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Involvement of developing and emerging economies in the power-to-X market ramp-up:

A legal analysis of specific variants for financing PtX CfD windows

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INHALTSVERZEICHNIS

A.
Substance matter and commissioned analysis

(1) In harmony with the Paris Agreement, which entered into force in November 2016 and is intended to keep global warming well below 2 degrees and, if possible, limit it to 1.5 degrees, the EU and Germany have set the ambitious climate protection goal of achieving climate neutrality by 2050 and 2045, respectively. These ambition targets have been most recently spelled out in actual policy in resolutions adopted by the Federal Cabinet in connection with the Climate Protection Programme 2030 and the recently updated German Climate Protection Act (*Klimaschutzgesetz*). At the same time, to achieve effective protection of the climate, support for the defossilisation of partner countries outside the EU is also imperative.

(2) At the global level, drastic changes are needed in all sectors of the economy. All sectors of industry, energy, heating and transport are affected by the complete transformation as we move toward a climate-neutral future. Some sectors cannot be decarbonised through electrification alone, however, or can only be decarbonised with difficulty or only inefficiently, and will continue to rely on gaseous and liquid energy sources. Gaseous and liquid energy carriers that are free of fossil CO_2, such as hydrogen and hydrogen-based derivatives (hereinafter also referred to as power-to-X (PtX) products), which include ammonia, methane, methanol and kerosene, are playing a key role in the further development and completion of the German, European and global energy transition.

(3) With funding from the German Federal Ministry for Economic Cooperation and Development (BMZ), the H2Global Foundation is conducting an independent research project called "Green Hydrogen and Power-to-X: Opportunities and Risks for Developing and Emerging Economies in Cooperation with the Private Sector associated with the International Market Ramp-Up".

(4) The determinants of equal opportunities for participation by developing and emerging economies in the international market ramp-up of green hydrogen and PtX products are to be identified within the framework of the research project. To achieve this aim, the determinants identified are to be analysed and specific contributions to equal opportunities are to be brought into the political discourse surrounding the international market ramp-up, and should also bear relevance to other climate protection programmes and technologies. The underlying reason for this is a fierce international

competition that is emerging between potential (supply) markets for international investors. At the same time, a regulatory framework with international standards is developing that will require to invest billions in sustainable infrastructures. Both may present themselves as obstacles, but also an opportunity for private-sector investment in partner countries within the framework of development cooperation (DC), thereby opening up new fields of activities for cooperation fostering development involving the private sector in the effort to promote sustainable economic development.

(5) The focus of the independent research project is on competitive conditions in an incipient market for green hydrogen and PtX products and the effects that the foreseeable legal and technical framework conditions will have on competitive opportunities for actors from developing and emerging economies. It is with this in mind that the project focuses on a legal, economic and technical analysis of the newly emerging PtX supply and demand markets, the market position of, and investment conditions for, economic actors in partner countries in development cooperation projects, as well as on identification of specific recommendations for action to promote cooperation with the private sector. In addition, sustainability requirements, standards and certification procedures that are being discussed in expert institutions such as the National Hydrogen Council and the European Commission (Commission) are to be analysed in terms of their feasibility in DC partner countries and placed in a country- and competition-specific context.

(6) This report provides a legal analysis of specific variants to finance PtX CfD windows within the framework of the H2Global instrument, and which are aimed at contributing to the involvement of developing and emerging economies and other third countries in the PtX market ramp-up. In addition to Germany and the EU, the countries spotlighted in the analysis are the developing and emerging economies of Brazil, Colombia, South Africa, Namibia, Mexico, and the Maghreb countries Tunisia and Morocco. The study also ventures a look at the third countries of Norway, the United Kingdom, Australia, the United Arab Emirates and Saudi Arabia, which are not partner countries in the field of development cooperation. [1]

(7) A CfD double auction mechanism, such as H2Global, is a flexible instrument that facilitates the design of specific "funding windows" - adapted to the requirements of the funding agency. In the context of using the instrument in cooperation with one or more

[1] These third countries are reference countries that complement the analysis.

partner countries in the field of German and international development cooperation (DC), the question therefore arises as to legally permissible and feasible variants for providing funding for an appropriate mechanism. This assessment analyses the financing of "funding windows" geared towards:

- the local market,
- the export market and
- a combination of local offtake and export.

(8) The following variants are respectively explored:

- Co-financing of the funds allocated to the funding mechanism by:
  - Germany and partner country/countries in the field of development cooperation
  - Germany and multilateral institution (especially the World Bank, African Development Bank)
  - the EU and DC partner country
  - the EU and multilateral institution (especially the World Bank, African Development Bank)
- Augmenting the financing model with CAPEX funding for plant construction by the hydrogen and PtX producer through third countries.

(9) The legal standard in the assessment is the legal framework laid down by the EU, in particular European State aid law, as well as international economic law (in particular that relating to the WTO and GATT).

B.
Executive Summary

I. State aid law

1. A support measure is deemed to contain State aid – which is in principle prohibited – if it cumulatively exhibits all the characteristics of State aid laid down in Article 107 (1) TFEU. In the case at hand, most of the characteristics of State aid can be readily regarded as being present. Only the elements of granting from state resources or resources imputable to the state and the threat of distortion of competition and the (potential) effect on trade between states require further analysis. With regard to these elements constituting State aid, the review has produced the following findings:

   - The financial resources provided by the EU, an international institution or a third country for funding a PtX window are only to be considered as State aid or aid granted through state resources if the funds for the PtX window are provided on the instructions of, or in accordance with, the requirements of one or more EU Member States.

   - A distortion of competition or an effect on trade between Member States could only be ruled out if the planned instrument on the side of the purchaser solely addresses the local sales market in the producer state outside the EU, does not provide for import into the EU and the beneficiary third-country producer is not (also) active in the single market.

2. State aid law provides for a number of exceptions to the general prohibition of State aid (Art. 107 (1) TFEU). In the case of financing measures for a PtX window that fulfil the elements of State aid, it must be reviewed whether they are compatible with the internal market in accordance with the relevant exemption provisions. Our assessment has shown that the Commission could declare these financing contributions compatible with the internal market after carrying out a notification procedure on the basis of the Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 (CEEAG). The relevant compatibility conditions are

set out in section 4.1 of the CEEAG ("Aid for the reduction and removal of greenhouse gas emissions").

II. EU Foreign Subsidies Regulation

1. The recently enacted Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market (FSR) provides for various instruments that will allow the Commission to investigate third country subsidies granted to undertakings economically active in the EU Single Market in the future. This has implications both for the respective PtX intermediary under the H2Global instrument and for its HPA contractors selected under a PtX funding window (co-)funded by a third country.

2. Firstly, depending on the volume of HPAs to be awarded, the PtX intermediary must in future indicate in notices of HPA competitive bidding procedures that bidders must submit notifications or declarations of (non-)receipt of third-country subsidies, which the PtX intermediary must in turn forward to the Commission without undue delay.

3. On the other hand, the receipt of third-country subsidies from a PtX funding window may result in an obligation for a planned concentration with the (indirect) participation of the HPA contractor to be notified to the Commission. This is because a financial contribution from a third country to a PtX funding window can potentially be deemed to constitute a third country subsidy within the meaning of the FSR, which the Commission is empowered to investigate in the future in connection with certain mergers.

III. WTO law

1. Financial contributions to the H2Global instrument are to be assessed under WTO subsidy law. WTO subsidy law in the ASCM, which spells out Art. XVI GATT in detail, distinguishes between subsidies that are permissible in principle, prohibited export subsidies (Art. 3.1 (a) ASCM) and actionable subsidies (in particular Art. 5 (a) and (c) ASCM). One major achievement of the ASCM is to provide a uniform definition of subsidies (Art. 1.1 (a) (1) ASCM). However, a general prohibition of subsidies comparable to Art. 107 (1) TFEU is not to be found in WTO law.

2. WTO law provides for a number of exceptions and special provisions for developing countries or least developed countries at the general level (see, for example, Art. XI:2 of the WTO Agreement) and at the level of subsidy law (Art. 27 of the ASCM). However, these special provisions and exceptions to the ASCM Agreement do not apply to the partner countries under consideration within the framework of the H2Global instrument, in particular because none of the countries is among the *least developed countries* according to Annex VII of the ASCM or has a per capita GNP of less than $ 1,000.

3. Financial contributions to the H2Global instrument by Germany and other development cooperation countries or institutions must be considered separately. Neither the Federal Republic of Germany nor development cooperation countries own H2Global or its PtX intermediary. Compared to other WTO members, however, the Federal Republic of Germany meets the preconditions for the payment of financial contributions to the H2Global instrument that other WTO members especially do not fulfil:

   - Financial resources from the Federal Republic of Germany clearly fulfil the principle of territoriality laid down in Art. 1.1 (a) (1) ASCM. Thus, the criteria set out in Art. 1.1 (a) (1) ASCM are met with a high degree of probability.

   - In contrast, such contributions do not constitute export subsidies according to our assessment. The H2Global instrument does not link the award to a specific export quantity or similar, but is a purely market-oriented instrument.

   - Finally, it is not an actionable subsidy according to Art. 5 (a) or (c) of the ASCM because there is no discernible intent to cause injury and the H2Global instrument is not limited to certain third countries. In this respect, there is much to suggest that the H2Global instrument is compatible with WTO subsidy law with regard to the German contributions.

4. Financial contributions to the H2Global instrument by the EU also fulfil the "territorial link" requirement laid down in Art. 1.1 (a) (1) ASCM because H2Global or its PtX intermediary have their head office in the area of application of the EU Treaties. Moreover, as a founding member of the WTO, the EU meets the requirements for the status of a public body. However, for the EU as well as for Germany, financial contributions to the H2Global instrument constitute neither a prohibited export subsidy nor an actionable subsidy.

5. Financial contributions to the H2Global instrument by EU Member States (Spain), on the other hand, do not fulfil the principle of territoriality and therefore do not fall under Art. 1.1 (a) (1) ASCM. In this assessment, it should be noted that the principle of territoriality has recently been interpreted very broadly by the General Court of the EU (keyword: transnational subsidies), but this line has not yet been confirmed by the ECJ or WTO dispute settlement institutions. Beyond this, however, there are no deviations with regard to the question of whether prohibited export subsidies or actionable subsidies are involved (see already 3. and 4. in this connection).

6. Financial contributions to the H2Global instrument by third countries (Norway, United Kingdom and Australia) must not to be measured in terms of Art. 1.1 (a) (1) ASCM, either, due to the lack of a territorial link. Insofar as this criterion is interpreted broadly (see 5.), these are not export subsidies or actionable subsidies. This also applies to third countries that are not linked to the EU through current or future free trade agreements (United Arab Emirates and Saudi Arabia).

7. Financial contributions to the H2Global instrument by developing countries (Brazil, Colombia, Morocco, Tunisia, Mexico, South Africa and Namibia) do not have any *territorial link*, either. An exception in accordance with Art. 27 ASCM for the development cooperation countries that are under consideration here, which are at the same time developing countries, is not relevant (see 2. for the prerequisites for an exception in accordance with Art. 27 ASCM).

8. Finally, potential financial contributions to the H2Global instrument by international organisations (financial institutions) do not fulfil Art. 1.1 (a) (1) ASCM, either. The organisations at the centre (ADB, IABD, World Bank) are not bound by WTO law due to their lack of membership in the WTO. Only states and autonomous customs territories can become members of the WTO.

C.
Assessment from a State aid law perspective

(10) This Part C. "State aid assessment" is broken down into two sections. First, the prohibition of State aid enshrined in Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU) will be presented, followed by an analysis of whether the funds provided under the planned instrument contain the elements deemed to constitute State aid and thus fall within the scope of State aid law. To this end, the criteria that are decisive for the State aid to be deemed to be present in the meaning of Article 107 (1) TFEU are to be analysed: starting with those criteria whose existence can be easily established and culminating with those criteria whose existence is rather questionable and requires closer examination (see C.I.). Secondly, based on the assumption that the funds provided under the envisaged instrument fall within the scope of State aid rules, the conditions under which State aid granted under the planned instrument can nevertheless be considered compatible with the internal market (and thus implemented) will be analysed (see under C.II. pursuant hereto).

(11) The following analysis is largely based on the Commission Decision of 20 December 2021 in State aid case SA.62619 (2021/N)[2] (hereinafter referred to as the "original decision"), which approved the "original instrument". This applies both to the description of the instrument (section 2 of the original decision) and to the legal conclusions reached by the Commission with regard to the original instrument. Indeed, to the extent that the new variants examined in the following are consistent with the original instrument, it can be assumed that the Commission would reach the same conclusions. This especially goes for the analysis of the State aid element (cf. C.I. below). However, the extent to which the new variants exhibit deviations from the original instrument that are relevant for the assessment under State aid law will be underscored in the following.

[2] Commission Decision of 20 December 2021, State aid SA.62619 (2021/N) - Germany: H2Global measure for the market take-up of green hydrogen and its derivatives in Europe.

I. Definition of State aid (Art. 107 (1) TFEU)

(12) Article 107 (1) TFEU lays down a fundamental prohibition of State aid:

> "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."

(13) A support measure is therefore deemed to contain State aid if it cumulatively fulfils all the characteristics of the State aid criterion laid down in Article 107 (1) TFEU:

- Grant from state resources or resources imputable to the state
- Presence of advantage
- Selectivity of the advantage
- Status of the beneficiary/beneficiaries as an undertaking
- Threat of distorting competition and (potentially) affecting trade between Member States.

1. Criteria for State aid that are fulfilled without any problem

(14) In the case at hand, most of the criteria for deeming State aid to be present can be readily considered to be fulfilled, as the Commission already stated in the original decision. In the new variants examined here, there are no changes compared to the original instrument that would justify any other assessment of these criteria. In the case of the new variants as well, the criteria of advantage, selectivity and the status of the beneficiaries as undertakings are clearly met.

(15) Advantage means any economic benefit in any form that an undertaking could not have obtained under normal market conditions.[3] The original instrument and the planned new variants provide that both producers and purchasers of renewable hydrogen and its derivatives receive an advantage. The advantage for producers consists of long-term Hydrogen Purchase Agreements (HPAs) at a price that covers the relevant

[3] Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, paras 66 and 68.

production costs and allows for a reasonable profit that cannot be achieved under normal market conditions.

(16) On the other hand, there is much to suggest that there is no advantage at the level of the buyers. This is because Hydrogen Selling Agreements (HSAs) are only concluded with those buyers who win out in a competitive selection process, with the only selection criterion being the price. This ensures that HSAs are concluded at the highest price obtainable on the market. According to marginal no. 84(ii) of the Commission notice on the notion of State aid, a sale is deemed to be concluded at arm's length and therefore does not confer an advantage if it is carried out through a competitive, transparent, non-discriminatory and unconditional tender procedure with the award being to the highest bid.[4] The classification of this highest bid as a market price is not precluded by the fact that it does not cover the entire production costs. This is clearly established by Article 42 (5) of the General Block Exemption Regulation for State Aid (GBER)[5]. This states the following with regard to operating aid for the generation of renewable electricity:

> "The aid is granted as a premium in addition to the market price whereby the generators sell their electricity directly in the market."

(17) This suggests that the market price is defined as the highest price that can be achieved on the market and not necessarily a break-even price. In its original decision, the Commission nevertheless assumed (as a precautionary measure) that there was also an advantage at the level of the purchasers in view of the high time pressure of the notification procedure at the time. There was not enough time in the notification procedure for an in-depth analysis, which would have allowed for a different conclusion. As a result, this question can remain a moot point for the purposes of this analysis, since the new variants also result in an advantage at the level of the producers. Therefore, the criterion of an advantage is already met for this reason.

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4 Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para 84.

5 Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 TFEU, as amended 23 July 2021, OJ EU 2021 L 270/39.

(18) According to Art. 107 (1) TFEU, the advantage must moreover be selective, i.e. it must not only apply generally, but must favour certain undertakings or categories of undertakings or certain sectors of the economy.[6] This is the case with both the original instrument and the new variants being planned. The advantage is only available to certain types of investors, namely those who invest in the production of renewable hydrogen or its derivatives and with whom an HPA is concluded. If one were to assume that the purchasers would also have an advantage, this would also be of a selective nature. Given the early stage of development of the market for renewable hydrogen and its derivatives, it would only be available to certain actors who can decarbonise their production processes through this type of investment and with whom HSAs would be concluded.

(19) Nor is there any doubt that both producers and buyers are to be regarded as undertakings in the meaning of State aid law. In State aid law, the so-called "functional" concept of an undertaking developed by the European Court of Justice (ECJ) and used by the Commission in its consistent rulings applies. Accordingly, the concept of an undertaking covers

> "any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity".[7]

(20) In addition to these criteria defining State aid, which are without any problem fulfilled in the case at hand, there are also two criteria that require a more in-depth analysis. These are the criteria of the effect on trade between the Member States and distortion of competition as well as the criterion of the granting of aid from state resources or resources imputable to the state. As regards the first criterion in question, the Commission concluded in the original decision that the beneficiaries are those producers and purchasers of renewable hydrogen or its derivatives that are involved in the production of products or services that are widely traded in the European Economic Area (EEA). This is because the original instrument provides that all products marketed through it are imported into the EU from the respective producer country outside the EU. For this reason, the Commission found that the original instrument could distort

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6 Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, paras 117-118.

7 See, inter alia, ECJ, Judgment of 12 September 2000, Joined Cases C-180/98 to C-184/98 - *Pavel Pavlov and Others v Stichting Pensioenfonds Medische* Specialisten, ECLI:EU:C:2000:428, para. 74.

competition in the hydrogen market and downstream markets and affect trade within the EEA. In contrast, one of the variants now being considered also concerns such funding windows where the products produced are not imported into the EU, but are instead offered on the local market of the producing country. In this respect, a different legal assessment could be possible with regard to the criterion of the effect on competition and trade. Therefore, a closer look at this criterion is warranted (cf. C.I.2. below).

(21) With regard to the second criterion to be examined in more detail, the Commission was entitled to readily assume in the original decision that the measure is financed from state resources and is imputable to the state. This is because the original instrument is financed exclusively from the general German state budget and according to specifications laid down by the Federal Ministry of Economics and Climate Protection (BMWK) in its grant decision. However, in the new variants being considered, various scenarios are envisaged in which funding is provided not only by Germany (or another EU Member State) but also by other entities, namely developing or emerging economies, the EU or international institutions such as the World Bank or the African Development Bank (see para. (8)). This change constitutes a significant departure from the original instrument. A reassessment of this criterion is hence necessary.

2. Threat of distorting competition and (potentially) affecting trade between Member States

(22) The simplest way to ensure that the aid does not affect trade between Member States and does not distort or threaten to distort competition would be to align it with the criteria of the so-called de minimis Regulation[8]. Under this Regulation, aid is generally deemed to not meet all the criteria set out in Article 107(1) of the Treaty and is therefore exempt from the notification requirement of Article 108(3) of the Treaty if the aid granted to an individual enterprise does not exceed EUR 200,000 per Member State over any period of three fiscal years. This regulation, which only applies until 31 December 2023, is currently being revised by the Commission. The Commission proposes to amend the de minimis threshold in order to adapt it to the current economic situation. According to the proposal, the de minimis threshold is to be raised to EUR 275,000. However, even after raising the de minimis threshold, aid of EUR 275,000

[8] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid.

per Member State and per undertaking would not be sufficient for the purposes of the variants envisaged. The market ramp-up of green hydrogen and its derivatives requires investments and volumes that cannot be achieved with a price differential compensation limited to EUR 275,000 per producer.

(23) Therefore, it has to be examined whether a distortion of competition or an effect on trade between Member State can be excluded on the basis of the general principles. In principle, the Union Courts set only very low requirements for the fulfilment of these criteria defining State aid. In the case of an undertaking that is (also) active in the internal market, they generally assume without any deeper-going examination that any advantage is capable of affecting competition and trade in the internal market.[9]

(24) However, according to case law, a closer examination is required if the object of the state support – as in the present case – is the activities of undertakings in third countries. The Union Courts have underscored that effects on competition and trade between Member States by support measures of this kind are in any case less direct and more difficult to perceive than in the case of financial support for intra-European activities and projects.[10] The otherwise usual reference to the fact that the aid recipient (also) participates in intra-Community trade is in these cases not a sufficient indication of the presence of a potential distortion of competition or effect on trade in the internal market.[11] Accordingly, these criteria are examined below on the basis of the decision-making practice of the Union Courts and the Commission in cases involving third countries.

(25) A prerequisite for the assumption of a distortion of competition is that the state measure in question be suitable to improve the competitive position of the recipient vis-à-vis its competitors on the internal market.[12]

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9 See, inter alia, ECJ, Judgment of 11 June 2009, Case T-189/03 - *ASM*, ECLI:EU:T:2009:193, para. 68; Judgment of 6 March 2002, verb. T-92/00 and T-103/00 - *Disputaciòn Floral de Alava*, ECLI:EU:T:2002:61, para. 72.

10 ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, para 62; ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para 49.

11 ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, para. 61 et seq.; ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para. 74.

12 Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para. 187 et seq.

a) "Import into the EU" variant

(26) There is no doubt that the Commission would assume a distortion of competition and an effect on trade in any case insofar as a support measure with a third-country connection also benefits the economic activities of an undertaking in the EU internal market. The variants now under consideration also include funding windows that – like the original instrument – provide for the import of products into the EU. With such funding windows, relevance of the support to the internal market is beyond question. This follows by way of an "argumentum a fortiori" from the Commission's decision-making practice on support for activities intended to promote the export of products manufactured in the EU to third countries (e.g. storage of European goods in the third country, advertising and trade fair stands for European products, business trips by European sales staff to the third country, and the establishment of a customer service office or a distribution network for the sale of European products in a third country). According to the decision-making practice of the Union Courts and the Commission, promotion of these activities is deemed to lead to a distortion of competition in the internal market if the third country in question is a market to which other undertakings operating on the internal market also export comparable products.[13] If the Commission recognises that trade may be affected even if a beneficiary exports part of its production to countries outside the Union, this must apply a fortiori if a beneficiary imports all or a substantial part of its production into the EU. This is because the imported products are in competition with other products traded on the internal market.

b) "Local market" variant

(27) However, the criteria of distortion of competition and effect on trade need to be examined in more detail in those variants that exclusively address the local sales market in the producer country outside the EU and do not provide for imports into the EU.

aa) Distortion of competition

(28) The criterion of distortion of competition presupposes that an advantage is capable of improving the position of the undertaking in question on the domestic market.[14] In the

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[13] Commission, Decision of 24 March 2010, State aid C 4/2003 - *Italy: Wam SpA*, para. 85 et seq, confirmed by ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, and ECJ, Judgment of 7 November 2013, Case C-560/12 P - *Wam SpA*, ECLI:EU:C:2013:726; see also Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para 193.

[14] Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para. 187 et seq.

case of support for the manufacture of products in a third country that are only to be offered on the local market, this is not evident, at least not at first glance.

(29) However, according to the Commission's decision-making practice, it is deemed to be sufficient for the beneficiary to generate profits from the subsidised activity in the third country, which it could theoretically reinvest in its European business.

(30) In this respect, the Court of Justice of the European Union (CJEU) and the Commission emphasise the fungible or exchangeable character of money ("*money is fungible*").[15] On the basis of this case law and decision practice, competition is also deemed to be distorted if the subsidised project does not involve any export or import, but the subsidy is granted for the establishment of a production facility in a third country for the subsequent supply of customers located there, but the undertaking generates profits from its activities in the third country that it could transfer to Europe. The latter could characterise producers which also operate in Europe.

(31) Even if the beneficiary undertaking – in this case the operator of a production plant in a third country – does not intend to reinvest its third-country profits in the EU, the Commission assumes, in view of the fungibility or interchangeability of money, that state support for profitable third-country activities enables an undertaking operating in the internal market to use its own expenses thus saved for other purposes within the EU.[16] In doing so, the Commission assumes that the financing of profitable activities is one of the costs normally borne by an undertaking itself, irrespective of whether these activities are carried out inside or outside the EU.

(32) Therefore, according to the Commission's decision-making practice, even the promotion of profitable activities of an undertaking (also) operating in the internal market, which are exclusively performed in a third country and have no export or import connection, would also strengthen its position in the European internal market as a result.

(33) However, something different would apply to the direct or indirect advantage for undertakings from the third countries concerned if they do not belong to a European group of undertakings and they do not offer any goods or services in the European internal market. This is because, under these conditions, a strengthening of such an

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15 ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para. 47 et seq.; Commission, Decision of 24 March 2010, State aid C 4/2003 - *Italy: Wam SpA*, para. 91.

16 Commission, Decision of 24 March 2010, State aid C 4/2003 - *Italy: Wam SpA*, para. 91.

undertaking in the internal market and thus a distortion of competition within the meaning of Article 107 (1) TFEU is ruled out. However, the planned instrument does not limit the support of renewable hydrogen producers to undertakings operating exclusively in third countries. As we understand it, the funding windows in all the variants considered will also be open to interested undertakings from the EU. For this reason, a financial strengthening of undertakings operating in the internal market and thus at least a potential impairment of competition on the internal market cannot be ruled out.

bb) Adverse effect on trade

(34) However, it does not necessarily follow from the financial strengthening of an undertaking that the undertaking will use these funds in connection with the trade in products or services in the internal market. This is particularly true for undertakings operating internationally, i.e. including outside the internal market. The Union Courts have held that a mere indication that the beneficiary undertaking is (also) participating in intra-Community trade is not a sufficient evidence for the presence of an effect on intra-Community trade in such cases.[17] Rather, if the Commission affirms the quality of support for activities carried out in a third country, it must make a "greater effort to state reasons" for an effect of the respective measure on trade (especially) between EU Member States.[18]

(35) However, the ECJ also established that the Commission is not obliged

> "to carry out an economic analysis of the actual situation of the relevant market or the patterns of trade in question between Member States or to show the actual effect of the trade in question, in particular on [...] prices, or to examine [the beneficiary undertaking's] turnover".[19]

(36) According to case law, it is sufficient that the Commission's statement of the grounds comprehensibly relates the reasons for which it assumes that intra-Community trade is

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[17] ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, para. 61 et seq.; ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para. 74.

[18] ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, paras 57 and 62.

[19] ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, para. 58; ECJ, Judgment of 6 September 2006, verb. Cases T-304/04 and T-316/04 - *Wam SpA*, ECLI:EU:T:2006:239, para. 64.

potentially affected by the support in question.[20] Due to the close connection between the elements of distortion of competition and effect on trade, the Commission is not obliged to carry out a separate examination for each of these two elements in every case. Instead, the Commission may examine the existence of the two elements together and, if sufficiently justified, conclude from the existence of a distortion of competition that there is a potential negative effect on trade between Member States. The CJEU accordingly ruled in a case involving support by the Italian state for measures facilitating Italian undertakings' penetration of third countries' markets that the Commission satisfied its obligation to state reasons by also assuming a potential effect on trade as a consequence of the distortion of competition based on a financial strengthening of the beneficiary without conducting any separate examination.[21] The Commission is by no means obliged to reach a corresponding conclusion or to link the two elements of the criterion, however. A risk therefore remains that the Commission will automatically conclude from the existence of a potential distortion of competition that there is a potential effect on trade. This would not be objectionable according to case law handed down by the Union Courts.

c) Preliminary conclusion

(37) A distortion of competition or an effect on trade between Member States could only be ruled out if the planned instrument on the purchaser's side exclusively addresses the local sales market in the producer state outside the EU, does not provide for imports into the EU and the beneficiary third-country producer is not (also) active on the internal market.

3. Grant from state resources or resources imputable to the state

(38) The German contribution to the new variants under consideration, which just like under the original instrument is presumably being funded from the German budget on the basis of the applicable provisions of the Federal Budget Code and a grant notice from the respective Federal Ministry, is undoubtedly considered to be granted from

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[20] ECJ, Judgment of 30 April 2009, Case C-494/06 P - *Wam SpA*, ECLI:EU:C:2009:272, para. 60; ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para. 53.

[21] ECJ, Judgment of 27 September 2012, Case T-303/10 - *Wam SpA*, ECLI:EU:T:2012:505, para. 53; Commission, Decision of 24 March 2010, State aid C 4/2003 - *Italy: Wam SpA*, para. 93.

state resources and is imputable to the state. The same applies to funding contributions from another EU Member State.

(39) However, this does not apply to financial contributions from the EU, international institutions such as the World Bank and the African Development Bank, or third countries. The addressees of the prohibition of State aid laid down in Article 107 (1) TFEU are in principle only the EU Member States including their national authorities.

(40) By way of exception, however, financial contributions provided (indirectly) from the EU budget, from international organisations or from third countries may also be deemed to be state resources and thus subject to State aid checks and controls. This is the case insofar as Germany and/or another EU Member State makes the decisive decision on the use of such funds within the scope of its discretionary latitude. This follows from the principles developed by the Commission on the question regarding under which conditions financial resources that are not provided by Member State bodies are to be classified as state or non-state resources:

> "Resources coming from the Union, [...] from the European Investment Bank, or from the European Investment Fund or from international financial institutions, such as the International Monetary Fund or the European Bank for Reconstruction and Development, are considered as State resources if national authorities have discretion as to the use of these resources (in particular the selection of the beneficiaries). By contrast, if such resources are awarded directly by the Union, by the European Investment Bank or by the European Investment Fund, with no discretion on the part of the national authorities, they do not constitute State resources [...]".[22]

(41) Accordingly, the decisive factor in the classification as state resources is whether the decision regarding the use of funds and in particular on the selection of aid recipients is left up to the discretion of one or more[23] EU Member States. There is every indication that the same principles apply to funds managed by third countries, the use of which is decided by one or more EU Member States.

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[22] Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para 60.
[23] Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para 59.

(42) In actual practice, this could be particularly relevant in constellations in which one or more EU Member States provide funds to an international organisation or a third country for the operational management or promotion of certain (development policy) purposes, but retain the decisive decision-making power over their use. If the operational provision of the funds in question is subsequently not performed by EU Member State bodies, but – according to the specifications of one or more EU Member States – by an international organisation or national authorities of a third country, this does not call into question classification as state resources within the meaning of Article 107 (1) TFEU. This is underscored by the following statement by the Commission:

> "The origin of the resources is not relevant provided that, before being directly or indirectly transferred to the beneficiaries [...]."[24]

(43) If the EU, an international organisation or a third country provides funds to the intermediary responsible for the PtX window in question (hereinafter: 'PtX intermediary') for the (co-)financing of a PtX window upon the instructions of, or in accordance with, the requirements established by one or more Member States, the fact that the HPA purchase price is paid by a private PtX intermediary does not prevent it from being classified as state resources. Admittedly, no national authority is involved here.

(44) Germany does not intend to participate in any PtX intermediary. As the Commission stated in its decision on the original instrument, however, this does not prevent purchase price payments effected via a private PtX intermediary from being deemed imputable to the state. This is because the PtX intermediary is not free to use the subsidy granted to it by the German state as it sees fit. With the original instrument, for example, the grant decision of 23 December 2021 obliged the PtX intermediary "Hintco", which was in charge of its implementation, to use the funds granted by Germany exclusively as compensation for price differentials:

> "The grant is earmarked for a specific purpose. It may only be used for the above-mentioned project in accordance with your application dated 19 November 2021, including the attached overall preliminary calculation."

(45) This degree of earmarking, including checks and controls on the use of funds, sufficed for the Commission to conclude not only that the funds of the original instrument were

[24] Commission, Notice on the concept of State aid, OJ EU 2016 C 262/1, para 57.

State resources, but that the payment of the purchase price by Hintco to the selected HPA contractors was also to be imputed to the German State:

> "The scheme is established in national law [...] and the German Federal Government together with HINT.CO determines important essential elements of the scheme, including the beneficiaries, the conditions of eligibility in the scheme, and the scheme's budget. The notified measure is therefore imputable to the State."

(46) This chain of imputation is not lost even if Germany or another Member State does not pay the grant directly to the PtX intermediary, but the funds are provided to the intermediary upon the instructions of, or in accordance with, the requirements of one or more EU Member States by the EU, an international organisation or a third country. This is because in this case these intermediary institutions act as an "extended arm" of the EU Member State(s) concerned. The crucial aspect is that it is EU Member State bodies that decide on the use of resources earmarked for a PtX window.

(47) Such constellations, in which international organisations manage and disburse funds provided by an EU Member State according to its instructions, exist in actual practice. One example of this are so-called "bilateral agreements" in which the treaty parties – an EU Member State and a multilateral institution – agree on the participation of the state in question in a certain programme of the institution and in which the state has decisive (co-)decision-making powers over the use of the funds it provides. Such agreements are to be found, for example, in the practice of the African Development Bank.[25] Whether the agreements in the respective "bilateral agreement" actually lead to the funds in question being regarded as state resources or resources imputable to the state requires a closer examination of the respective agreement in the individual case. However, this cannot be ruled out from the outset by citing that funding measures from such a programme are disbursed to the beneficiaries by an international institution and not directly by an EU Member State.

(48) Conversely, the mere fact that the EU, an international institution or a third country channels funds to the final recipients via a PtX intermediary does not lead to the funds being classified as state resources of Germany and thus as State aid. This is because

[25] Cf. an overview at the following link (last accessed on 10 May 2023): https://www.afdb.org/sites/default/files/documents/legal-documents/2011_04_21_bilateral_hpl_xls.pdf.

the H2Global instrument does not provide for capital or other control over an intermediary by Germany (see para. (44)) that would indicate that Germany decides on the use of the funds, including their beneficiaries. Accordingly, it remains the case that funds provided by the EU, an international institution or a third country to finance a PtX window are only to be regarded as state resources within the meaning of Article 107 TFEU if the provision of the funds to the PtX intermediary takes place on the instructions of, or in accordance with, the specifications of one or more EU Member States. Should such a connection arise, a reassessment of the presence of State aid would be necessary.

4. Consequences for the different scenarios

(49) The conclusions described in the previous section are not irrelevant to other aspects of the State aid assessment. Two important implications should be kept in mind:

- If the funds provided by an entity other than Germany (or another EU Member State) are to be classified as state resources and constitute State aid, they must also be notified to the Commission. Germany or the EU Member State concerned would have to notify these funds to the Commission as if they were its own. The actual notification procedure can be preceded by so-called preliminary contacts with the Commission. These can be used to clarify whether the funds from an entity other than Germany (or another EU Member State) should actually be classified as State aid and thus included in the notification.

- Funding provided by an entity other than Germany (or another EU Member State) for a PtX window may be relevant for compliance with State aid rules even if it does not constitute State aid, however. This applies to those PtX windows where Germany or another EU Member State is involved in the funding in addition to the "other entity". If the financing contribution by Germany or the EU Member State concerned fulfils the criteria for State aid within the meaning of Article 107 (1) TFEU, it must be notified to the Commission. The financing contribution of the Member State can only be declared compatible with the internal market if, together with the financing contribution of the "other entity", it does not lead to overcompensation of the aid recipient. This follows explicitly from marginal no. 57 of the Commission Guidelines on State

Aid for Climate, Environmental Protection and Energy 2022[26] (CEEAG) with regard to the proportional financing of a measure from State resources centrally managed by the EU (see para. (59)). Accordingly, when centrally managed Union funds that are not directly or indirectly under the control of the Member State are cumulated with State aid, it must be ensured that the total amount of public funding granted for the same eligible costs does not lead to overcompensation. All indications are that the same principles apply to co-financing of a PtX funding window by international institutions or third countries. Here as well, the co-financing contribution by Germany (or another Member State) relevant to the aid must not lead to overcompensation of the aid recipient. This requires taking into account any other funding flows, in particular in calculating the funding gap required under CEEAGs (see para. (70)).

5. Preliminary conclusion

(50) Most of the criteria for determining the presence of State aid can be readily regarded as fulfilled in the present case. Only the criterion of grants from state resources or resources imputable to the state and the threat of distortion of competition and (potential) effect on trade between states need to be examined more closely. The following applies with regard to these criteria:

- The funds provided by the EU, an international institution or a third country for a PtX funding window shall only be considered as State aid or aid granted through State resources if the provision of the funds for the PtX window is made on the instructions of, or in accordance with, the requirements of one or more EU Member States.

- A distortion of competition or an effect on trade between Member States could only be ruled out if the planned instrument on the purchaser's side exclusively addresses the local sales market in the producer state outside the EU, does not provide for imports into the EU and the beneficiary third-country producer is not (also) active on the internal market.

[26] OJ EU 2022 C 80/1.

II. Compatibility with the internal market

(51) Since the financial resources provided constitute State aid, at least in some scenarios, it is necessary to examine how their compatibility with the internal market can be determined with regard to the general prohibition of State aid (Article 107 (1) TFEU).

(52) The determination of the compatibility of an aid measure generally requires a notification to the Commission. In this case, the relevant measure may not be implemented until it has been approved by the Commission (so-called standstill obligation, Art. 108 (3) TFEU). However, no notification or approval obligation applies if an exempting condition is fulfilled, according to which the relevant support measure is deemed to be compatible with the internal market without notification to or approval by the Commission.

1. Without notification requirement - General Block Exemption Regulation 2023 (GBER)

(53) Under Article 109 TFEU, the Council may determine categories of aid which are exempted from the notification requirement. On the basis of such a determination, the Commission, pursuant to Article 108(4) TFEU, has to adopt the GBER (cf. footnote 5). On 9 March 2023 the Commission approved an amendment to the GBER which is expected to enter into force in the summer of 2023 once the text has been translated into all official languages and published in the Official Journal of the EU.

(54) In order for the GBER to apply to a particular aid (and thus for the aid to be exempted from notification requirement), all the general and specific conditions laid down in the GBER must be fulfilled (Article 3 GBER). The general conditions are set out in Chapter I of the GBER. The specific conditions depend on the category of aid concerned. The purpose of these conditions is to allow an objective assessment of whether the aid is subject to notification obligations.

(55) One of the amendments adopted by the Commission is the creation of exempting conditions for aid for hydrogen and hydrogen derivatives. Such exempting conditions are laid down in Art. 36 GBER ("Investment aid for environmental protection, including decarbonisation") for investments in equipment and machinery for transporting or using low CO_2 or green (renewable) hydrogen (consequently also for investments in equipment and machinery producing hydrogen derivatives using hydrogen) as well as

for investments in equipment and machinery producing low CO_2 (and not green) hydrogen. The conditions for exempting investment aid for the production of renewable hydrogen are again set out in Art. 41 ("Investment aid for the promotion of energy from renewable sources, renewable hydrogen and high efficiency cogeneration").

(56) However, for the reasons explained in the following, an exemption of aid for the financing of PtX windows in the H2Global instrument pursuant to Art. 36 and 41 GBER is not possible. Firstly, exemption from the notification requirement is linked to the aid in question not exceeding the so-called notification thresholds laid down in the GBER. For investment aid within the meaning of Articles 36 and 41 of the GBER, a threshold of EUR 30 million per enterprise and investment project applies. If the aid granted to an enterprise for a specific project exceeds this value, it is subject to the notification requirement. Any exemption from the notification obligation according to Art. 36 or 41 GBER is then excluded. As we understand it, the price differential compensation granted to the PtX intermediary in relation to an HPA over the entire term of the agreement is likely to exceed this amount by far on a regular basis.

(57) Secondly, Articles 36 and 41 of the GBER apply only to investment aid intended exclusively to finance the investment costs of an investment project, and not in contrast to operating aid. The latter serve to cover operating costs, i.e. costs incurred by an undertaking in carrying out its activities, including costs for personnel, external services, waste, energy, maintenance, rent, etc. In the original decision, the Commission had already established that the H2Global instrument constituted operating aid.

(58) Operating aid is not exempted from the notification requirement under the GBER to a sufficient extent for the financing of PtX windows, however. Although Art. 43 GBER provides for operating aid for the promotion of renewable hydrogen, this is only for small projects with an installed capacity of no more than 3 MW or equivalent capacity for the production of renewable hydrogen. Art. 42 GBER, which provides for operating aid for larger installations as well, only applies to electricity from renewable energy sources, but not on the other hand to the production of hydrogen. It can be concluded from this that none of the exemptions mentioned is applicable to the variants under consideration. For this reason, the GBER is not discussed in any detail.

2. With notification requirement

a) Guidelines for State Aid for Climate, Environmental Protection and Energy 2022 (CEEAG)

(59) The Commission explicitly classifies investment and/or operating aid for the production of renewable hydrogen as "aid for the reduction and removal of greenhouse gas emissions" within the meaning of Section 4.1 CEEAG. Section 4.1 CEEAG distinguishes between "aid for renewable energy" (Section 4.1.2.1) and "other aid for the reduction and removal of greenhouse gas emissions" (Section 4.1.2.2). Aid for the production of renewable hydrogen is explicitly assigned to section 4.1.2.1 ("Aid for renewable energy"). Aid for derivatives produced on the basis of renewable hydrogen is not explicitly listed in section 4.1.2.1 CEEAG. According to marginal no. 79 CEEAG, however, this section includes measures to promote all types of renewable energies. The latter also include liquid or gaseous renewable fuels of non-biogenic origin (so-called RFNBOs) that meet the requirements of Art. 27 (3) as well as Art. 25 (2) and Art. 28 (5) RED II or the Delegated Acts adopted by the Commission on the basis of these provisions. These are also considered renewable and can be credited to renewable energy quotas. The original instrument only includes derivatives that meet these requirements. For the purposes of this opinion, it is assumed that this also applies to the new variants under consideration. Accordingly, the compatibility assessment of the support under consideration for the project would be based on the renewable energy aid provisions of the CEEAG.

(60) In the CEEAG, the Commission specifies how it exercises the discretionary latitude granted to it under Article 107(3)(c) TFEU to determine the compatibility of climate, environmental and energy aid with the internal market. Section 3 of the CEEAG contains general compatibility criteria for all aid measures falling within the scope of these Guidelines. Section 4 contains specific compatibility criteria for certain types of aid which specify the general requirements of Section 3 or establish additional requirements – for the aid measure under consideration here in Section 4.1. Due to this structure of the CEEAG, Sections 3 and 4.1 of the CEEAG are therefore authoritative pursuant to the compatibility assessment in this case.

(61) The following discussion provides a rough overview of the assessment scheme relevant for the present measure, which results from the provisions in Section 3 of the CEEAG in their specific form and supplemented by the requirements in Section 4.1. The discussion is based on the premise that the aid – as in the original instrument – is

granted in the context of a competitive bidding process and has the parameters set out in the description of the substance matter.

(62) The Commission's compatibility assessment under the CEEAG is roughly divided into three steps. First, the Commission examines whether the aid contributes to the promotion of one or certain economic sectors ("positive condition"). In the second step, the Commission then verifies that the aid does not adversely affect trading conditions to an extent contrary to the common interest ("negative condition"). Finally, the Commission determines whether the positive contribution of the aid to the Union's climate, environmental and energy objectives outweighs negative effects on the conditions of competition and trade ('balancing'). These three steps in the assessment are performed on the basis of the conditions listed below (marginal no. 22 CEEAG):

- "Positive condition": The aid must contribute to the promotion of one or certain economic sectors (Section 3.1 in conjunction with Section 4.1.2 CEEAG). The Commission imposes the following requirements on the presence of the positive condition (marginal no. 22 lit. a CEEAG):
    - Identification of the economic activity which is being facilitated and the positive effects of the measure (Section 3.1.1 CEEAG)
    - Incentive effect (Section 3.1.2 CEEAG)
    - No breach of any relevant provision of Union law (section 3.1.3 CEEAG)
- "Negative condition": The aid must not unduly affect trading conditions to an extent contrary to the common interest (Section 3.2 in conjunction with Sections 4.1.3 and 4.1.4 CEEAG). The Commission imposes the following requirements on the presence of the negative condition (marginal no. 22 lit. b CEEAG):
    - The need for the State intervention (Section 3.2.1.1 CEEAG)
    - The appropriateness of the State aid (Section 3.2.1.2 CEEAG)
    - Eligibility for aid/principle of technology neutrality (specific additional criterion for "aid for the reduction and removal of greenhouse gas emissions", cf. section 4.1.3.3 CEEAG)
    - Public consultation (specific additional criterion for "aid for the reduction and removal of greenhouse gas emissions", cf. section 4.1.3.4 CEEAG)
    - Proportionality of the aid (Section 3.2.1.3 CEEAG)

  - Transparency of the aid (Section 3.2.1.4 CEEAG)
  - Avoidance of undue negative effects of the aid on competition and trade (Section 3.2.2 in conjunction with Section 4.1.4 CEEAG)
- Balancing: The positive contribution of the aid to the Union's climate, environmental and energy objectives must outweigh the negative effects on conditions of competition and trade (Section 4.1.4 CEEAG).

aa) Identification of the activity supported and the positive effects of the measure (positive condition).

(63) The Member State must indicate the following in the notification:

- Details on the sector of activity supported and how this support is to be provided;
- The way in which the funding is provided;
- Demonstrate whether and how the aid contributes to the EU's climate, environmental and energy policy objectives. This requirement does not pose any problems for PtX support windows. These contribute both to increasing the share of renewable energies in energy consumption, to achieving the goals of the EU hydrogen strategy and to reducing CO_2 emissions. With regard to the CO_2 savings potential, the Commission requires plausible information in the notification procedure on which fossil energy sources used to date are to be substituted by the PtX products covered by the respective window and to what extent, and what CO_2 savings are to be expected from substitution in the production and/or use of the green hydrogen or its derivatives compared to the production and use of the fossil energy sources used to date.

bb) Incentive effect (positive condition)

(64) Only aid that has an incentive effect can be declared compatible with the internal market. An incentive effect is deemed to be present wherever the aid causes the beneficiary to change its behaviour and to undertake additional economic activities or more environmentally friendly activities which it would not undertake, would undertake only to a lesser extent or would undertake otherwise in the absence of the aid. This is to avoid a deadweight effect of State support for activities that the aid beneficiary would undertake even without the aid.

(65) To demonstrate the incentive effect, the facts of the substance matter and the likely counterfactual scenario in the absence of the aid must be determined. According to footnote 56 CEEAG, the counterfactual scenario is the activity that the aid beneficiary would have performed without the aid.

(66) The determination of the counterfactual scenario is naturally easier if the granting body's decision - e.g. a German Federal Ministry - is approved directly for a specific producer of PtX products as so-called *ad hoc individual aid.* In this case, the Member State has to relate a plausible counterfactual scenario on the basis of the factors that were relevant at the time of the aid beneficiary's investment decision. According to footnote 40 CEEAG, "official documents of the management bodies, evaluations, financial reports, internal business plans, expert reports and studies" on the project concerned should be used for this purpose. Such documents would have to be submitted in the notification procedure and clearly indicate that the project will only be carried out if the investment subsidy is granted.

(67) A key feature of the H2Global instrument is, however, that the subsidy provider does not grant the subsidy directly for a specific plant. Rather, the decision on the grant is made for the intermediary PtX provider. The intermediary then selects the HPA contract partners and thus the actual aid recipients through competitive bidding procedures. The subsidy is therefore potentially open to a large number of producers of green hydrogen or its derivatives which are not yet known to the PtX intermediary at the time that the subsidy decision is made by the subsidy provider. State-funded H2Global funding windows are thus not considered to be *ad hoc individual aid* for a specific producer, but rather a so-called aid scheme. In the case of aid schemes, the analysis cannot, of course, be carried out at the level of the individual beneficiary. It only has to be submitted as an example based on one or more plausible reference projects (e.g. for green hydrogen and the various derivatives under consideration). Something different applies by way of exception for those parties in aid schemes that benefit a particularly limited number of beneficiaries. However, there is nothing to suggest the latter could apply in the case of H2Global funding windows.

(68) An incentive effect is generally excluded if work on the project has already started before the aid recipient has submitted a written aid application to the national authorities. This must be verified by the PtX intermediary in each case (e.g. by submitting self-declarations from the producer concerned) before HPAs are concluded.

cc) No breach of relevant provisions of Union law (positive condition)

(69) Even if the aid contributes to the achievement of the Union's climate, environmental and energy policy objectives, it may not be declared compatible with the internal market if it breaches other provisions of Union law (in particular the principles of free movement of goods and freedom to provide services). Therefore, the granting of the aid may not be made contingent upon the use by the aid recipient of products produced in the EU Member State granting the aid (e.g. Germany) in order to carry out the project.

dd) Necessity of the aid (negative condition)

(70) According to section 3.2.1.1 of the CEEAG, the necessity of the aid requires, in principle, identification of one of the types of existing market failure mentioned in marginal no. 34 of the CEEAG which is to be addressed by the aid measure. However, the special provisions in Section 4.1 of the CEEAG for "aid for the reduction and removal of greenhouse gas emissions" contain different provisions in this respect. According to marginal no. 89, the general rules laid down in marginal nos. 34 to 37 of the CEEAG on market failure do not apply to this type of aid. According to section 4.1 of CEEAG (marginal no. 89 f.), however, marginal no. 38 of the general provisions on necessity (section 3.2.1.1 of the CEEAG) does apply. According to this provision, the Member State concerned must prove – similar to the incentive effect – that the project would not be carried out without the aid. According to marginal no. 38, the Member State can provide this evidence in two ways. Either it submits a quantification of the net additional costs (funding gap) for the factual scenario compared to the counterfactual scenario. Or the Member State provides other evidence that the project would not take place without the aid. As a result, the requirements of this section do not differ from those that already have to be fulfilled in order to demonstrate the incentive effect.

(71) In addition, according to marginal no. 89 CEEAG, the Member State must explain what other policies already exist to reduce greenhouse gas emissions and why they do not provide sufficient incentive to implement the project. Quantification of the funding gap must take into account the costs and revenues of the project, including those associated with existing policies to reduce greenhouse gas emissions (e.g. ETS).

ee) Appropriateness of the aid (negative condition)

(72) In principle, according to section 3.2.1.2 of the CEEAG, the Member State must demonstrate that the aid measure is an appropriate instrument for achieving the objective that is being pursued by the support and what the reasons are for it. Appropriateness in the State aid sense of the word means that no policy or aid instrument can be identified that could achieve the same results with only a lesser negative effect on competition and trade in the internal market. To this end, the CEEAG generally require that the Member State must explain why other policy instruments (e.g. regulation, demand-side incentives, public infrastructure support, environmental labels, etc.) or less distortive aid instruments (e.g. repayable advances, soft loans or tax credits instead of direct non-repayable grants) are not equally suitable to achieving the intended objective.

(73) According to the special provisions laid down in Section 4.1 of the CEEAG, these explanations are not required for "aid for the reduction and removal of greenhouse gas emissions". According to marginal no. 93 CEEAG, the general requirements for appropriateness set out in section 3.2.1.2 of the CEEAG do not apply to this type of aid. Instead, the Commission considers State aid, including direct grants, to be an appropriate measure in view of the scale and urgency of the decarbonisation challenges, provided that all other compatibility conditions laid down in the CEEAG are met. In the present case, there would therefore be no need for separate grounds to be provided justifying the appropriateness of the variants of the H2Global instrument under discussion.

ff) Eligibility/principle of technology neutrality (negative condition)

(74) Specifically for "aid for the reduction and elimination of greenhouse gas emissions", section 4.1.3.3 of the CEEAG – to this extent going beyond the general provisions contained in section 3 of the CEEAG – stipulates the requirement of a fundamentally technology-neutral design of the support measure. Member States may provide for a restriction of the support to one or certain technologies, however, if there are objective reasons for such. Marginal no. 96 CEEAG contains a list of example case groups in which a limitation of eligibility to one or certain technologies does not unduly distort competition. This is considered to be the case, for example, if the measure in question targets a specific sectoral or technology based objective enshrined in Union law, such as "a renewable energy or energy efficiency scheme" and "where appropriate, for renewable hydrogen" (marginal no. 96 lit. a CEEAG). In the case of support for PtX

windows, the link or contribution of the project to the "roadmap" of the EU hydrogen strategy and to intended regulation at EU level should therefore be established. If possible, arguments for the presence of further case groups provided in marginal no. 96 CEEAG should be developed as a precautionary measure. According to marginal no. 96 lit. d CEEAG, a derogation from the principle of technology neutrality can also be considered if an eligible sector has the potential to make an important and cost-effective contribution to environmental protection and comprehensive decarbonisation in the longer term. This should be elaborated in a notification procedure both for producers of green hydrogen and its derivatives and for potential user industries where the demand and thus the willingness to pay for the respective PtX products is likely to be comparatively high.

gg) Public consultation (negative precondition)

(75) If a formal notification of the aid is submitted after 1 July 2023, it is in principle necessary to perform a public consultation in accordance with section 4.1.3.4. A public consultation is only not required if the following cumulative conditions are met:

- the estimated average annual aid to be granted is below EUR 150 million,
- the aid is granted through a competitive bidding process
- and if the measure does not support investments in fossil fuel-based energy generation, production or other activities.

(76) While the latter two conditions are likely to be fulfilled for the PtX windows at issue here, the average annual budget depends on the financial endowment of the window and the duration of the HPAs. If this shows that the total aid granted through the window per year is less than EUR 150 million on average, a public consultation can therefore be dispensed with. If, on the other hand, the exception would by way of exception not apply due to a financial endowment exceeding this threshold, a public consultation of at least six weeks' duration is required, during which the public is given the opportunity to comment on the following aspects:

- eligibility; this concerns the question of whether the supported activity actually contributes to the production of renewable energy or otherwise contributes to the reduction of greenhouse gas emissions;
- method and estimate of subsidy per tonne of CO_2 equivalent emissions avoided (per reference project);
- proposed use and scope of competitive bidding processes and any exemptions;

- the main parameters for the aid allocation process, including for enabling competition between different types of beneficiary;
- the main assumptions informing the quantification used to demonstrate the incentive effect, necessity and proportionality.

hh) Proportionality of the aid (negative condition)

(77) The aid is deemed to be proportionate if the aid amount is limited to the minimum needed for carrying out the aided project. According to marginal no. 48 CEEAG, this is usually considered to be the case if the aid amount corresponds to the net extra costs (funding gap) necessary to realise the project compared to the counterfactual scenario in which no aid is granted.

(78) According to marginal no. 49 CEEAG, however, a detailed assessment of these net extra costs will not be required if the aid amounts are determined through a competitive bidding process that meets the requirements of marginal nos. 49 and 50. In order to ensure the proportionality of "aid for the reduction and removal of greenhouse gas emissions", the implementation of such a competitive bidding procedure is in principle mandatory according to section 4.1.3.5 CEEAG. The award of the aid via competitive bidding procedures is an essential feature of the H2Global instrument, so the strict requirements, in the case of which a competitive bidding procedure can be waived by way of exception, do not need to be addressed in any detail here. The fact that a detailed assessment of the net extra costs is not required for aid amounts determined through a competitive bidding procedure does not mean that an assessment is not necessary at all. Even in such a case, an exemplary analysis of the funding gap based on a representative model project must be submitted in order to demonstrate the incentive effect and the need for state intervention (unless the Member State submits another specific evidence-based analysis demonstrating the need for the aid in order to demonstrate the necessity of a state intervention; see para. (70)).

ii) Transparency of the aid (negative condition)

(79) According to Section 3.2.1.4 CEEAG, the Member State must publish in the Commission's transparency module or on a comprehensive website for State aid at the national or regional level the full text of the approved aid scheme and its implementing rules, as well as information on any individual aid exceeding EUR 100,000 granted under the aid scheme.

(80) Information on any individual aid granted under an aid scheme exceeding EUR 100,000 must be published within six months of the date on which the aid was granted. The relevant date for the start of this period is the conclusion of the respective HPA.

jj) Avoidance of undue negative effects of the aid on competition and trade (negative condition)

(81) In principle, according to section 3.2.2 CEEAG, the Member State must explain in detail how the aid will avoid undue adverse effects on competition and trade in the internal market. For "aid for the reduction and removal of greenhouse gas emissions", these explanations are not required according to the special provisions contained in section 4.1 CEEAG. According to marginal no. 114, section 3.2.2 CEEAG - with the exception of the limitation of aid schemes to a maximum duration of 10 years (marginal no. 70 CEEAG) - does not apply to aid of this kind.

(82) However, depending on the type of project supported, the notifying Member State must provide information on individual compatibility criteria listed in section 4.1.4 CEEAG, e.g.:

- From 1 July 2023, the subsidy per tonne of avoided CO_2 equivalent emissions must be estimated for each reference project, specifying the assumptions and methodology for this calculation. Wherever possible, this estimate should identify the net emission reduction from the activity, taking into account the emissions generated or reduced over the whole life cycle. In addition, short- and long-term interactions with other relevant policies or measures, including the Union's ETS, should be taken into account (marginal no. 115 CEEAG).
- The Member State must take appropriate measures to ensure that the subsidised project is actually realised (marginal no. 120 CEEAG).
- The granting of the aid should not incentivise recipients to offer their output below their marginal costs (marginal no. 123 CEEAG).
- The aid must not displace investments into cleaner alternatives that are already available on the market. The restriction of the support to a specific technology must not hamper a wider development of a market for cleaner solutions. However, this is not problematic in the case of an exclusive use of renewable energies under the measure (marginal no. 127 CEEAG).

kk) Balancing

(83) As in the case of the condition "avoidance of undue adverse effects of the aid on competition and trade", the Member State must in principle explain in detail, in accordance with Section 3.3 of the CEEAG, how the positive effects of the aid outweigh its negative effects in the context of an overall balancing. For "aid for the reduction and removal of greenhouse gas emissions", however, these explanations are not required according to the special provisions in section 4.1 of the CEEAG. According to marginal no. 114, section 3.3 does not apply to this type of aid.

(84) In the case of "aid for the reduction and removal of greenhouse gas emissions", the Commission generally assumes that the balancing test will be positive, provided that the other compatibility requirements are met and there is no obvious evidence of a breach of the "do no significant harm" principle of the Taxonomy Regulation[27] (marginal no. 134 CEEAG). If this assumption does not apply, the Commission will assess whether the positive effects outweigh the negative impacts on the internal market on balance.

b) Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia 2023 (TCTF)

(85) The geopolitical crisis triggered by Russia's attack on Ukraine and the use of energy supplies as leverage has made it even more urgent for the EU to reduce its dependence on fossil fuels by accelerating the development of renewable energy. Against this background, the Commission has decided to grant more flexibility in the TCTF[28] to Member States to grant certain State aid contributing to these objectives for a limited period of time, until 31 December 2025 at the latest.

(86) The Commission explicitly classifies aid for the production of renewable hydrogen and fuels derived from renewable hydrogen as "aid for accelerating the rollout of renewable energy and for energy storage relevant for REPowerEU" within the meaning of section 2.5 TCTF. The requirements for compatibility with the internal market regulated there are in part significantly lower than the requirements of CEEAG described

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[27] Regulation (EU) 2020/852 of 18 June 2020 establishing a framework to facilitate sustainable investment, OJ EU 2020 L 198/20.

[28] Temporary framework for State aid in support of the economy following Russia's aggression against Ukraine - crisis management and change management, OJ EU 2023 C 101/03.

above. In particular, there is no need to demonstrate an incentive effect here (cf. para. (64) ff.) and an analysis of the funding gap (cf. para. (77) ff.).

(87) Section 2.5 TCTF distinguishes between "investment aid for accelerating the rollout of renewable energy and for energy storage" (section 2.5.1) and "operating aid for accelerating the rollout of renewable energy and for energy storage" (section 2.5.2). As explained in the foregoing, the Commission had found in the original decision that the H2Global instrument constitutes operating aid (see para. (57)). Accordingly, the compatibility assessment of the support at stake for the project could only be carried out on the basis of the provisions of section 2.5.2 TCTF on operating aid for renewable energy.

(88) In section 2.5.2 TCTF, the Commission sets out the conditions that should be met in order for it to consider operating aid for the promotion of renewable energy (including hydrogen and fuels produced from renewable hydrogen) compatible with the internal market under Article 107(3)(c) TFEU. However, these conditions are not compatible with the financing of PtX windows in the H2Global instrument. Firstly, according to marginal no. 78 lit. d TCTF, the aid must be granted by 31 December 2025 at the latest. As we understand it, the HPAs, which are decisive for the granting of aid according to the opinion expressed here, may also be closed later, at least in part, within the framework of the planned instrument. Secondly, the aid must be granted in the form of two-way contracts for difference in accordance with marginal no. 78 lit. e TCTF. According to footnote 117 TCTF, a two-way contract for difference means a contract signed between a power generating facility operator and a (state) counterpart that provides both minimum remuneration protection and a limit to excess remuneration. Before the contract is concluded, a so-called "strike price" is determined and fixed for the entire term of the contract (e.g. 20 years). During this term, the facility operator sells the product it has generated on the market in the usual way. Another parameter in the implementation of a two-way contract for difference is the so-called "reference price". This is the price at which, in a given reference period (e.g. one month), the product in question was sold from installations in the State of the facility operator concerned. If the reference price is below the fixed strike price, the aid recipient receives the difference between the reference and strike price from the support mechanism. If, however, the reference price is above the strike price, the aid recipient must pay the difference to the counterpart. Characteristic of a two-way contract for difference is thus that reciprocal payment flows between the two contracting parties are possible in both directions.

(89) While it is true that some features of the H2Global concept are at least very similar to those of a two-way contract for difference, this applies in particular to the agreement of a minimum remuneration – in the case of H2Global in the form of a fixed product price – and the capping of the return to an upper limit. However, the H2Global concept does not include any payments from the facility operator to the PtX intermediary or the aid provider. The facility operator benefits from a fixed product price via the HPA, possibly financed proportionally with state funds. Conversely, however, it is not obliged to make any payments to the PtX intermediary or the subsidy provider. This could indicate that the Commission would not classify an HPA as a typical case of a two-way contract for differences. In the absence of any published decision-making practice, it is therefore impossible to determine without consulting the Commission whether it would be prepared to apply section 2.5.2 TCTF accordingly to the PtX windows at issue here due to the existing parallels between the H2Global concept and the typical case of application of a two-way contract for difference. With regard to such PtX funding windows where the granting of aid or the conclusion of the HPA contract – as required by marginal no. 78 lit. d of the TCTF – takes place no later than 31 December 2025, it should be discussed with the Commission before initiating the notification procedure whether section 2.5.2 of the TCTF can be considered as a basis for compatibility as an alternative to the CEEAG.

3. Preliminary conclusion

(90) Such financing measures for a PtX window that fulfil the State aid criterion can be declared compatible with the internal market by the Commission after carrying out a notification procedure on the basis of the Guidelines on State Aid for Climate, Environmental Protection and Energy 2022 (CEEAG). The relevant compatibility conditions are set out in section 4.1 of the CEEAG ("Aid for the reduction and removal of greenhouse gas emissions").

D.
EU Foreign Subsidies Regulation

(91) As explained in the foregoing, State aid is subject to a detailed legal regime. In principle, it is prohibited (see para. (12)). In order for it to be deemed compatible with the internal market by way of exception, it must meet detailed requirements (see para. (52) ff.). A comparable legal framework for third-country subsidies (from non-EU countries) has been lacking so far. This has given undertakings receiving third-country subsidies an unfair advantage over their competitors when acquiring other undertakings in the EU, participating in public procurement procedures in the EU or making other investments in the EU.

(92) This has changed with the recently enacted Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market (FSR). As of 12 July 2023 (or in relation to the obligations referred to in paras (119) and (123) from 12 October 2023), the Commission will have the power to investigate third country subsidies. A number of new obligations will be imposed on undertakings and public procurement bodies. As will be shown in the following, the FSR displays quite a number of similarities with the State aid rules described in Part C (with the main difference being that it concerns third country measures and not EU Member States). For this reason, it can be provisionally assumed that measures by DC partner countries and other third countries participating in the planned instrument constitute subsidies within the meaning of the FSR, which entail certain obligations for both the PtX intermediary and the producer-side participants in the planned instrument.

(93) The following analysis seeks to outline the basic principles of the FSR and its implications for the envisaged instrument. As the FSR has only recently entered into force and has not yet been tried and tested in practice, the analysis is mainly limited to the text of the FSR itself and, wherever available, the Commission's statements in this connection.

I. Subsidy criteria

(94) Art. 3 (1) FSR defines when a third country subsidy is deemed to be present:

> "For the purposes of this Regulation, a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries."

(95) A third-country subsidy is thus deemed to be such within the meaning of the FSR if it cumulatively fulfils all of the following criteria:

- Presence of a financial contribution
- Granting by a third country
- Conferring a benefit
- Status of the beneficiary/beneficiaries as an undertaking
- Engaging in an economic activity in the internal market
- Specificity

1. Presence of a financial contribution

(96) Financial contributions are not comprehensively defined in the FSR. The FSR only defines an illustrative list of financial contributions. These include, but are not limited to:

- the transfer of funds or liabilities, such as capital injections, grants, loans, loan guarantees, fiscal incentives, the setting off of operating losses, compensation for financial burdens imposed by public authorities, debt forgiveness, debt to equity swaps or rescheduling,
- the foregoing of revenue that is otherwise due, such as tax exemptions,
- the granting of special or exclusive rights without adequate remuneration; or
- the provision of goods or services or the purchase of goods or services.

(97) In the context of the envisaged instrument, it should be noted that the conclusion of an HPA involves the purchase of hydrogen or hydrogen derivatives (or the provision of services if the contracts also cover the transport of hydrogen). If the HPA purchase price is paid by the PtX intermediary using financial resources of a third country, the benefit to be granted under the envisaged instrument can be considered to constitute a financial contribution to the PtX intermediary's HPA contractor.

2. Granting by a third country

(98) Third country does not only mean the central government of a country. If this were the case, it would be very easy to circumvent the FSR. For this reason, financial contributions made by a third country include not only those made by the central government, but also those made by:

- public authorities at all other levels;
- a foreign public entity whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity and the legal and economic environment prevailing in the state in which the entity operates, including the government's role in the economy;
- a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances.

(99) Again, it should be noted that this condition coincides to a certain extent with the requirements for imputability to the state in the State aid test. The analysis of whether the actions of a foreign public or private entity can be attributed to a third country is based on general, not strictly defined criteria. Of particular importance is that the FSR requires the consideration of "all relevant circumstances" in determining the attributability of the acts of a private entity. Such a private entity need not even be a foreign entity (it may simply be a company established in the EU). It cannot be excluded a priori that a PtX intermediary is therefore considered to be such private entity whose actions could be attributed to a third country providing funds for the envisaged instrument. This can be considered if the PtX intermediary manages funds provided by a third country according to its specifications, but needs to be examined on a case-by-case basis.

3. Conferring a benefit

(100) The FSR does not provide further clarification as to what is to be considered a benefit. However, it is clear from the recitals of the FSR that the term is to be understood in the same way as the term advantage under the State aid rules:

> "A financial contribution should be considered to confer a benefit on an undertaking if it could not have been obtained under normal market conditions."

(101) This corresponds to the interpretation of the concept of advantage in State aid law.

(102) Applying the reasoning set out in the original decision in connection with the aspect of the presence of an advantage (see para. (15)), it can be presumed that the Commission will also assume the presence of an advantage including under the FSR, at least at the level of the producers of green hydrogen and its derivatives (which, however, is disputed in particular at the level of the purchasers; cf. para. (16)). It is true that the recitals of the FSR state that the provision or purchase of goods or services under a competitive, transparent and non-discriminatory tender procedure is presumed to be in line with normal market conditions. Nevertheless, the Commission affirmed the aid criterion of advantage in its approval decision on the original instrument. Due to the congruence of the understanding of the notion in State aid law and in the FSR, it is conceivable that, in the Commission's view, the advantage conferred by the planned instrument also fulfils this subsidy criterion within the meaning of the FSR.

4. Undertaking status of the beneficiary/beneficiaries

(103) The term "undertaking" is not exhaustively defined in the FSR. In Art. 2(1) FSR it is defined only in the context of public procurement procedures. It states that "undertaking" in this context means "economic operator" within the meaning of the Public Procurement Directives. Furthermore, the FSR establishes in Art. 1(2) that an undertaking also covers a public undertaking that is directly or indirectly controlled by the state. In the absence of any further clarification, it must be assumed that the Commission interprets this term very broadly in principle and, in the context of the FSR, applies the definition of a undertaking provided in para. (19) in the context of State aid as well. There are at least three arguments in favour of this hypothesis. First, only such a broad understanding would ensure a uniform application of the FSR throughout the EU, regardless of how the notion of undertaking is defined in a particular Member State. Second, only such a broad definition of an undertaking would ensure that the application of the FSR cannot be easily circumvented. Third, the FSR pursues similar objectives as other competition policy instruments (e.g. State aid, antitrust rules and merger controls). Therefore, it makes good sense for the FSR to define an undertaking in the same functional way as competition policy instruments.

(104) Here as well, it can therefore be concluded that the producers of hydrogen and hydrogen derivatives benefiting from the planned instrument are undertakings within the meaning of the FSR.

5. Exercise of an economic activity in the internal market

(105) Economic activity is another term that is not defined in the FSR. However, its interpretation should not pose any major problems. For the purposes of competition law, the following applies according to established case law:

> "any activity consisting in offering goods or services on a given market is an economic activity".[29]

(106) From the information provided in para. (103), it makes good sense to apply this definition to the FSR as well. However, the mere exercise of an economic activity is not sufficient. The activity must be carried out on the internal market. Thus, if a producer of hydrogen or hydrogen derivatives only produces for the local market (in third countries) and does not carry out any other activity in the Union, this precondition would not be met. However, this does not mean that the FSR would never apply to it. If such an undertaking acquires control of, or merges with, another undertaking established in the Union or participates in a public procurement procedure in the Union, it is deemed to be performing an economic activity in the internal market pursuant to Article 1(1) FSR. HPA contractors are selected through procedures conducted in accordance with public procurement rules. Therefore, the FSR is potentially relevant for any undertaking participating in HPA auctions, regardless of whether or not it is currently already carrying out an economic activity in the internal market.

6. Specificity

(107) The criterion of specificity is also based on the criterion of selectivity under State aid rules (see para. (18)). A third country measure of general application which can be used by any undertaking does not constitute a third country subsidy. It should be noted, however, that only producers of green hydrogen or its derivatives can participate in the HPA competitive bidding procedures and, moreover, only those bidders which are successful in the competitive bidding procedures can benefit from the subsidy. For these reasons, the Commission considered the aid criterion of selectivity to be fulfilled

[29] ECJ, Judgment of 12 September 2000, verb. Cases C-180/98 to C-184/98 - *Pavlov and others*, ECLI:EU:C:2000:428, para. 75.

in its original decision (cf. para. (18)). It must be assumed that for the same reasons it would also affirm the characteristic of specificity within the meaning of the FSR.

II. Review of third country subsidies

(108) Based on the criteria for establishing the presence of a foreign subsidy, it can be concluded that the financial contribution of a partner country in the area of development cooperation or other third country (or more precisely the HPAs concluded with its help) could potentially constitute a third country subsidy. If this is the case, the beneficiaries of the proposed instrument could be subject to the scrutiny of such third country subsidies outlined in the following sections.

(109) The mere presence of a third country subsidy does not have negative effects for an undertaking receiving such a subsidy. These can only come about if such a third country subsidy distorts the internal market. A distortion of the internal market is deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market. Whether there is a distortion of competition is to be determined on the basis of indicators such as the amount and nature of the foreign subsidy, the situation of the undertaking, including its size and the markets or sectors concerned, the level and evolution of economic activity of the undertaking in the internal market, and the purpose and conditions attached to the foreign subsidy as well as its use on the internal market. Certain categories of foreign subsidies are considered most likely to distort the internal market (e.g. foreign subsidies granted to an ailing undertaking, foreign subsidies directly facilitating a concentration, foreign subsidies enabling a company to submit an unduly advantageous tender in a public procurement procedure). In contrast, subsidies that do not exceed EUR 4 million per company over a consecutive period of three years are not deemed to distort the internal market. Moreover, the FSR provides for a de minimis threshold: If the total amount of a third country subsidy to an enterprise does not exceed EUR 200,000 per third country in any consecutive three-year period, such third country subsidy is not deemed to distort competition.

(110) If a third country subsidy distorts the internal market, the Commission must carry out a so-called balancing test. Here it balances the negative effects of a foreign subsidy in terms of distortions in the internal market against the positive effects on the develop-

ment of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy (e.g. the broader positive effects in terms of relevant policy objectives, in particular Union objectives). With regard to third country financial contributions to a PtX funding window, a contribution to Union objectives will usually be well demonstrated. This is because, as already explained, the H2Global instrument contributes to the achievement of European and international climate protection goals. If the instrument stimulates investments and value creation in partner countries in the field of development cooperation, the instrument also contributes to the Union's development policy goals.

(111) The FSR provides the Commission new powers to investigate third country subsidies. The three main new instruments are:

- A general instrument for investigating all market situations not listed in the two points in the following – here the Commission can initiate an investigation on its own initiative (ex officio) or request an *ad hoc notification* for smaller concentrations and public contracts than those listed below (Art. 9 et seq. FSR).
- A notification-based instrument to review concentrations if a company has an EU turnover of at least EUR 500 million and the concentration involves a third country financial contribution of at least EUR 50 million (Art. 20 FSR)
- A notification-based instrument to examine tenders for public contracts where the estimated value of the contract is at least EUR 250 million (or, in the case of lot procedures, the value of the lot or all lots for which the tenderer is applying is at least EUR 125 million) and the tenderer (including certain subsidiaries, holding companies, main subcontractors and suppliers) has received a third country financial contribution of at least EUR 4 million per third country in the three years preceding the notification (Art. 28 FSR).

(112) All these instruments are laid down in detail in the FSR. The following is not intended to be an exhaustive description of all the provisions of the FSR, but rather an overview of the most important procedures and obligations.

1. A general instrument

(113) The Commission may, on its own initiative, review information from any source (its own, a Member State's, a natural or legal person's or an association's) concerning alleged foreign subsidies that distort the internal market. If the Commission considers

that the information indicates the possibility that a foreign subsidy distorting the internal market exists, it is to request such additional information as it deems necessary for the purpose of carrying out a preliminary review as to whether the financial contribution constitutes a foreign subsidy and distorts the internal market. For this purpose, the Commission may request information from the Member State, the undertaking concerned and other undertakings: In the present case, therefore, not only the beneficiaries of the planned instrument, but also the PtX intermediary and Germany may be concerned. The Commission may also carry out inspections inside and outside the Union. Depending on the outcome of the preliminary review, the Commission may take a decision to initiate an in-depth investigation or close the preliminary review if it concludes that there is no foreign subsidy or that there is insufficient evidence of actual or potential distortion in the internal market.

(114) The in-depth investigation is essentially similar to a preliminary review in terms of the Commission's powers (requesting information, carrying out subsequent reviews). As a result of such an in-depth investigation, the following types of decisions may be issued:

- Decision not to raise any objections if the Commission concludes that there is no foreign subsidy, there is insufficient evidence of actual or potential distortion in the internal market or the positive effects of any distortion in the internal market outweigh the negative effects;
- Decision imposing redressive measures or a decision with commitments in which the Commission determines that a foreign subsidy distorts the internal market.

(115) A decision imposing redressive measures or a decision with commitments may include either structural remedies (e.g. dissolution of a concentration, divestment of certain assets, reduction of market presence) or behavioural remedies (e.g. repayment of the subsidy or enforced granting of access to infrastructure). In order to preserve competition in the internal market and prevent irreparable harm, these measures can also be used as interim measures.

(116) In order to ensure that undertakings comply with their obligations under these procedures and decisions, the Commission has the power and authority to impose fines and periodic penalty payments on undertakings for intentional or negligent infringements. Fines may amount to up to 1% of the total turnover of the undertaking or association of undertakings concerned in the preceding financial year. Penalty payments may

amount to up to 5% of the average daily total turnover of the undertaking or association of undertakings concerned in the preceding financial year for each working day of delay until the complete and correct information required by the Commission is provided or an undertaking submits to an inspection. More severe sanctions are provided for in the event that an undertaking fails to comply with a decision imposing redressive measures, a decision ordering interim measures or a decision with commitments. The Commission may then impose fines of up to 10% of the aggregate turnover of the undertaking concerned in the preceding financial year or periodic penalty payments of up to 5% of the average daily total aggregate of the undertaking concerned in the preceding business year for each day of non-compliance until the Commission determines that the undertaking concerned is in compliance with the decision.

2. A notification-based tool to investigate concentrations

(117) Under the FSR, a concentration is deemed to arise when there is a change of control on a lasting basis through the merger of two or more previously independent undertakings or parts of undertakings, or through the acquisition of direct or indirect control of the whole or parts of one or more other undertakings by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether through the purchase of securities or assets, by contract or otherwise.

(118) The definition of a concentration is very broad. Therefore, only certain concentrations are notifiable. This is deemed to be the case if at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and has an aggregate turnover in the Union of at least EUR 500 million, as well as if all parties to a given concentration have received financial contributions from third countries totalling more than EUR 50 million in the last three years.

(119) A notifiable concentration must be notified to the Commission before its implementation and following conclusion of the agreement, announcement of the public bid or the acquisition of a controlling interest. The Commission may also require notification of any other concentration that does not meet the above thresholds if it suspects that foreign subsidies have been granted to the undertakings concerned in the three years preceding the concentration. The same rules apply to such a concentration.

(120) After notification, the Commission is to follow the procedure described in the section on the general instrument. During the procedure, the merger may not be carried out.

The preliminary review may take up to 25 working days. During this period, the Commission may initiate an in-depth investigation, which generally takes up to 90 days. The categories of decisions that the Commission may adopt are similar to those provided for with the general instrument (see para. (113)). The difference is that instead of a decision imposing redressive measures, the Commission may adopt a decision prohibiting a concentration if it finds that a foreign subsidy distorts the internal market.

(121) As with the general instrument, the Commission may impose fines or periodic penalty payments (see para. (116)).

(122) Concentrations that may be of interest to the Commission will not take place directly within the framework of the H2Global instrument. However, beneficiaries of the planned instrument may be involved in such concentrations. If they are found to be receiving foreign subsidies under a PtXwindow co-financed by a third country, for example, they should be aware of the consequences of the FSR for any concentrations.

3. A notification-based instrument for reviewing tenders in public procurement procedures

(123) Foreign subsidies that cause or risk causing a distortion in a public procurement procedure are deemed to fall within the scope of the FSR if they enable an economic operator to submit a tender that is unduly advantageous in relation to the works, supplies or services concerned. In order to allow the Commission to verify such foreign subsidies, economic operators participating in a public procurement procedure with a value of at least EUR 250 million must submit a notification to the contracting authority or contracting entity if they (together with their subsidiaries without commercial autonomy, holding companies and, wherever applicable, the main subcontractors and suppliers involved in the same tender) have received financial contributions totalling at least EUR 4 million per third country in the three years preceding the notification. If the procurement is divided into lots, in addition to the above requirements, the value of the lot or the total value of all lots for which the tenderer is bidding must be at least EUR 125 million. As in the case of merger control, if the Commission suspects that an economic operator has received foreign subsidies in the three years preceding submission of the tender or the request to participate in the procurement procedure, it may require notification of the financial contributions granted by third countries to that economic operator in each procurement procedure, irrespective of whether the threshold is reached, before awarding the contract.

(124) In a public procurement procedure, the notification or declaration must be submitted together with the tender. In a multi-stage procedure, it must first be submitted with the request to participate and then with the tender. The notification is then forwarded to the Commission by the contracting authority or contracting entity. After receiving the notification, the Commission usually has 20 working days for a preliminary review. If it decides to launch an in-depth investigation, this may take up to 110 working days after receipt of the complete notification. No award of the contract may take place during these procedures. The categories of decisions that the Commission may issue are similar to those available under the notification-based instrument for investigating concentrations (see para. (120)). In particular, the Commission may issue a decision prohibiting the award of a contract.

(125) It is important to note that economic operators are subject to certain obligations even if they do not meet the above notification thresholds. They must list in a declaration all foreign financial contributions received and confirm that they are not subject to notification. In addition, the Commission may decide on fines or periodic penalty payments for non-compliance with obligations.

(126) The instrument for reviewing tenders in public procurement procedures could be of particular importance for PtX funding windows if the PtX intermediary were considered to be a contracting authority (e.g. in case of predominantly state funding) or if it has to conduct the tenders for HPAs according to the rules of public procurement due to the requirements of the funding authority. If this is the case, it must fulfil the obligations of a contracting authority under the FSR. Among other things, it must indicate in the award documents of the contract notice that the economic operators are subject to the notification obligation, forward the notifications or declarations to the Commission without delay, request the economic operators concerned to submit the relevant documents and, if this has not been done, not award the contract before the expiry of the Commission's review deadlines.

III. Preliminary conclusion

(127) The FSR has added a new dimension to the legal analysis of the proposed instrument. This has implications for both the PtX intermediary and its HPA contractors selected within the framework of a PtX funding window (co-)funded by a third country. On the one hand, depending on the volume of HPAs to be awarded, the PtX intermediary must

in future state in notices of HPA award procedures that bidders must submit notifications or declarations of (non-)receipt of foreign subsidies, which the PtX intermediary must in turn forward to the Commission without undue delay.

E.
WTO legal assessment

(128) Financial contributions by developing countries and emerging economies to the H2Global instrument must be measured not only in terms of EU State aid law, but also WTO law. The admissibility of financial contributions to the H2Global instrument depends in particular on whether they comply with the principle of territoriality that applies under WTO subsidy law, whether they possibly constitute export subsidies and whether, and if so to what extent, developing and emerging economies as well as international organisations are bound by WTO subsidy law in the first place.

(129) H2Global has identified various constellations or country categories in the context of the WTO legal assessment of financial contributions to the H2Global mechanism:

1. Financial contributions from developing and emerging economies (Brazil, Colombia, Morocco, Tunisia, Mexico, South Africa and Namibia),

2. Financial contributions from EU countries (Germany and Spain),

3. Financial contributions from third countries with links to the EU (Norway, United Kingdom and Australia),

4. Financial contributions from third countries with no links to the EU (United Arab Emirates and Saudi Arabia),

5. Financial contributions from multilateral (financial) institutions (ADB, IABD, World Bank),

6. Financial contributions from the European Union (EU).

(130) In the following, the general framework of WTO law (I. to III.) is addressed first. This is followed by a discussion of whether financial contributions of individual WTO members and international banks to the H2Global instrument are compatible with WTO law. In this context, a distinction must be made as to whether the contributions in question originate from Germany (IV.), the EU (V.), other EU Member States such as Spain (VI.), third countries with special relations to the EU (VII.), other third countries (VIII.), developing countries or *least developed countries* within the meaning of WTO law (IX.) or international (financial) organisations (X.).

I. General underlying conditions in WTO law

1. General

(131) WTO law addresses subsidies in a number of international agreements, with the General Agreement on Tariffs and Trade (GATT)[30] and the Agreement on Subsidies and Countervailing Measures (ASCM) [31] being the most important.[32] Both GATT and the ASCM constitute so-called multilateral agreements according to Art. II:2 of the Agreement establishing the World Trade Organisation (AWTO)[33], i.e. all members of the WTO, regardless of whether they are states, autonomous customs territories or founding members such as the (present-day) EU, are bound by these agreements upon accession to the WTO.[34] Some (current) WTO members are bound by GATT even further back in time, because GATT 1947 has been in force since 1 January 1948 and was extended by a number of provisions in the course of the founding of the WTO in 1994 (so-called GATT 1994). [35]

(132) It follows from this that developing and newly emerging economies, insofar as they are members of the WTO, are also bound by GATT and the ASCM, unless special agreements have been made for the respective newly emerging economies and developing countries in the course of negotiations over accession (e.g. extended periods for the application of certain provisions) or the general exceptions of GATT or the ASCM apply.

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30 https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

31 https://www.wto.org/english/docs_e/legal_e/24-scm.pdf

32 For example, *Beniath*, The WTO Law of Subsidies, 2019; *Nowak*, in: *Hilf/Oeter*, WTO-Recht, 2nd ed. 2010, p. 316 et seq. 2022, § 15, para. 707 ff; *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 840 ff; *Müller*, WTO Agreement on Subsidies and Countervailing Measures. A Commentary, 2017; *Grave*, The Concept of Subsidy in the WTO Agreement on Subsidies and Countervailing Measures, 2002; *Rydelski*, EC and WTO Anti-Subsidy Law, 2001.

33 https://www.wto.org/english/docs_e/legal_e/04-wto.pdf

34 On the consequences of the "dual membership" of the EU and its Member States in the WTO, see in detail *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 7.

35 https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_e.htm

(133) In contrast, it is unlikely that divergent legal obligations can arise from the Multilateral Agreement on Trade-Related Investment Measures (TRIMS)[36] or the General Agreement on Trade in Services (GATS)[37]. This also goes for international environmental law, such as the Paris Agreement.

2. Interpretation of WTO law

(134) It should be noted that WTO law, as a framework of international treaties, is to be treated according to the general rules applying to interpretation of international law, cf. also Art. 3.2. of the WTO Dispute Settlement Understanding (DSU).[38] Art. 31 of the Vienna Convention on the Law of Treaties (VCLT) plays an important role in this context: According to Art. 31 (1) of the Vienna Convention on the Law of Treaties, an international treaty is to be interpreted in good faith in accordance with the ordinary meaning to be assigned to its provisions in their context and in the light of its object and purpose. This shows that the wording of an international treaty is of particular importance, which suggests a certain restraint is warranted to avoid an overly evolutionary interpretation of such treaties and thus also of WTO subsidy law.[39] This plays a role, for example, in the context of the question as to whether so-called transnational subsidies fall under WTO law or not (on this, see para. 160 ff.).

3. Developing and emerging economies in WTO law

a) General

(135) WTO law does not provide for a universally valid definition of the term "*developing country*".[40] This also applies to the term "*newly industrialised country*", which has no autonomous meaning in the system of WTO law. Nevertheless, WTO law has a number of special exceptions which show that developing countries in particular are assigned a certain special position within the WTO, whereby it is almost always up to

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36 https://www.wto.org/english/tratop_e/invest_e/trims_e.htm
37 https://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm
38 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 29, marginal no. 329 ff.
39 *Crawford*, Brownlie's Principles of Public International Law, 8th ed, 2012, p. 379.
40 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 20, marginal no. 989; *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 121.

the WTO members themselves to decide whether they claim the status of "developing country" (so-called "principle of self-definition").[41]

(136) However, a certain differentiation of the WTO regime can be noted between *developing countries* and *least developed countries*, whereby, due to the principle of self-definition, it is initially up to the WTO members themselves to decide which status they claim for themselves.

(137) However, WTO law refers to developing countries at least in Art. XVIII:1 GATT, without this being a conclusive definition:

> "*those (Members) the economies of which can only support low standards of living and are in the early stages of development.*"[42]

b) Special and exceptional arrangements for developing countries

(138) However, the status of "developing country" is relevant in WTO law when WTO law explicitly provides for exceptions for developing countries. This is the case in almost every agreement under WTO auspices.

(139) Thus, the ATC contains a general provision on so-called *least developed countries*, Art. XI:2 ATC:

> *The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.*

(140) However, the United Nations list of countries classified as *least developed* does not include any of the countries to be examined in more detail below (see para. 6 and para. 129).[43] Special arrangements for *least developed countries* are therefore not devoted any further consideration in this report.

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41 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 20, marginal no. 989.

42 See also *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 121.

43 https://www.un.org/ohrlls/content/list-ldcs

(141) There are also special provisions for WTO members in the context of dispute settlement (see below under para. 143 ff.) which are associated with the status of "developing country". For example, the special interests of developing countries must be taken into account in WTO dispute settlement (Art. 24.1 DSU), while periods and deadlines in proceedings can be extended for developing countries. [44]

(142) This also applies in particular to WTO subsidy law. Article 27 of the ASCM thus contains a number of special provisions for developing countries, some of which, however, are limited in time (see para. 158). At present, Art. 27 of the ASCM can almost only play a role in the context of the accession of new members to the WTO which are also developing countries. These special arrangements are discussed in detail in the context of WTO subsidy law.

4. Dispute settlement under WTO law

(143) In contrast to EU law, there is no centralised supervision of subsidies at WTO level. It is therefore first of all the task of the WTO members to ensure that their practice complies with the requirements of WTO law. If this is not the case from the perspective of another WTO member, it is possible to initiate dispute settlement proceedings. The relevant rules upon which these procedures are based are laid down in the Dispute Settlement Understanding (DSU) , which is binding on all WTO members (Art. II WTO).[45] According to this, a dispute settlement procedure can be initiated in particular after consultations between WTO Members (Art. 4 DSU), in which the establishment of a dispute settlement panel is requested (Art. 4.7. 4.3. at the end, 5.3. DSU). An appeal against a report by a panel may be lodged with the Appellate Body.

(144) It should be noted, however, that the Appellate Body has not been properly staffed for years due to an obstructionist stance on the part of the USA, effectively paralysing its activities. Although the so-called Interim Mechanism (MPIAA)[46] has been developed as an effective fallback solution to a limited extent, the DSU's appellate regime has nevertheless been greatly weakened. This only applies to the remedies regime and not

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44 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 9, marginal no. 324; *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 312 ff.

45 In this regard, *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 173 et seq.

46 WTO Multiparty Interim Appeal Arbitration Agreement; see also WTO document JOB/DSB/1/Add December

to the panel procedure, however. No diminished binding effect of WTO law is associated with this. The legal obligation to comply with WTO requirements applies irrespective of the question of whether it can (currently) be effectively implemented or enforced.

(145) It should also be noted that the EU Member States do not play an active role in WTO dispute settlement procedures because the EU has exclusive competence under Article 3 (1) (e) TFEU. [47]

5. Consequences/sanctions

(146) Violations of WTO law cannot be countered unilaterally with economic sanctions or similar. Instead, WTO members are obligated to remedy the violation of WTO law in accordance with the decisions issued by WTO dispute settlement bodies (Art. 22.1 DSU). Only if this does not happen in due time can negotiations on compensation take place in accordance with Art. 22.2 DSU or can a complaining party request a suspension of concessions. [48]

(147) It should be noted that the ASCM has special rules on sanctions in the event of a breach of its provisions.[49] In particular, only the measures specifically regulated in the ASCM may be taken.[50] This assessment shall not address the consequences of violations of WTO subsidy law in any more detail, however, because it is primarily concerned with the compatibility of financial contributions to the H2Global instrument.

II. Subsidies under WTO law

1. General

(148) The compatibility of subsidies with WTO law is primarily determined by Art. XVI GATT and the Agreement on Subsidies and Countervailing Measures (ASCM), which is a multilateral trade agreement pursuant to Art. II:2 of the Agreement on Subsidies

47 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 7.
48 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 9, marginal no. 313 ff.
49 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 15, marginal no. 712.
50 Appellate Body, US - Continental Dumping and Subsidy Offset Act of 2000, WT/DS194/R, para. 8.25 et seq.

and Countervailing Measures (ASCM) (see para. 131), which is binding on all WTO members (Annex 1A ASCM).

(149) According to Art. XVI (1) GATT, subsidies are in principle permissible:

> *1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.*

(150) Art. XVI para. 2-5 GATT deal with problematic forms of subsidies, in particular export subsidies, which are in principle not permitted for WTO Members. These rules only apply to WTO members that have explicitly accepted them for the respective economic sector concerned, which are to be examined on a case-by-case basis.

(151) Art. XVI GATT, however, does not contain any definition of subsidies within the meaning of WTO law; in this respect, the ASCM is authoritative (see in the following under para. 152 ff.).[51]

2. Definition of subsidy laid down in Art. 1.1 (a) (1) ASCM

(152) Art. 1.1. (a) (1) ASCM defines subsidies as "*financial contribution by a government or any public body within the territory of a Member* (...)". Financial contributions within the framework of the H2Global instrument are to be measured in terms of these criteria (see in detail under para. 185).

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[51] *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed., 2022, § 15, marginal no. 716.

(153) However, subsidies are only deemed to fall within the scope of the ASCM if they are "*specific*" (Art. 2 ASCM). However, insofar as the subsidies in question involve "export subsidies" within the meaning of Art. 3.1 (a) ASCM (see under para. 155), they are always to be regarded as specific according to Art. 2.3 ASCM.

(154) Furthermore, the ASCM provides for a so-called traffic light approach, according to which subsidies are basically divided into prohibited subsidies (Art. 3 ASCM) and actionable subsidies (Art. 5 and 6 ASCM) and own procedures in relation to the respective subsidy category.[52]

3. Strict prohibition of export subsidies

(155) Art. 3.1 (a) ASCM contains a strict prohibition for so-called export situations, i.e. benefits that are linked to "*export performance*":

> *3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:*
> *(a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;*
> *(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.*
> *3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1.*

4. No special role for energy subsidies in WTO law

(156) Numerous energy policy issues are connected with financial contributions to the H2Global instrument. For a long time, the topic of "energy" (or legal questions on energy policy issues) did not play a prominent role in WTO law; there was even talk of a *gentlemen's agreement* according to which "energy" was not an issue for WTO law.

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52 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 15, marginal no. 711.

(157) However, such an approach can no longer be advocated today. A general "energy policy area exception" or an informal "standstill mechanism" between WTO members can no longer be observed today.[53]

5. Special rules for developing countries

a) Art. 27 ASCM

(158) WTO subsidy law contains an exception for developing countries in Art. 27 of the ASCM. Under this provision, the WTO recognises the special role that subsidies can play for these countries and allows certain exceptions to the general rules of the ASCM.[54] According to Art. 27.2 (a) ASCM, Art. 1.1 (a) 1 ASCM and Art. 3 ASCM are not applicable to the developing countries (WTO Members) listed in Annex VII to the ASCM. For other developing countries, temporary exceptions are provided for, which, however, are no longer relevant today, including with regard to the WTO members to be examined in more detail here (para. 6 and para. 129).

> *27. 1 Members recognize that subsidies may play an important role in economic development programmes of developing country Members.*
> *27.2 The prohibition of paragraph 1(a) of Article 3 shall not apply to:*
> *(a) developing country Members referred to in Annex VII.*
> *(b) other developing country Members for a period of eight years from the date of entry into force of the WTO Agreement, subject to compliance with the provisions in paragraph 4.*
> *27.3 The prohibition of paragraph 1(b) of Article 3 shall not apply to developing country Members for a period of five years, and shall not apply to least developed country Members for a period of eight years, from the date of entry into force of the WTO Agreement.*
> *(...)*

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53 *Buchmüller*, Strom aus erneuerbaren Energien und WTO-Recht, 2013, p. 135 ff; *Schorkopf*, "Energie" als Thema des Welthandelsrechts, in: Leible u.a. (ed.), Die Sicherung der Energieversorgung auf globalisierten Märkten, 2007, p. 93 ff; *Terhechte*, Energiekartelle im Lichte des WTO-Rechts - zugleich ein Beitrag zur Auslegung des Art. XX GATT, in: Ehlers/Schröder/Wolffgang (eds.), Energie und Klimawandel, 2010, p. 61 ff.

54 *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 950.

b) Annex VII to the ASCM

(159) Annex VII to the ASCM lists, first of all, the *least developed countries* according to the United Nations list (Annex VII lit. a), see para. 140) and, secondly, a number of countries for which GNP per capita is less than $ 1,000 (Annex VII lit. b). Morocco and India are mentioned on this list. However, GNP per capita in Morocco has been above $ 1,000 for many years (about $ 3,795 at present). In India, GNP per capita is currently around $ 2,250. In this respect, it is obvious that the exceptions stated in Art. 27.2 ASCM do not (or no longer) apply.

6. Special case of transnational subsidies

(160) Finally, a special case group of subsidies under WTO law are transnational subsidies. The term itself has not yet been unambiguously clarified (see para. 161 ff.). Furthermore, it is questionable whether WTO law is applicable to transnational subsidies in the first place, which depends in particular on whether a connection to territoriality is necessary here (para. 170). It is obvious that this criterion is of crucial importance for the assessment of contributions to the H2Global instrument, because these are contributions from third countries that would be granted to H2Global or the PtX intermediary based in Germany or the EU.

a) Definition and case groups

(161) *Transnational subsidies* or *cross-border* subsidies are subsidies granted by a government or public body to enterprises in third countries.[55]

(162) Even if such subsidies have so far often been treated as a uniform problem, the few official documents or decisions that exist on this topic show that a distinction can be made between different constellations.[56]

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55 *Crochet/Gustafsson*, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law, World Trade Review 20 (2021), 343 (343): "*a government subsidizes a firm outside of its territory*". See also *Benitah*, The WTO Law of Subsidies, p. 605: "*a subsidy granted to a benefit recipient manufacturing the product at issue outside the country granting government*".

56 See on this Commission Regulation (EU) 2020/776 of 12 June 2020, OJ EU No. L 189/1 of 15 June 2020, para. 672: "The Commission notes that these comments address the issue of whether the Chinese government can be charged under the SCM Agreement with subsidies for the production abroad of goods exported to third WTO Members. However, they do not address the separate issue of whether, under the SCM Agreement, the government of the exporting country can in certain cases be charged

(163) It is therefore warranted to distinguish between the following constellations (the case groups are not to be regarded as exhaustive, including because transnational subsidies have only recently become a topic of world trade law):

1. a WTO member provides subsidies to an enterprise in a third country,

2. a WTO Member provides a subsidy to an enterprise in a third country that has a direct link to the providing WTO Member,

3. a WTO member actively seeks such subsidies from another WTO member for enterprises in its territory.

(164) In light of these considerations, the planned financial contributions of third countries to the H2Global instrument initially fall under the first case group (third countries would pay the amounts directly to the PtX intermediary). A distinction must be made between this and co-financing by the Federal Republic of Germany, as in this case Germany would pay subsidies to a company based in Germany. Furthermore, it must be examined separately whether the intended "reservation" of windows for products from the third country providing the subsidy would lead to a kind of "backflow" that would possibly preclude a clear allocation of the contributions of third countries to the first group.

b) WTO law applicable to transnational subsidies?

(165) It should be noted that so far no rulings have been issued by the WTO dispute settlement bodies (panel reports or Appellate Body rulings) that unambiguously clarify the question of whether or not transnational subsidies are covered by WTO law.

(166) Accordingly, the WTO Expert Group on Trade Financing stated in 2004:

> *"it is not entirely clear whether or not the (SCM Agreement) applies where the subsidizing entity is not within the territory of the Member whose goods are allegedly being subsidized*". [57]

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with actively seeking subsidies for products produced there and with recognising and accepting subsidies as such."

[57] WTO Expert Group Meeting on Trade Financing - Note by the Secretariat, 16 March 2004, WT/GC/W/527, 5.

(167) The question of whether transnational subsidies fall under WTO law or not is also a subject of dispute in academic debates.[58] No clear line has yet emerged on this issue, which in this respect also depends on clear positions being taken by WTO institutions.

(168) The statements that also seek to include transnational subsidies under Art. 1.1 (a) (1) ASCM, however, primarily deal with subsidy payments by China to companies in third countries or China's foreign trade policy. In these contexts, considerations regarding the topic of "climate change" or the history of the origins of the GATT often play no role. In addition, the wording employed in Art. 1.1 (a) (1) ASCM is generally more or less ignored here, which is problematic from the perspective of interpretation practice under international law (see para. 134).

c) Legal practice in the EU

(169) Transnational subsidies have only recently begun to play a role in the practice of EU courts.[59] Thus, in 2023, the General Court of the EU – as far as can be seen for the first time – had to address transnational subsidies and in doing so also focused on Art. 1.1 (a) (1) ASCM. According to the General Court, it is sufficient for the fulfilment of the criteria laid down in Art. 1.1 (a) (1) ASCM that a subsidy be granted by a government in the territory of a WTO member, which at least does not generally exclude the attribution of subsidies granted by third countries. According to this view, it is initially only important that subsidies are granted by a WTO member:

> *100*
> *Thus, contrary to the applicants maintain, the provisions of the basic anti-subsidy regulation must be interpreted, as far as possible, in the light of the corresponding provisions of the SCM Agreement (Judgment of 10 April 2019, Jindal Saw and Jindal Saw Italia v Commission, T-300/16, EU:T:2019:235, para 101). The same is true of Article 3 of that regulation, which seeks to implement the content of Article 1 of the SCM Agreement (Judgment of 10 April 2019,*

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58 For example, *Benitah*, The WTO Law of Subsidies, 2019, p. 605 ff.; *Crochet/Gustafsson*, Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law, World Trade Review 20 (2021), 343; *Crochet/Hegde*, China's 'Going Global' Policy: Transnational Production Subsidies under the WTO SCM Agreement, Journal of International Economic Law 23 (2020), 841; *Nagy*, Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field be Levelled?, Central European Journal of Comparative Law, 2021, 147; *Weiß*, The EU's Strategic Autonomy and Rule of Law: What Future for Accountable Multilateralism in Trade Policy, ESIL IG, Granada 2022

59 ECJ, Judgment of 1 March 2023, T-480/20, ECLI:EU:T:2023:90 - Hengshi et al v Commission.

Jindal Saw and Jindal Saw Italia v Commission, T-300/16, EU:T:2019:235, paragraph 102).

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As regards Article 1 (1) (a) (1) of the SCM Agreement, it should firstly be noted that the latter defines a subsidy as a financial contribution by a government or public body in the territory of "a" Member of the WTO. That wording does not therefore preclude the possibility that a financial contribution granted by a third country may be attributed to the government of the country of origin or export, since it is sufficient that the financial contribution of the government or any public body is granted in the territory of "a" member of the WTO.

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In the second place, Articles 13 and 18 of the SCM Agreement, which relate to consultations and undertakings respectively, do not call into question the foregoing considerations. The wording and purpose of those provisions do not exclude situations in which the financial contribution is attributed to a WTO member, since, first, members whose products may be investigated may be consulted on the financial contributions attributable to them and, second, members whose products may be investigated may impose limitations on the subsidies attributable to them.

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In the light of the foregoing, it must be held that, since the Commission correctly interpreted the basic anti-subsidy regulation in the light of the SCM Agreement, the question whether or not it took Article 11 of the ILC Articles into account is irrelevant. Consequently, it is also necessary to reject the third complaint of the present part of the plea and, therefore, that part in its entirety. [60]

(170) The General Court is thus of the opinion that it ultimately does not matter whether a financial contribution is made in the territory of a WTO member or in the territory of another WTO member. From this perspective, the decisive factor is rather that it is a payment by a WTO member that is realised in its own territory or in the territory of another WTO member. It is doubtful, however, whether this interpretation of Art. 1.1 (a) (1) ASCM will prevail. This is precisely not an interpretation by a WTO body, but by the ECJ in the first instance. The ECJ has not yet confirmed this

[60] Ibid. margin 100-103.

new line of case law. This position of the General Court will nevertheless have to be taken into account in the legal analysis of subsidies, however, if only for political reasons.

d) Preliminary conclusion

(171) Overall, it is thus unresolved whether transnational subsidies fall under Art. 1.1 (a) (1) ASCM in the first place or whether they are not to be measured in terms of Art. 1.1 (a) (1) ASCM due to the absence of territoriality and thus do not fall under WTO subsidy law as a whole, since export subsidies pursuant to Art. 3.1 (a) ASCM or actionable subsidies pursuant to Art. 5 (a) or (c) ASCM also require a *territorial link.*

III. General considerations on the compatibility of the H2Global instrument (or financial contributions to the H2Global instrument) with WTO law

(172) Financial contributions to the H2Global instrument by states or international financial institutions raise a number of generalisable questions in the context of WTO subsidy law. In this respect, the compatibility of such contributions with Art. 1.1 (a) (1) ASCM is to be examined in the following, in order to then explore the individual constellations in more detail (IV.-X.).

1. Preliminary consideration: Separation versus overall view of financial contributions?

(173) From the perspective of WTO law, it makes sense to distinguish between the financial state contributions of the Federal Republic of Germany and the financial state contributions of third countries. This is especially so if these contributions ultimately flow to the PtX intermediary, because the PtX intermediary is not a "joint venture" between the Federal Republic of Germany and a third state, but a subsidiary of the H2Global Foundation, whose assets were raised by the industry. Nor is it a contractor of Germany and/or the third country in question.

(174) The Federal Republic of Germany and the third country have neither the authority to issue instructions nor a positive claim to fulfilment against the PtX intermediary. The PtX intermediary is merely the recipient of the grant. In the event of non-conforming use, "only" the revocation of the funding decision and a (pro rata) reclaiming of funding already paid out are possible remedies.

(175) Another argument against an "overall view" is that H2Global and the PtX intermediary may not be "public bodies" within the meaning of Art. 1.1 (a) (1) ASCM (see in the following under para. 185). In particular, the PtX intermediary – in contrast to the H2Global Foundation – is not a non-profit organisation.

(176) Finally, it should be noted that the H2Global instrument is in principle suitable for an indefinite number of bilateral windows to be financed through it.

2. Do financial contributions to the H2Global instrument fulfil the requirements of Art. 1.1 (a) (1) ASCM?

a) Scope of application

aa) Material scope of application of the ASCM

(177) The application of the ASCM and GATT presupposes a "goods or products" linkage.[61] In particular, a distinction must be made between agricultural and other goods, because special WTO rules apply to agricultural goods. In this regard, the ASCM only applies to products to which the Agreement on Agriculture (AoA)[62] does not apply.[63]

(178) In view of the way the H2Global instrument works, a linkage to goods may have to be rejected. This goes not only for H2Global, but also in particular for the PtX intermediary, which does not act as a producer or manufacturer of goods.[64]

(179) However, it will be difficult to reject any linkage to the production or transfer of goods, especially since WTO law primarily distinguishes between agricultural goods and other goods, whereas "indirect" constellations are not discussed any further in the ASCM, but presuppose a linkage to goods.

bb) Temporal scope of the ASCM

(180) The ASCM is only applicable to the extent that the countries concerned are already members of the WTO. In this respect, the date of accession of a WTO member may be

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61 *Beniath*, The WTO Law of Subsidies, 2019, p. 3.
62 https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm
63 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 15, marginal no. 750 ff.
64 On this *Müller*, WTO Agreement on Subsidies and Countervailing Measures. A Commentary, 2017, p. 129.

of decisive importance, as well as any special provisions, such as Art. 27 of the ASCM or special agreements concluded in the course of accession to the WTO with regard to subsidies.[65]

(181) As far as can be seen, however, there is no special status with regard to the WTO members in question (para. 6 and para. 129), which means that the temporal scope of application of the ASCM does not pose any problems.

b) Financial contribution

(182) In addition, financial resources for the H2 Global Mechanism must also constitute *financial contributions* within the meaning of Art. 1.1 (a) (1) ASCM. Art. 1.1 (a) (1) of the ASCM contains examples of rules for this. Accordingly, the following measures constitute financial contributions:

> (*i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);*
>
> *(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)*

(183) Direct financial contributions by a WTO member constitute a financial contribution from this perspective. WTO law assumes that such contributions can take various forms.[66] Thus, in a dispute settlement proceeding in 2012, it was held:

> *"Action involving the conveyance of funds from the government to the recipient...The direct transfer of funds... therefore captures conduct on the part of the government by which money, financial resources, and/or financial claims are available to a recipient*".[67]

(184) So what matters first of all is that payment flows, which is the case with financial contributions to H2Global. This does not change first of all because H2Global or the

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65 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 15, marginal no. 714.
66 *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 847.
67 Appellate Body, US - Measures Affecting Trade in Large Civil Aircraft, WT/DS 35/AB/R, para. 616.

PtX intermediary only convey funds in the case of an award, which is to say there is no automatic conveyance of funds to an enterprise in a third country.

c) Public body

(185) According to Art. 1.1 (a) (1) ASCM, a subsidy must also be provided "by a government or any public body". In the practice of WTO dispute settlement institutions, these terms are interpreted narrowly. Thus, in particular the term "public body" is only used for bodies that also perform governmental functions.[68]

(186) It follows from this that the contributions made by states (Germany or third countries) to H2Global or the PtX intermediary within the framework of the H2Global instrument only constitute a subsidy within the meaning of Art. 1.1 (a) (1) ASCM if they come from an "entity with a governmental function". This is not automatically the case with sovereign funds or public enterprises. In this respect, it must be clarified which governmental "bodies" are responsible for the actual payment of contributions.

(187) Furthermore, EU funds are also likely to be regarded as funds originating from a public body within the meaning of Art. 1.1 (a) (1) ASCM because, as a founding member of the WTO, it is not to be treated differently in this respect from WTO members having the quality of a state.

d) Territoriality

(188) Art. 1.1 (a) (1) ASCM also requires that the subsidies be granted by a government or a public body "within the territory of a Member". This feature of Art. 1.1 (a) (1) ASCM has not played a major role in jurisprudence practice so far, not least because for a long time it was simply not imaginable that a WTO member would grant subsidies to a company based in a third country. The history of the origins of Art. XVI GATT and the ASCM also point in this direction.

(189) The WTO Analytical Index does not contain any further information on this feature of Art. 1.1 (a) (1) ASCM, from which it can be concluded that it has not been able to play a role in the practice of WTO dispute settlement institutions so far.

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[68] Appellate Body, US - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, paras 310 and 317; *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed, 2022, § 15, para 716.

(190) In view of the wording of Art. 1.1 (a) (1) ASCM, however, there is much to suggest that subsidies to enterprises in third countries, i.e. beyond their own territory, are not covered by WTO law.[69]

(191) First of all, it should be noted in this context that Art. XVI A. 1. GATT, in the light of which the ASCM is to be interpreted, explicitly speaks of the WTO member's own territory:

> *If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify (...)* .

(192) Finally, other WTO Members have also stated that they consider territoriality in 1.1 (a) (1) ASCM to be an important feature. China, for example, has made it clear in the context of an anti-dumping investigation by the EU Commission that

> *"(...) the beneficiary should be located in the territory of the subsidising WTO member*."[70]

(193) It remains to be seen whether a different view on the territoriality criterion will prevail, at least for the EU level. In a decision issued on 2023, the General Court at least took the view that, according to Art. 1.1 (a) (1) ASCM, all that is relevant is that a subsidy of a WTO member is paid in the territory of a WTO member (see para. 169). So far, however, only this ruling is available and has been appealed to the ECJ.

(194) Overall, the wording of Art. XVI GATT and the background to its inception suggest that Art. 1.1 (a) (1) ASCM only covers subsidies paid to companies within the territory of a WTO member. In this respect, there is much to suggest that financial contributions from third countries to the German-based H2Global or the PtX intermediary for "windows" tailored to producers from their respective countries within the framework of the H2Global mechanism are compatible with WTO law. However, this does not apply to contributions from the German side, nor does it apply to contributions on the part of the EU, as in these cases the criterion of territoriality is in any case fulfilled.

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69 In this regard, see *Benitah*, The WTO Law of Subsidies, 2019, p. 605 ff.

70 Commission Regulation (EU) 2020/776 of 12 June 2020, OJ EU No. L 189/1 of 15 June 2020, para. 671.

e) Advantage

(195) In the next step, the financial contribution within the meaning of Art. 1.1 (a) (1) ASCM must also lead to an advantage on the part of the recipients. This is usually the case without further ado, especially in the case of direct monetary payments.[71] However, this advantage must not merely exist in an abstract manner, but must be realised in concrete terms on the side of a recipient. The mere outflow of money from the public body is not deemed to be sufficient for this.[72] This approach is also expressed in Art. 14 ASCM (benefit to the recipient). Furthermore, an ex ante perspective is crucial here, i.e. the question of whether an advantage is granted must be clarified in advance.[73] As a rule of thumb, the recipient must be "better off" after receiving the financial contribution.[74]

(196) Financial contributions to the H2Global instrument initially have a specific recipient, namely H2Global itself or the PtX intermediary. For both, however, the contributions do not result in them being "better off", as the aim is for these amounts to be "forwarded through" on the basis of the auction model. The advantage is realised by the company in a third country that wins the bid. It is questionable whether this construction is not seen as a kind of "forward-through mechanism" from the perspective of WTO law. Also, the consequence of this approach is that at least the third country in whose territory the enterprise ultimately placed at an advantage is located must ensure the compatibility of the procedure with WTO law.

f) Specificity according to Art. 2 ASCM

(197) It is also questionable whether the financial contributions from third countries or German co-financing are "specific" in the sense of Art. 2 of the ASCM, i.e. whether they selectively favour certain enterprises in the state granting the subsidy. Cf. Art. 2.1 (b) ASCM:

> *"Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist,*

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71 *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 860.
72 Appellate Body, Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS472, para. 154.
73 Appellate Body, EC and Certain Member States - Measures Affecting Trade in Large Civil Aircraft, WT/DS316, para. 706.
74 *van den Bosche/Zdouc*, The Law and Policy of the World Trade Organization, 5th ed. 2022, p. 861 with additional references.

provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification."

(198) Funding from the H2Global instrument is provided according to transparent and objective criteria, which are specified by the respective state funding agencies in their funding decisions and published in the HPA award notices. This could be an indication that no such "specificity" exists in the present case.

(199) It should be noted, however, that "objective criteria or conditions" in this sense are only horizontally applicable criteria or conditions of a neutral nature (e.g. the number of employees or the size of the enterprises). In contrast, the HPA auctions also link up to sectoral – and thus precisely not horizontal – company-related criteria. This suggests that there is specificity in the funding mechanism. The EU Commission also assumed the selectivity of the H2Global instrument in its State aid approval decision (see the detailed discussion in Part C.).

(200) It should also be noted in this context that Art. 2.3 ASCM provides that export subsidies subject to the prohibition of Art. 3 ASCM are always to be regarded as "specific" or selective, irrespective of fulfilment of the requirements laid down in Art. 2.1 ASCM (see para. 153 ff.).

3. No export subsidies

(201) However, the contributions under the H2Global instrument to H2Gloabal or the PtX intermediary would not be interpreted as "export subsidies" in the meaning of Art. 3 ASCM, which are generally not permitted to WTO members, with the proviso of special rules and exceptions.

(202) Prohibited subsidies are in particular deemed to be those which are contingent in law or in fact upon the "export performance" of the recipient (Art. 3.1 (a) ASCM). This provision presupposes the following:

"[T]he complainant will have to demonstrate that the subsidizing state 'either in law or in fact' made payment contingent on either exports or the use of the domestic goods. In the jurisprudence of the Appellate Body and the Panels,

contingent has been understood to mean 'conditional or dependent', 'tied to' the export performance."[75]

(203) However, the H2Global instrument does not directly target export performance, nor does it impose any requirements on what absolute quantities the respective producer bids for and what share these make up out of its total production. The subject of each HPA tender is a certain financial purchase volume (i.e. the price paid by the PtX intermediary for the ten-year supply of the PtX product in question). The contract is awarded to the most favourable offer (largest quantity of the product in question for the tendered financial purchase volume). The award is neither linked to an absolute (minimum) delivery quantity per product nor to an absolute maximum price per tonne of the product in question. In this respect, there is much to suggest that state contributions to the instrument are already in conceptual terms not linked to a specific *"export performance"* and thus do not fall under Art. 3 ASCM.

4. Actionable subsidies

(204) In addition, Art. 5 and 6 of the ASCM provide for a number of actionable (so-called "serious prejudice") subsidies. These are not measures prohibited from the outset, such as export subsidies within the meaning of Art. 3 ASCM, but are rather subsidies that can be problematic in individual cases.

(205) According to Art. 5 (a) ASCM, such a seriously prejudiced subsidy requires that there must be *an injury to the domestic industry of another Member*. [76]

(206) However, no such damage through the H2Global instrument is evident, rather at the most a disappointment of expectations of other WTO members through non-participation or non-consideration in the auction mechanism. Such expectations are not protected by Art. 5 (a) ASCM (see also Art. 15 ASCM, however, according to which such injury must be demonstrated).

(207) Art. 5 (c) ASCM, on the other hand, presupposes that the interests of other WTO members are seriously prejudiced (see Art. 6 ASCM). This potentially relates to the effects that the H2Global instrument could have on other WTO members. The instrument is not limited to certain third countries, however, which means that potentially all WTO

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75 *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, 3rd ed. 2015, p. 331.
76 *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, 3rd ed. 2015, p. 339.

members that have an interest can enter into talks with the Federal Republic of Germany on "bilateral windows".

(208) Moreover, the "bilateral windows" considered so far would only be one component of the much more comprehensive H2Global instrument. As things stand today, the vast majority of the H2Global instrument will be made up of windows that are open globally to all third countries. Moreover, the instrument does not intervene in an already existing market; rather, it aims to establish a market first.

5. Preliminary conclusion

(209) On the whole, it can therefore be said that there are many arguments in favour of contributions to the H2Global instrument being deemed to be compatible with WTO subsidy law, even if they fulfil some of the characteristics of Art. 1.1 (a) (1) ASCM. However, they are neither prohibited export subsidies according to Art. 3.1 (a) ASCM nor actionable subsidies according to Art. 5 (a) or (c) ASCM. However, a strict distinction must be made between the DC countries making such contributions (see under IV. ff.). In addition, it is recommended that the requirements of WTO law be taken into account when designing the respective subsidy windows.

IV. Compatibility of financial contributions to the H2Global instrument from the Federal Republic of Germany with WTO law

1. Germany as a member of the WTO

(210) The Federal Republic of Germany acceded to GATT on 8 July 1951 and has also been a member of the WTO since 1 January 1995. In this respect, the Federal Republic of Germany is fully bound by WTO law.

2. Role of the Common Commercial Policy (Art. 206 f. TFEU)

(211) It should be noted, however, that the Federal Republic of Germany is at the same time a member of the EU, which has exclusive competence in the area of the so-called Common Commercial Policy (Art 206 f. TFEU) (Art. 3 (1)(e) TFEU). In this respect, much depends on how the EU interprets certain requirements of WTO law (on this,

see only para. 169). However, in preliminary talks with the EU Commission, agreement was reached that no fundamental obstacles are seen, and that the H2Global instrument can be regarded as WTO-compliant. This is also due to the fact that contributions from the Federal Republic of Germany or third countries in particular do not easily fulfil the criteria of Art. 1.1 (a) (1) ASCM.

3. Subsidy in the meaning of Art. 1.1 (a) (1) ASCM

a) Financial contribution

(212) It is already questionable whether government contributions by the Federal Republic of Germany constitute a "*financial contribution*" within the meaning of Art. 1.1 (a) (1) ASCM. A "*financial contribution*" within the meaning of Art. 1.1 (a) (1) ASCM requires a "*direct transfer of funds*" or a "*forgoing or not collecting government revenue that is otherwise due*". In essence, this is a direct payment or a reduction of the burden. However, the existing or future grant notification from the Federal Republic of Germany to the PtX intermediary does not provide for a direct flow of funds from the federal government to the PtX intermediary.

(213) Whether and to what extent the PtX intermediary is entitled to draw down funds on the basis of the grant notices during the respective grant period depends largely on the regulatory framework and the market environment. It is a price compensation mechanism influenced by external factors and thus in any case not a typical case of a *"financial contribution"* in the meaning of Art. 1.1 (a) (1) ASCM.

b) H2Global or PtX intermediary as public bodies?

(214) Furthermore, H2Global or the PtX intermediary may not be "*public bodies*" in the meaning of Art. 1.1 (a) (1) ASCM. The Federal Republic of Germany is neither a shareholder in H2Global or its PtX intermediary, nor is it a client of H2Global or its PtX intermediary. It has neither authority to issue instructions nor a positive claim to performance against H2Global or the PtX intermediary. The PtX intermediary is merely the recipient of the grant. In the event of non-conforming use, there is "only" the threat of revocation of the funding decision and a (pro rata) reclaiming of funding already paid out. The PtX intermediary is not a non-profit organisation, either, so it cannot be considered a *public body.*

c) Territoriality

(215) Financial contributions from the Federal Republic of Germany are to be assessed differently from contributions from third countries because the territoriality link required by WTO law is not problematic for them in relation to H2-Global. H2Global and the PtX intermediary are based in Germany.

(216) However, the PtX intermediary will not export any goods itself with the grant it receives. On the contrary. Subject to the proviso of a more in-depth review, a relevance of WTO-law to German participation could probably be ruled out by the fact that – as expressed by the Commission in the State aid notification procedure – no requirements have been set for the involvement of German companies in the manufacture of the products.

d) Benefit

(217) Moreover, it is not certain that the H2Global instrument will result in a "*benefit*" in the meaning of Art. 1.1 (a) (1) ASCM. The instrument *can*, but *must* not *necessarily*, lead to compensation payments. It is therefore questionable whether or to what extent the effect of an advantage will materialise at all.

e) Traders as "recipients"?

(218) Finally, it is also questionable whether the PtX intermediary as a "trader" is a suitable "*recipient*" of a subsidy in the first place. The PtX intermediary does not produce any goods and does not export any goods. This question is closely related to the question of whether the ASCM (or the GATT) are applicable to the case at all.[77] However, this does not solve the problem that countries in the area of development cooperation are also to be assessed in terms of WTO law. Rather, such an approach ultimately shifts the problem in the direction of the development cooperation countries. Moreover, the H2Global instrument is also about supporting or enabling the production or export of goods.

[77] *Müller*, WTO Agreement on Subsidies and Countervailing Measures. A Commentary, 2017, p. 129.

f) Specificity

(219) Finally, a subsidy would also have to be sufficiently specific ("*specificity*") according to Art. 2 ASCM. However, in view of the design of the award criteria, specificity can generally be assumed (para. 197).

g) Preliminary conclusion

(220) Overall, it is therefore doubtful whether contributions by the Federal Republic of Germany constitute subsidies in the first place within the meaning of Art. 1.1 (a) (1) ASCM. Ultimately, it all depends on the concrete form of the subsidy. Nevertheless, it cannot be ruled out that this will be assessed differently in the context of WTO dispute settlement proceedings, so the question of whether contributions to the H2Global instrument possibly constitute export subsidies pursuant to Art. 3.1 (a) ASCM or actionable subsidies pursuant to Art. 5 (a) or (c) ASCM must also be addressed.

4. No export subsidy according to Art. 3.1 (a) ASCM

(221) Contributions by the Federal Republic of Germany do not constitute export aid in the light of the criteria of Art. 3.1 (a) ASCM already touched upon in the foregoing. The H2Global instrument is not directly aimed at export performance, nor does it impose any requirements on the absolute quantities for which the respective producer submits a bid and what share these account for in its total production. In this respect, there is much to suggest that state contributions to the instrument are if only in conceptual terms not linked to any specific *"export performance"* and hence do not fall under Art. 3.1 (a) ASCM (see already para. 201 et seq.).

5. Prejudicial aid according to Art. 5 ASCM?

(222) This also applies to the question of whether the contributions constitute prejudicial subsidies under Article 5 of the ASCM. No injury within the meaning of Art. 5(a) ASCM is apparent in the context of the H2Global instrument, nor are the interests of any WTO member seriously prejudiced pursuant to Art. 5(c) ASCM (see already para. 204 et seq.).

6. Conclusion

(223) All in all, financial contributions by the Federal Republic of Germany to the H2Global instrument can in principle be considered to be compatible with WTO law.

V. Compatibility of EU financial contributions to the H2Global instrument with WTO law

(224) Insofar as the EU itself would make contributions to the H2Global mechanism, these contributions must also be measured in terms of WTO subsidy law. The EU is a member of the WTO (para. 225) and therefore bound by WTO law (para. 226). However, it is questionable how the criterion of territoriality is to be applied in this case and, insofar as this characteristic is fulfilled, an actionable subsidy pursuant to Art. 5 f. ASCM is present. From the perspective of WTO law, it is less important which EU institution (e.g. the EU Commission) actually makes such financial contributions, but rather that financial resources be paid out that can be attributed to the EU.

1. The EU as a member of the WTO

(225) The EU has been a founding member of the WTO since 1 January 1995 (Art. XI:1 TFEU).[78] In relation to its Member States, it has exclusive competence in the area of the Common Commercial Policy (Art. 206 f. TFEU), which, according to case law handed down by the ECJ, is far-reaching and, pursuant to Art. 207 (1) TFEU, must be based on uniform principles.

[78] "The contracting parties to GATT 1947 as of the date of entry into force of this Agreement, and the European Communities, which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and for which Schedules of Specific Commitments are annexed to GATS shall become original Members of the WTO".

2. WTO law binding on the EU

(226) According to Art. 216 (2) TFEU, the EU is bound by WTO law, whereby WTO law ranks between primary and secondary law.[79] The EU is thus automatically bound by the ASCM.

3. Subsidy according to Art. 1.1 (a) (1) ASCM

(227) Financial contributions by the EU itself at least potentially fall under the definition of subsidy laid down in Art. 1.1 (a) (1) ASCM. In this case, however, the criterion of territoriality in the context of the EU may have to be assessed differently than in the case of the Federal Republic of Germany, or the grounds may have to be different.

a) Requirements laid down in Art. 1.1 (a) 1 ASCM

(228) Financial contributions by the EU to the H2Global instrument are in many respects to be assessed similarly to contributions by the Federal Republic of Germany. In this connection, please see the respective discussion (para. 212 ff.).

b) Territoriality

(229) It is questionable, however, whether financial contributions of the EU to the H2Global instrument also fulfil the criterion of territoriality. While in the case of states this criterion refers to the territory (i.e. the *sovereign territory)* (so-called *territorial sovereignty)*, in the case of the EU it refers to the territorial scope of the EU Treaties, which is laid down in Article 52 of the Treaty on European Union (TEU) and Article 355 TFEU. As a founding member of the WTO, the EU is bound by WTO law.

(230) Based on these principles, it is clear that EU financial contributions fulfil the criterion of territoriality.

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[79] See for example in detail *Hilpold*, Die EU im GATT/WTO-System 3rd ed. 2009; *Terhechte,* in: Schwarze/Becker/Hatje/Schoo (eds.), EU-Kommentar, 4th ed. 2019, Art. 216 TFEU, para. 20.

4. No export subsidy or actionable subsidy

(231) With regard to the question of whether financial contributions from the EU constitute export subsidies pursuant to Art. 3.1 (a) ASCM or actionable subsidies, please see also the comments on German contributions (on this see para. 221).

5. Conclusion

(232) In sum total, EU financial contributions to the H2Global instrument can in principle be considered to be compatible with WTO law.

VI. Compatibility of financial contributions from EU Member States to the H2Global instrument with WTO law

(233) Furthermore, it is questionable whether financial contributions from other EU Member States are compatible with WTO law. Here, a distinction must be made between Germany and other EU Member States because Germany at least fulfils the territoriality criterion according to Art. 1.1 (a) (1) ASCM. This does not apply to other WTO members that are also EU Member States. In this context, H2Global has asked in particular for an assessment of possible contributions by Spain. It should be underscored that legal standards are basically identical for all EU Member States.

1. EU Member States as Members of the WTO

(234) EU Member States are all also members of the WTO. Accordingly, Spain also acceded to GATT on 29 August 1963 and has been a member of the WTO since 1 January 1995.

2. Role of the Common Commercial Policy (Art. 206 f. TFEU)

(235) Within the framework of the WTO, most competences in the area of trade policy are assigned to the EU. Pursuant hereto, please see the corresponding discussion regarding the Federal Republic of Germany (para. 211).

3. Subsidy according to Art. 1.1 (a) 1 ASCM

a) Requirements laid down in Art. 1.1 (a) 1 ASCM

(236) Spain's financial contributions to the H2Global instrument are in many respects similar to those of the Federal Republic of Germany. In this connection, please see the corresponding discussion (para. 212 ff.).

b) Absence of territoriality

(237) In contrast to the contributions made by the Federal Republic of Germany and the EU to the H2Global instrument, however, Spain's financial contributions do not fulfil the criterion of territoriality pursuant to Art. 1.1 (a) (1) ASCM. Therefore, there are currently overriding reasons (see paras 160 et seq. and para. 188 for more details) not to consider these as subsidies within the meaning of Art. 1.1 (a) (1) ASCM.

4. Conclusion

(238) Overall, financial contributions by Spain (or other EU Member States) to the H2Global instrument can in principle be considered to be in harmony with WTO law.

VII. Compatibility of financial contributions to the H2Global instrument from third countries with WTO law (Australia, United Kingdom, Norway, Brazil)

(239) Contributions by third countries within the framework of the H2 Global Agreement must also be measured in terms of WTO law. This is because almost all relevant trading nations are members of the WTO and are accordingly bound by WTO subsidy law. With regard to third countries, a distinction must be made between developing countries and other third countries, because only developing countries are exempt from application of the ASCM. However, in a further step, a distinction can be made between third countries with close ties and third countries with loose ties to the EU. In the following, financial contributions from Australia, the United Kingdom, Norway and Brazil are examined in particular, and hence from states that are linked to the EU in a variety of ways.

1. Membership in the WTO

a) Australia

(240) Australia has been a member of the GATT since 1 January 1948 and accordingly a member of the WTO since 1 January 1995. As a sovereign state, Australia is fully bound by WTO law. Although the EU and Australia have been negotiating a free trade agreement since 2018, it is not yet foreseeable when these negotiations can be concluded.[80] In this respect, it is unresolved whether this agreement will contain provisions governing subsidies.

b) The United Kingdom after Brexit

(241) The United Kingdom has been a member of GATT since 1 January 1948 and a member of the WTO since 1 January 1995. It should be noted that the United Kingdom was also a Member State of the EU until 31 January 2020, but since so-called Brexit it is once again independently bound by WTO law in all matters as a sovereign state.[81] In the meantime, the EU is linked to the United Kingdom via the Trade and Cooperation Agreement, which also contains provisions governing subsidies.[82]

(242) The United Kingdom notified the WTO on 1 February 2020 that it will fully comply with the obligations set out under relevant WTO agreements.[83] The transitional provisions of the withdrawal agreement, which among other things also made reference to WTO obligations, no longer play a role.[84] The United Kingdom is thus fully bound by WTO law and will no longer be represented by the EU Commission in dispute settlement proceedings under the WTO.

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80 https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement_en

81 *Terhechte*, Strukturen und Probleme des Brexit-Abkommens, NJW 2020, 425.

82 In this respect, *Tax/Terhechte*, Wettbewerb und Beihilfen, in: Kübek/Tams/Terhechte (eds.), Handels- und Kooperationsabkommen EU/VK, 2022, § 21; see also *Terhechte*, All's well that ends well? - Das EU/VK-Handels- und Kooperationsabkommen, NJW 2021, 417.

83 Doc. WTO/GC/206.

84 *Terhechte*, Deadend or Pathway to new Relations? - Structure and Problems of the EU-UK Withdrawal Agreement, in: J.-A. Kämmerer/H.-B. Schäfer (eds.), Brexit and the Law - An Interdisciplinary Study, 2021, p. 92 ff.

c) Norway

(243) Norway has been a member of GATT since 10 July 1948 and a member of the WTO since 1 January 1995. Norway is also a member of the European Economic Area (EEA) and thus closely linked to the EU. In the area of State aid law, this means a commitment to Art. 61 et seq. EEA Agreement and Protocol No. 29 to the EEA Agreement. However, these provisions initially bind EEA States to the respective provisions of the EEA Agreement (in particular the general prohibition of State aid pursuant to Art. 61 EEA Agreement). However, there are no special features with regard to WTO law.

d) Brazil

(244) Brazil has been a member of GATT since 30 July 1947 and of the WTO since 1 January 1995. Brazil is moreover one of the founding members of the South American Common Market (MERCOSUR), which was established in 1991. The EU and MERCOSUR are currently working on a free trade agreement that will also address subsidies.[85] A draft text of the agreement or an "agreement in principle" has been in existence since 2019. In addition, the EU Commission has published drafts for the individual chapters of the planned agreement. This also applies to the chapter on "subsidies".[86] According to Art. X:1 of the draft, subsidies are to be permitted in principle.[87] Under Art. X:2 of the draft, the contracting parties are to coordinate their subsidy policy in particular with regard to the WTO (including with respect to new subsidy rules within the framework of the WTO) and also commit to a transparent procedure. The corresponding rules are to be applied three years after the entry into force of the free trade agreement. At present, however, it is not foreseeable when this might be the case.

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85 On the history *Bulmer-Thomas*, The European Union and MERCOSUR: Prospects for a Free Trade Agreement, Journal of Interamerican Studies and World Affairs 42 (2000), 1.

86 https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/b4b39e9b-7752-43f9-8507-5984c8f80f96/details

87 "The Parties agree that subsidies can be granted by a Party when they are necessary to achieve a public policy objective. The Parties acknowledge, however, that certain subsidies have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation".

2. Subsidy according to Art. 1.1 (a) (1) ASCM

a) Requirements laid down in Art. 1.1 (a) (1) ASCM

(245) Financial contributions from third countries to the H2Global instrument are in many respects to be assessed similarly to contributions from the Federal Republic of Germany. In this connection, please see the respective discussion (paras. 212 ff.).

b) Absence of territoriality

(246) In contrast to contributions by the Federal Republic of Germany and the EU to the H2Global instrument, however, financial contributions by third countries do not fulfil the criterion of territoriality pursuant to Art. 1.1 (a) (1) ASCM. Thus, there are currently overriding reasons (see paras 160 et seq. and para. 180 for more details) why these should not be regarded as subsidies within the meaning of Art. 1.1 (a) (1) ASCM.

3. Conclusion

(247) All in all, financial contributions from third countries (or from additional EU Member States) with links to the EU pursuant to the H2Global instrument can in principle be considered compatible with WTO law.

VIII. Compatibility of financial contributions from third countries without links to the EU (United Arab Emirates and Saudi Arabia)

(248) In addition to WTO members that have a special connection to the EU on the basis of (planned) free trade agreements, financial contributions from third countries without such a connection should also be considered. In particular, the United Arab Emirates and Saudi Arabia are analysed here.

1. Membership in the WTO

a) United Arab Emirates

(249) The United Arab Emirates (UAE) acceded to GATT on 8 March 1994 and has also been a member of the WTO since 10 April 1996.

b) Saudi Arabia

(250) Saudi Arabia acceded to the WTO on 11 December 2005 and is thus automatically bound by GATT and the ASCM as multilateral agreements within the framework of the WTO. As part of the WTO accession process, Saudi Arabia has pledged to reduce existing export subsidies on agricultural goods. No further agreements or special rules going above and beyond this are to be found.

2. Subsidy according to Art. 1.1 (a) (1) ASCM

a) Requirements laid down in Art. 1.1 (a) (1) ASCM

(251) The financial contributions by the UAE and Saudi Arabia to the H2Global instrument are in many respects similar to the contributions by the Federal Republic of Germany. In this connection, please see the respective discussions.

b) Absence of territoriality

(252) In contrast to contributions by the Federal Republic of Germany and the EU to the H2Global instrument, however, financial contributions by the UAE and Saudi Arabia do not fulfil the criterion of territoriality pursuant to Art. 1.1 (a) (1) ASCM. Thus, there are currently overriding reasons (see paras 160 et seq. and para. 188 for more details) not to regard these as subsidies within the meaning of Art. 1.1 (a) (1) ASCM.

3. Conclusion

(253) In sum total, financial contributions from the UAE or Saudi Arabia in their capacity as third countries without closer ties to the EU pursuant to the H2Global instrument can in principle be considered to be compatible with WTO law.

IX. Compatibility of financial contributions to the H2Global instrument from developing countries with WTO law (Namibia, South Africa, India and Morocco)

(254) So-called *least developed countries* (LDCs) enjoy under certain preconditions a special status from the perspective of WTO law (see para. 138 ff.). However, the third countries to be examined in more detail below (Namibia, South Africa, India, Morocco, Colombia, Mexico) are not LDCs, which means that, firstly, no special rules apply.

(255) However, the status of "developing country" is sometimes sufficient for special rules to apply, for example in the context of dispute settlement. Even in the case of third countries that do not have close ties to the EU, membership in the WTO is a prerequisite for being bound by WTO law. In an additional step, the preconditions of Art. 1.1 (a) (1) of the ASCM must be addressed.

1. Membership in the WTO

a) Namibia

(256) Namibia acceded to GATT on 15 September 1992 and has also been a member of the WTO since 1 January 1995.

b) South Africa

(257) South Africa acceded to GATT on 13 June 1948 and has also been a member of the WTO since 1 January 1995. Although South Africa has repeatedly demanded special rules within the framework of the ASCM in the WTO context, it has not yet been possible to implement these demands in actual practice. These demands related, for example, to the states of the Southern African Development Community (SADC).[88]

c) India

(258) India acceded to GATT on 8 July 1948 and has also been a member of the WTO since 1 January 1995. India is explicitly mentioned in Annex VII lit. b) to the ASCM. In view of India's economic development, however, the condition stated in Annex VII lit. b) that the GNP per capita must be less than $ 1,000 has probably no longer been met for many years. India is thus fully bound by WTO subsidy law for the time being.

d) Morocco

(259) Morocco acceded to GATT on 17 June 1987 and has also been a member of the WTO since 1 January 1995. Morocco is also explicitly mentioned in Annex VII b) to the ASCM. In view of Morocco's economic development, however, the requirement in Annex VII lit. b) that the GNP per capita must be below $ 1,000 has probably no longer

[88] Communication from South Africa, 1 January 1999, WT/L/317.

been met for many years. Morocco is thus fully bound by WTO subsidy law for the time being.

e) Colombia

(260) Colombia acceded to GATT on 3 October 1981 and has also been a member of the WTO since 30 April 1995. In the past (early 2000s), Colombia has repeatedly invoked the special rules contained in Article 27 of the ASCM. The respective deadlines expired on 17 December 2002, however.

f) Mexico

(261) Mexico acceded to GATT on 24 August 1986 and has also been a member of the WTO since 1 January 1995. No special rules are apparent here, either.

2. Subsidy according to Art. 1.1 (a) (1) ASCM

a) Requirements laid down in Art. 1.1 (a) (1) ASCM

(262) Financial contributions from the above-mentioned developing countries to the H2Global instrument are in many respects to be assessed similarly to contributions from the Federal Republic of Germany. In this connection, please see the respective discussion (para. 212 ff.).

b) Absence of territoriality

(263) In contrast to contributions by the Federal Republic of Germany and the EU to the H2Global instrument, however, financial contributions by developing countries do not fulfil the criterion of territoriality pursuant to Art. 1.1 (a) (1) ASCM. Thus, there are currently overriding reasons (see paras 160 et seq. and para. 188 for more details) not to regard these as subsidies within the meaning of Art. 1.1 (a) (1) ASCM.

c) No special rules according to Art. 27 ASCM

(264) While WTO subsidy law has special rules for developing countries in accordance with Article 27 of the ASCM, these do not apply to the countries under consideration here (see para. 158 ff.).

3. Conclusion

(265) Overall, financial contributions from developing countries to the H2Global instrument can in principle be considered to be in harmony with WTO law. Special exceptions such as Art. 27 ASCM do not apply to Namibia, South Africa, India, Morocco, Colombia or Mexico.

X. Compatibility of financial contributions from international organisations to the H2Global instrument with WTO law

1. General

(266) With the exception of the EU, international organisations can only become members of the WTO if they also constitute an autonomous customs territory pursuant to Art. XII:1 of the WTO. The WTO does not provide for membership of other international organisations. This does not mean, however, that the WTO has nothing to do with other international organisations, but merely that these organisations cannot obtain formal membership status with all the rights and obligations that go along with it.[89] This status is also significant in that WTO law can only be binding under international law among its treaty parties, but not on institutions that are outside the WTO system. For non-members, the ASCM thus has no effect, either.

2. Individual funding and financial institutions

(267) WTO obligations are thus only binding on states or autonomous customs territories that have signed the WTO agreement.[90] WTO law is thus in line with a "state-centred view".[91] In this respect, membership of the international financial institutions under consideration here is also excluded in the future. Nevertheless, these have links to WTO law.

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89 *Weiß/Ohler/Bungenberg*, Welthandelsrecht, 3rd ed. 2022, § 8, marginal no. 161.

90 *Weiß*, in: Grabitz/Hilf/Nettesheim (eds.), Recht der EU, 77th EL 2022, Art. 207 TFEU para. 209 f.

91 *Kokott*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Art. 220 TFEU marginal no. 26, individual economic operators, for example, can only indirectly benefit from trade liberalisation under WTO law.

a) The World Bank (IBRD/IDA)

(268) The World Bank, in its capacity as a multinational development bank which comprises five organisations[92], each being a separate legal entity, is not bound by WTO law according to the principles mentioned in the foregoing. However, the WTO "shall endeavour to cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development [World Bank] and its related institutions in the interests of coherence in global economic policy-making".[93]

(269) The WTO is thus authorised to cooperate with the IMF and the World Bank. This also emanates from the agreement between the International Bank of Reconstruction, the International Development Association and the WTO.[94]

(270) The authorisation to cooperate with the aim of achieving greater consensus in international economic policy implies at the same time that a direct commitment by the World Bank itself is also out of the question as a result of the principles mentioned in the foregoing.

b) ADB (Asian Development Bank)

(271) As a multinational development bank headquartered in Manila, the ADB, in its capacity as an international organisation – like the other banks in question – is not eligible to be a member of the WTO. This also excludes the possibility of being bound by WTO law. Similar to the other banks, however, the "Memorandum of Understanding between the Asian Development Bank and The Secretariat of the World Trade Organization" is to be respected.[95]

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92 International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA); International Centre for Settlement of Investment Disputes (ICSID).

93 Art. III.5 ÜWTO, see also *Bäumler*, in: Krenzler/Herrmann/Niestedt (eds.), EU-Außenwirtschaftsrecht- und Zollrecht, 20th EL 2022, 131a. WTO marginal no. 17.

94 Agreement between the International Bank for Reconstruction and Development, the International Development Association and the World Trade Organization (Annex II) with mutual consideration, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/GC/W43.pdf&Open=True: see also *Van Grasstek*, Relations with other organizations and civil society, World Trade Organization, Chapter 5 p. 151 ff.

95 Memorandum of Understanding between ADB and WTO, https://www.adb.org/sites/default/files/institutional-document/33447/files/mou-wto.pdf

c) IDB/IADB (Inter-American Development Bank)

(272) The IDB, as a multilateral development bank in the legal form of a joint-stock company with headquarters in Washington, D.C., is not a member of the WTO and thus not bound by WTO law. Similar to the other banks, there is also a declaration of intent to strengthen and deepen cooperation between the WTO and the IDB.[96]

3. Summary

(273) Only WTO members are directly bound by WTO law. In this respect, there is no obligation applying to international organisations or financial institutions. For these, there are only declarations of intent for joint cooperation. Such declarations are generally not legally binding, however.[97]

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[96] WTO/IADB to cooperate on trade-related technical assistance programs for Latin American and Caribbean countries, WTO News: 2002 Press Releases Press/276 27 February 2002, https://www.wto.org/english/news_e/pres02_e/pr276_e.htm

[97] *Stein/von Buttlar/Kotzur*, Völkerrecht, 14th ed. 2017, § 4 para. 27 ff.