted that the EU would have a very good case, if the above regime were challenged under WTO law.

First, in the decisional practice of the Dispute Settlement Body, asymmetric impact does not equal discrimination and, hence, in itself, does not violate the requirement of National Treatment. To prove such a violation, the complainant needs to prove that the distinction is based on national origin and asymmetric impact, in itself, does not prove that. For instance, the WTO Dispute Settlement Body's decision in *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* suggests that asymmetric impact, at least in itself, may not be sufficient to establish discrimination: it needs to accrue from national origin.[68] Furthermore, legitimate regulatory distinctions do not violate National Treatment. As to both of these arguments, it is decisive that the EU has a very comprehensive and rigorous state aid regime in place and the treatment of foreign subsidies is modelled after this regime. In fact, in the EU there is an inverse discrimination in place: EU member states are prohibited from granting subsidies restrictive of competition in the internal market, while foreign states are not.

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[67] p. 14.

[68] *See e.g.* Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WTO Doc. WT/DS302/AB/R (adopted on 25 April 2005), para 96.

The proposed regulatory package on distortive foreign subsidies merely extends to foreign governments the rules that, for the time being, apply solely to EU member states. This circumstance also justifies a reference to the General Exceptions of the GATT and GATS. Article XX(d) GATT and Article XIV(c) GATS exempt measures aimed to ensure compliance with internal regulations (Article XX(d) GATT: "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"; Article XIV(c) GATS: "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"). EU state aid law, which is part of EU competition law, may be regarded as such a regulation. As EU state aid law applies to intra-EU transactions, no arbitrary or unjustifiable discrimination or disguised restriction on trade may emerge.

The Agreement on Government Procurement contains no general exceptions, however, a "legitimate regulatory distinction" test may be reasonably applied here.

Of course, in terms of WTO law assessment, the devil will lie in the details. The validity of the claim that the extension of EU state aid rules to extraterritorial subsidies is not discriminatory will ultimately depend on how this regime is shaped. There are some points that should be mentioned here. One the one hand, EU state aid rules will not be applied in their entirety but will serve only as a model for the treatment of foreign subsidies. There may be some minor differences, for instance, the block exemption regulations may not apply. On the other hand, although it could be argued that this is due to the different characteristics of domestic and extraterritorial subsidies, the application and enforcement of these rules will be different, the same as the remedies available.♣

Criminal Law as a Means of Regulation against Digital Abuse

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Abstract

In the face of rapid changes in digital communication, many types of digital violence that infringe on the legal interests of personality have emerged. If it is the existing division, each crime cannot effectively protect the legal interests of personality, and the only option is to amend the law. It is a pity that our country's legislators have not comprehensively examined the normative structure of the crime of defamation and the crime of obstructing secrets, and without perfecting the existing provisions of each crime, they intend to add additional provisions of Article 319-1 to Article 319-4 of the Criminal Law . Although the draft amendment seems to actively fight against digital malicious audio and video, excessive restrictions on sex-related areas are probably just a phenomenon of legislation. Here, not only is the effectiveness of the norms limited, but also the results of the application of the law will produce a lot of value conflicts with the current provisions of various crimes.

Keywords: Digital Violence, Deepfakes, Breach of Secrecy, Breach of Reputation

Reconsidering on the Criminalization of Deepfakes - A Perspective on the Regulation of Technical Risks from AI

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Abstract

"Deep fake" is currently a remarkable phenomenon in the digital world. Also the actions of producing and distributing images, sounds as well as movies by means of the technique of deepfakes are lege ferenda to think whether it should be punishable. Due to a scandal from a Youtuber, the government in Taiwan has come up with a draft to fight against deep fakes in 2022. However, the draft is very questionable because the elements of the offense and the legal interest to be protected remain highly unclear in the provision. The author believes that the problem of deep fakes can already be partially solved with the current regulations in criminal law. If a new offense to fight against deep fakes is absolutely necessary, the legislator should not neglect to include the misuse of the technology of AI.

Keywords: Deepfakes, Artificial Intelligence, Honor, Personality Rights, Sex Image, Criminalization, EU's Artificial Intelligence Act

Sexual Images or Videos, Pornography and Privacy

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Abstract

This article discusses the legal definition of "sexual images or videos" in Taiwanese criminal code. As a comparison, it introduces Japanese law and tries to summarize the characteristics of sexual images or videos in Japanese criminal code and to examine if the definition of "sexual images or videos" is appropriate as a clear-cut legal definition in our criminal law. Even if the definition of "sexual images or videos" is problematical, it is still necessary to find out some way to keep legal definition of the sexual images or videos within an appropriate range. This article suggests that it is necessary to refer to the purpose of this legislation to protect sexual privacy, when interpreting "sexual images or videos".

Keywords: Privacy, Sexual Images or Videos, Pornography, Deepfake Pornography, Digital Sexual Violence

A Study on the Practice Issues of Parking Space in Condominium Building

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Abstract

The purpose of this article, which is divided into six parts, is to analyze the practice issues of parking space in condominium building. Following an introduction relative to recent Taiwanese Supreme Court cases, Part II explores the problem of illegal underground parking space. Then, Part III argues for a legal possession of the owner of condominium against the highest-bidder, while Part IV clarifies that a non-owner of condominium does not meet the requirements of a chain of possessions. Part V explains that the highest-bidder is bound on the principle of collective covenant regarding the use of parking space. Finally, Part VI concludes by providing answers to Taiwanese practice issues.

Keywords: Parking Space, The Covenant of the Use and Management, Illegal Construction, Right to Dispose the Illegal Construction, A Chain of Possessions, Condominium

Exploring Future Legislation in the Era of Artificial Intelligence and Big Data

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Abstract

Internet opens up a society of unprecedented human interaction; technology driven productions and business models also bring new challenges to legislation. Thanks to new ways of data centric legislative law making, more legislative issues can be dealt with as never before. This article introduces crowd sourcing and big data as ways to empower and understand better civil participation in the legislative processes. It also discusses how the proposal of the European Artificial Intelligence Act reacts to the emerging manipulation problem of the Internet as a public sphere; hopefully, more related scholarly research and discussion will be further developed in the future.

Keywords: Legislation, Big Data, Artificial Intelligence, Crowd-sourcing, Manipulation

A Legal Study on Boundary between the Digital Platform Data Obtain Permission and the Right of Consumer Personal Data

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Abstract

The digital platform with matchmakers function, such as e-commerce websites, price comparison websites, and search engines, can reduce the searching cost by connecting business operators and consumers through algorithms. However, for the issue of users data collection of such platform, how to define the exact boundary between the digital platform data obtain permission and the right of consumer personal data? Based on the protection of Constitution Law, We can discuss this issue from the concept of "Information Right", including the right to request information diclosure and data protection. This article will discuss the boundary from the platform side: "the limitation of users data collection, processing, and utilization"; and the consumers side: "the boundary where users request enterprises to provide data".

Keywords: Information Rights, Information Autonomy, Digital Platforms, Information Disclosure, Personal Data

Current Status and Future Agenda of Forensic Psychiatric Evaluations under the Japanese Citizen Judge System — An Example of a Japanese Supreme Court's Judgment on Mental Disability

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Abstract

In the course of adult criminal justice, whenever the question of the application of Article 19 of Criminal Law (Competence to Act) arises in a major case, the question of "Is the defendant really mentally disabled? This question often becomes the focus of the news, mainly because the defendant can be completely exempted or relieved of criminal responsibility if he or she meets the requirements of Article 19 of the Criminal Law; therefore, public opinion is concerned that the offender will try to use Article 19 of the Criminal Law as a way to avoid criminal responsibility.

As a professional judge, in the process of judging cases related to the determination of responsibility, the judge must make an objective and impartial assessment of the connection between the defendant's responsibility and the crime, while avoiding being influenced by public opinion or the feelings of the victim. Generally speaking, an objective and impartial judgment means not only relying on legal expertise, but also requiring medical expertise (i.e., Forensic Psychiatric Evaluations); therefore, how to take into account the respective legal and medical professional judgments becomes a difficult issue in the trial.

With bill to add citizen judges to criminal trials coming into effect in 2023, the general public, who have been elected as national judges, will have to face the aforementioned the difficult issue together with professional judges. Therefore, this paper attempts to compile and analyze the arguments that have been used in the judgment on mental disorders since the implementation of the Citizen Judge System in Japan in 2009, in the hope that the Japanese experience will provide a space for Taiwan to think.

Keywords: Forensic Psychiatric Evaluations, Mentally Disordered Offenders, Personality Disorder, the Japanese Citizen Judge System, Citizen Judges

The Parol Evidence Rule in English Contract Law and Civil Evidence Law

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Abstract

This paper analyses the historical origins and modern developments of the 'Parol Evidence Rule (PER)' in English contract law and civil evidence law.

Three strands of the PER are identified by literature. The first strand related to the exclusion of evidence had been abolished. The second and the most controversial strand is connected to the proof of terms of contracts. Different opinions reflect the argument between subjectivism and objectivism of the contract law. The third strand related to the interpretation of contracts had also been abrogated. However, the exclusionary rule reaffirmed by the courts provides some space for it. In commercial practice, PER has been retained by adopting an Entire Agreement Clause.

Keywords: Parol Evidence Rule, Best Evidence Rule, Interpretation of Contracts, Entire Agreement Clause

Research on The Relief System of Ecological Damage from the Perspective of Holism

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Abstract

The system of ecological damage relief in China starts from administrative relief, prospers from civil relief, and finally becomes holistic relief. This holistic relief is not the simple sum of administrative relief and civil relief. It shows the trend that the overall function of ecological damage relief is greater than the traditional civil relief and administrative relief. Under the historical opportunity that China's Civil Code Tort Liability has stipulated the ecological damage, we should make an overall theoretical explanation of the system of ecological damage relief in China and extract the theoretical discourse with Chinese characteristics and international vision. The nature of the system of ecological damage relief should also be interpreted as a whole. In the future, we must promote the reform, improvement and systematic construction of this legal system.

Keywords: Ecological Damage Relief, Civil Code, Administrative Relief, Civil Relief, Holism

Eligibility of Housing Rental Subsidy
－ Comments on the four judgments, including the 2021 Year Jian Zi No. 70, made by Taiwan Taipei District Court

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Abstract

The issue of this case, which occurred after four court trials, lies in: whether the dwellings for which the plaintiff applied for housing rental subsidy meet the Rental Subsidy Regulations. In other words, does it comply with the authorization of the Housing Act when the Rental Subsidy Regulations classifies the dwellings' eligibility for rental subsidy by the permitted usage of the Building Act? From the perspective of the right to housing being a fundamental human right guaranteed by the Constitution, this paper identifies housing rental subsidy as an important way to implement not only the human right to housing under the Housing Act, but also the adequate housing right under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Thus, this study points out the shortcomings of the original judgment in ruling rental subsidy as a preferential policy. It further affirms the invocations of the Housing Act and the ICESCR made by the following three judgements, under the assertion of human right of housing, to review and correct the decision of the administrative authorities. In addition, this study also points out that relevant provisions of Rental Subsidy Regulations may be restricted due to the legal lacuna of the parent law, and thus may contradict the intention of the enabling statute and go beyond the scope of power granted by the enabling statute.

Keywords: Housing Rental Subsidy, Adequate Housing Right, International Covenant on Economic, Social and Cultural Rights (ICESCR), Policy Welfare Measures

International Jurisdiction and Proper Forum in Foreign Public Nuisance Dispute: A Comment on the Supreme Court Ruling No. 110 Tai-Kang 1019

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Abstract

In its Ruling No. 110 Tai-Kang 1019, the Supreme Court affirms the Taiwan High Court's finding that Article 20 of the Code of Civil Procedure can't be applied by analogy as the basis of joint jurisdiction among the defendants from different jurisdictions. The Court can exercise jurisdiction in a case brought against those defendants whose main office and/or domicile are located in Taiwan. Yet, it seemed the Court failed to consider whether Taiwan Court is the Proper Forum to hear this foreign public nuisance dispute.

This article points out that the Special Circumstance Theory was not appropriately applied by the court. The author further appeals that there could be room for the court to apply the Doctrine of *Forum Non Conveniens* in the future while hearing a complex litigation like this.

Keywords: International Jurisdiction, Proper Forum, Special Circumstance Theory, *Forum Non Conveniens*, Public Nuisance