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**A Comparative Study Between;
“Withdrawal of Export Subsidy”**

Under Article 4(7) of the Agreement on Subsidies and Countervailing Measures

And “Recovery of State Aid”

Under Article 14 of the Regulation NO. 659/1999

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ABBREVIATIONS

ECJ	European Court of Justice
EU	the European Union
OECD	Organization for Economic Cooperation and Development
SCM Agreement	the Agreement on Subsidies and Countervailing Measures
TFEU	Treaty on the Functioning of the European Union
WTO	the World Trade Organization

CHAPTER 1- INTRODUCTION

1.1 Description of the Problem and Purpose

In a pure and perfect market economy, unlawful State aids and Subsidies do not exist. The reality, either in the EU or in the rest of the world, is however different from this ideal market. Some state resources have been allocated to certain undertakings and businesses to support them in the recent time; this is broadly common not only throughout the EU but internationally.¹ Therefore, the recovery of granted unlawful aids and subsidies has a significant role in reinstatement of a level playing field between competitors in the same market after it has been distorted by these violative measures.

However, as some legal researchers have noted “Finding an appropriate remedy in response to the illegal export subsidies will never be an easy task”² and there are “Great concerns regarding an appropriate remedy for the use of export subsidies”³. By way of illustration, while it seems clear that the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement), which is the main regulation governing subsidies internationally,⁴ seeks rapid compliance with the prohibition by recovery of illegal Subsidy in order to restore a level playing field between competitors, unfortunately it has often not been clear what withdrawing the subsidy precisely entails?⁵

To make it clear, there is no definition of “Withdrawal” and its necessities in entire SCM Agreement.⁶ Accordingly, some related questions may arise. What does the “Withdrawal of Export Subsidy” mean? It is also not clear that if the effect of withdrawal of subsidies should be interpreted as a retrospective or a prospective remedy? Moreover, if the withdrawal to be interpreted as retrospective, should it includes interests at an appropriate rate in order to fully restores the *status quo ante* by depriving the recipient of the prohibited subsidy of the benefits it

¹ Even in the European Union, where State aid control is the strictest, it represents about 1% of EU GDP excluding crisis-related measures. See; The OECD Roundtable on “Competition, State Aids and Subsidies” 2010, Par.1 of the Executive Summary

² Tsai-yu Lin, Remedies for Export Subsidies in the Context of Article 4 of the SCM Agreement: Rethinking some Present Issues, 2008, pg. 23

³ Andrew J. Green, Michael Trebilcock and Vivien Milat, “The Enduring Problem of WTO Export Subsidies Rules”, American Law & Economics, Association Annual Meetings 2007, pg. 34

⁴ Claire Micheau, “WTO Law and Tax Subsidies, Towards Establishing Jurisprudential Standards”, Bulletin for International Taxation, 2007, pg. 550

⁵ Andrew J. Green, et. Al, Ibid, Pg. 59

⁶ Tsai-yu Lin, Ibid, pg. 27

may have enjoyed in the past? There is no concrete answer to these questions under the SCM Agreement.⁷

In comparison, according to the rules on the State aid- which is a similar notion to the Export Subsidies in so many aspects⁸- the Withdrawal or “Recovery” of the granted measure as a legal remedy for violation of these prohibitory rules, is well defined and obviously laid down in Article 14 and Article 15 of the Regulation 659/1999 (the Procedural Regulation).⁹

Due to the similarities between these two notions, i.e. State aid and Export Subsidies, which will be discussed in the next part, this study seeks to compare and analyze the “Remedies” under these two sets of rules (i.e. recovery of illegal state aid and withdrawal of illegal export subsidy) to shed some lights on the ambiguities existing in regard to the Export Subsidies by comparing these issues to the State aid rules and other European jurisprudential literature. In other words, the implication of the EU Experience with the “recovery of granted measures” for the “withdrawal of export subsidies” is the main purpose of this research.

The basic question arises at this point is that what is the relevance of Export subsidies under the WTO rules to the State aid regime under the EU law? This question will be discussed in the following part.

1.2 The relevance of State Aids and Export Subsidies

Generally speaking, those types of Subsidies, which according to Article 1.1(a)(1)(ii) of the SCM Agreement, amount to “Government revenue to be forgone or not collected” are of particular importance from the perspective of direct taxation.¹⁰ In these cases, a subsidy takes form of an outlawed tax incentive or tax credit. In this context, direct tax matters are clearly included in the definition of Subsidy.¹¹ In this vein, subsidies are related to taxation.

With regard to relevance of State aid and export Subsidies, in particular, since the both of these measures run a great risk of affecting the competition, and thus weakening the international market and the economy as a whole, it can be argued that rules prohibiting unlawful aids and

⁷ Tsai-yu Lin, *Ibid*, pg. 27

⁸ See; Sec 1.2 below, and Chapter 2; Summary of this research.

⁹ Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the TFEU, Official Journal L 83/1 (27 Mar. 1999).

¹⁰ Claire Micheau, *Ibid*.

¹¹ Claire Micheau, *Ibid*.

provisions forbidding Export Subsidies both are designed to secure cross-border neutrality; to guarantee that these measures would not influence business decisions.

However, it is important to stress that concerning the scope of the EU *State Aid* prohibition, and scope of *Export Subsidy* ban, provided for in the SCM agreement, there are essential differences; On the one hand, state aid is also prohibited in purely domestic situations,¹² while the Export Subsidy only applies to cross-border situations.¹³ In this respect, the prohibition of the State aid has a broader scope than the prohibition of Export Subsidies. On the other hand, Art. 107(1) TFEU requires that an advantage is granted to a “*Certain*” group of undertakings while the Subsidies look at the “*Specificity*” test. In addition, the notion of “State aid” has a broader scope and it covers positive benefits, such as *subsidies* and loans, and also measures that, in various forms, alleviate the charges that are “normally” included in the budget of an undertaking.¹⁴

In a nutshell, an unlawful State aid and export subsidy both strengthen the position of beneficiaries compared with that of their competitors and this leads to the conclusion that “intra-EU” or “international” trade is affected. In particular, the State aid rules and export subsidy regulations point in the same directions; they prohibit any distortionary grants made by member states, and they seek to “recover the granted measure” in such a way that it would remedy the distortion of competition caused by the effect of that measure.¹⁵ The main purpose of State aid and export subsidy control is therefore to maintain a level playing field and to protect the market. For that reason, it makes sense to consider and compare these two sets of rule in a joint review.

1.3 Method and Material

As provided, the purpose of this thesis is to examine and compare the Recovery of granted State aid and export subsidies particularly to provide a clearer picture of the “withdrawal of Export Subsidy” and what it entails. In so doing, the “Agreement on Subsidies and Countervailing

¹² Marie-Ann Mamut, Introduction to European Tax Law: Direct Taxation; the state aid provisions of the TFEU in Tax Matters, Spiramus Press, 2010, pg 85

¹³ John H. Jackson, “The World Trading System, Law and Policy of International Economic Relations”, 1997, pg. 279

¹⁴ Frank Engelen, State Aid and Restrictions on Free Movement: Two Sides of the Same Coin?, European Taxation, 2012 (Volume 52), No. 5, IBFD

¹⁵ Appellate Body Report, Brazil – Export Financing Program for Aircraft (Article 21.5 – Canada), ¶ 45, WT/DS46/AB/RW (July 21,2000)

Measures (SCM Agreement)” and the “Regulation No. 659/1999” have been the main sources of law and principal materials of this research in analyzing the remedies for prohibited Subsidies and unlawful State aids. To address the research questions the legal framework, specifically the State aid provision and the Subsidies Prohibition rules, will be outlined extensively in this paper. International literature on remedies available for Export subsidies and State aid will also be considered in this study.

The approach adopted by the author in this research is to first explain the basic notions, expressions, and sources of law which have been used in this research. Then the relevance of State aid and Export Subsidies will be discussed in more details and based on the analogy between State aids and Export Subsidies the author tries to answer the question of this research by adoption of a comparative approach. The research aimed at filling the existing gaps in the SCM agreement in terms of withdrawal of export subsidies by taking assistance from the State aid experiences with recovery of unlawful measures.

1.4 Delimitation

As the topic of this research indicates the study aimed at consideration of “Remedial” issues in recovery of illegal Export Subsidies and prohibited State aids. The remedial alternatives posed by the SCM agreement jurisprudence have wide scope. Each one calls for a separate study. Due to this fact thesis does not, and cannot view all of these options provided in the SCM agreement.¹⁶ Therefore, since uncertainties regarding “Withdrawal of Illegal Export Subsidy” are more serious¹⁷, this research stays focused on this kind of legal remedy under the SCM Agreement. In other words, the research is limited to the concept, the scope, and the effects of “withdrawal of illegal export subsidy”, which is provided by article 4(7) of the SCM agreement. In terms of State aid provisions, in order to answer the questions of the research, the paper also stays focused only on the remedial aspects of state aid rules, i.e. the recovery of unlawful aid, as laid down in Regulation 659/1999 according to which the granted aid should be recovered without delay.

1.5 Disposition

In order to answer questions posed in this study and develop a deeper comparative review of “recovery of illegal state aid” and “withdrawal of illegitimate export subsidy” the paper is

¹⁶ There are three main types of remedies for violations of export subsidies which are “withdrawal of the subsidy”, “countermeasures”, and “unilateral domestic measures”. See; Art. 4 the SCM Agreement.

¹⁷ Andrew J. Green, et. Al, Ibid, Pg. 34, and Tsai-yu Lin, Ibid, pp. 26- 27

structured in the following way: Chapter 2 deals with expressions and sources of law which have been applied in this research. Chapter 3 considers the recovery of granted measures and their effect in more details. This chapter tries to find an appropriate definition for the “Withdrawal of export Subsidies” and what this withdrawal entails. Chapter 4 deals with the impact of the “Principle of Protection of Legitimate Expectations” on recovery of unlawful measures, to address the question of whether the recovery of an illegal measure is compatible with the principle of legal certainty and legitimate expectations. And finally, Chapter 5 holds the analysis and conclusive remarks.

Chapter 2- BASIC NOTIONS

Before undertaking an in-depth examination of the recovery of granted measures under the SCM agreement and the procedural regulation, I present in this chapter descriptions for basic expressions and notions which are being used frequently in this research. This chapter considers the following notions:

2.1. The SCM Agreement

The Agreement on Subsidies and Countervailing Measures (SCM Agreement) is the main regulation that governs subsidies internationally.¹⁸ The SCM Agreement is an outcome of a long development of subsidy rules that started by adoption of the General Agreement on Tariffs and Trade (GATT) in 1947.¹⁹ The SCM Agreement seeks, *inter alia*, to provide a definition for the “Subsidy” and defining the scope of outlawed subsidies which distort international trade.²⁰ It also deals with the remedies and measures that can be taken to counteract the prohibited subsidies.²¹ The SCM agreement in Article 4(7) provides for “withdrawal” of subsidies as a remedy. The meaning of withdrawal and what it entails is not clear under the SCM agreement. In this research I will, in particular, try to picture a clear definition for “withdrawal of Export Subsidy” and its effect.

2.2. Definition of “Subsidy” and “Export Subsidy”

The first agreement that defines a “Subsidy” is the SCM Agreement.²² While the GATT members applied this notion, there was not a thorough definition of the subsidy until the SCM Agreement provided a definition of Subsidy in the articles 1 and 2.²³ These articles define “Subsidy” as: (a) a financial contribution (b) made by a government or any public body which (c) confers a benefit that (d) is specific pursuant to the meaning of article 2 of the SCM Agreement.

To determine what does the “financial contribution” mean, the SCM Agreement indicates that a contribution may take different forms: (1) the practice of direct transfers of funds or potential direct transfers of funds or liabilities,²⁴ (2) government revenue that is forgone or not collected,²⁵

¹⁸ Claire Micheau, *Ibid*, pg. 550

¹⁹ Claire Micheau, *Ibid*.

²⁰ Claire Micheau, *Ibid*.

²¹ Claire Micheau, *Ibid*.

²² Claire Micheau, *Ibid*.

²³ Claire Micheau, *Ibid*.

²⁴ Article 1.1(a)(1)(i) of the SCM Agreement

(3) the grant of goods or services apart from infrastructure or the purchase of goods,²⁶ and (4) payments to a funding mechanism.²⁷

The second type of financial contribution is of great importance for tax purposes.²⁸ This form of contribution deals with public revenue that was not collected, although it should have been raised through taxes, and it envisages tax credits as an example of a *tax incentive*.²⁹ As such, *direct tax* issues are expressly included in the definition of subsidy.³⁰

The *Export Subsidies* are, in a general sense, subsidies “granted only to products when they are exported”.³¹ Export Subsidies distort international trade, thus, the SCM Agreement prohibits these subsidies which are contingent upon exportation and upon the use of domestic over imported goods.³²

Regarding export subsidies almost all WTO Members agree that these subsidies definitely lead to trade distortion which is harmful to international trade.³³ Accordingly, export subsidies on non-agricultural products are considered *per se* forbidden pursuant to the SCM Agreement.³⁴ For that reason, in respect to non-agricultural products, members are obligated to avoid granting or maintaining subsidies which are contingent upon export performance, both in practice and in their law.³⁵

²⁵ Article 1.1(a)(1)(ii) of the SCM Agreement

²⁶ Article 1.1(a)(1)(iii) of the SCM Agreement

²⁷ Article 1.1(a)(1)(iv) of the SCM Agreement

²⁸ Claire Micheau, *Ibid.*

²⁹ Claire Micheau, *Ibid.*

³⁰ Claire Micheau, *Ibid.*

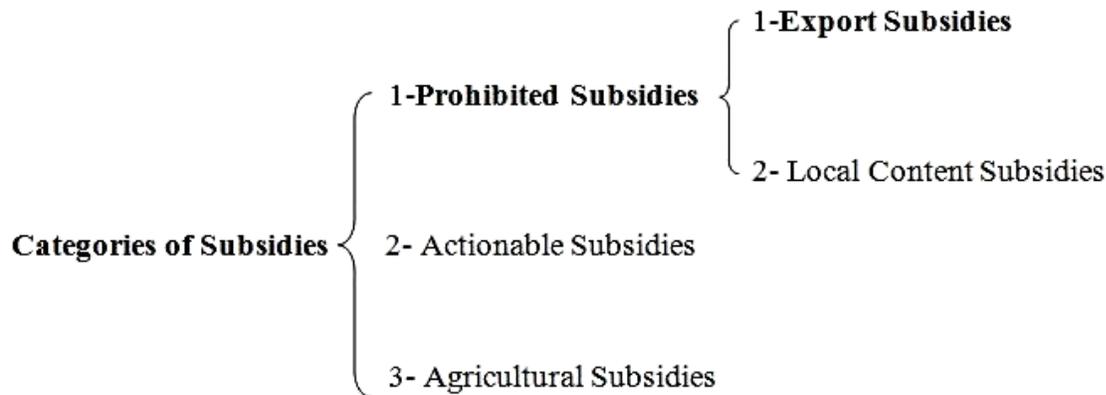
³¹ John H. Jackson, *Ibid.*, pg. 279

³² Panel Report in Brazil — Aircraft, para. 7.26.

³³ Tsai-yu Lin, *Ibid.*, pg. 22

³⁴ Art. 3(1) of the SCM Agreement

³⁵ Art. 3(2) of the SCM Agreement



❖ This chart shows the position of “*Export Subsidy*” among other types of subsidies

2.3 Definition of the “Specificity Test” in Subsidies

Even if a measure is a subsidy within the meaning of the SCM Agreement, it is not necessarily prohibited unless it has been *specifically* provided to an enterprise or industry or group of enterprises or industries.³⁶ There are four types of “*Specificity*” within the meaning of the SCM Agreement:

- **Enterprise-specificity.** A government targets a particular company or companies for subsidization;³⁷
- **Industry-specificity.** A government targets a particular sector or sectors for subsidization.³⁸
- **Regional specificity.** A government targets producers in specified parts of its territory for subsidization.³⁹
- **Prohibited subsidies.** A government targets export goods or goods using domestic inputs for subsidization.⁴⁰

³⁶ Introduction to Subsidies and Countervailing Measures in the WTO, WTO E-Learning Series, (2007) pp. 10-11

³⁷ “Subsidies and Countervailing measures, United Nation Conference on Trade and Development, Dispute Settlement”, United Nations, 2003, pg. 13

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

The basic principle is that a subsidy that distorts the allocation of resources within an economy must be prohibited.⁴¹ In other words, where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur.⁴² Thus, only “*Specific*” subsidies are subject to the SCM Agreement disciplines.

2.4 Definition of “State Aid”

Similar to what discussed regarding subsidies, in the EU context, State aid is, in general, incompatible with the internal market⁴³ and one of the goals of the European internal market is to ensure that competition is not distorted, *inter alia*, by Member States granting aid to particular undertakings or categories of production.⁴⁴

According to the European law, the Member States have delegated their competences and supervision of State aid to the Commission and the Commission is required to keep under constant review all types of aid schemes existing in the Member States.⁴⁵ Furthermore, the member States are required to inform the Commission any intention to grant new aid or modify existing aid.⁴⁶ The member states may not implement such schemes until the Commission has permitted their plan.⁴⁷

State aid which is implemented contrary to this commitment is unlawful and must be recovered from the beneficiaries swiftly unless this would be in breach of a general principle of EU law, such as the principle of legal certainty and the principle of legitimate expectations.⁴⁸ This obligation provides *ex ante* control and can be considered as one of the significant pros of the State aid provision which does not exist under WTO laws.

To be caught as a state aid, it is settled case law that the classification of a national measure as aid requires that all the conditions set out in article 107(1) of the TFEU be met.⁴⁹ *Firstly*, there must be an intervention by the state or through state resources. *Secondly*, the intervention must be liable to affect trade between Member States. *Thirdly*, it must confer an economic advantage

⁴¹ Introduction to Subsidies and Countervailing Measures in the WTO, Ibid, pp. 10-11

⁴² Introduction to Subsidies and Countervailing Measures in the WTO, Ibid, pp. 10-11

⁴³ Certain forms of aid are, however, considered to be compatible with the internal market. See; Art. 107(2) and 107(3)TFEU

⁴⁴ Frank Engelen, State Aid and Restrictions on Free Movement: Two Sides of the Same Coin? European Taxation, 2012 (Volume 52), No. 5, IBFD

⁴⁵ Art. 108(1) of the TFEU

⁴⁶ Art. 108(3) of the TFEU

⁴⁷ Art. 108(3) of the TFEU

⁴⁸ Frank Engelen, Ibid. This matter is discussed in chapter 4 of this thesis.

⁴⁹ Frank Engelen, Ibid

on “certain undertakings or production of certain goods”. And *fourthly*, it must distort or threaten to distort competition.⁵⁰ To ascertain whether the granted measure distorts competition and is affecting trade between Member States the Commission and the ECJ have taken an extensive scope.⁵¹ Even a measure which has a potential to distort the competition falls within the scope of unlawful state aid under Article 107 (1) TFEU.⁵² This approach aimed at protection of the common market from any potentially violative measure.

To sum up, the notion of “state aid” has a broad scope and it includes positive benefits, such as *subsidies* and loans, and also measures that, in different forms, alleviate the charges that are “normally” included in the budget of an undertaking.⁵³ Thus, the simple fact that the aid strengthens the position of beneficiary compared with that of its competitors leads to the conclusion that intra-EU trade is affected. This is in breach of *Capital Neutrality* which requires equal treatment of economic operators that carry out transactions in the EU and is, therefore, prohibited under the EU law.

2.5 Definition of the “Selectivity Test” of unlawful State Aid

What is understandable from the wording of the TFEU⁵⁴ is that an economic advantage granted by a Member State constitutes an illegitimate state aid only when it favors “*certain* undertakings or the production of *certain* goods”. This “Selectivity” test is in fact an essential condition for being considered as an unlawful State aid. A tax measure which confers advantage to certain undertakings or production of certain goods in comparison with other undertakings or productions that are in a comparable situation with the recipient may constitute a prohibited state aid.⁵⁵ To put it another way, a general advantageous feature of a tax system which is granted to all taxpayers and is provided without distinction to all undertakings and to the production of all goods does not constitute forbidden state aid.⁵⁶

⁵⁰ Art. 107(1) of the TFEU

⁵¹ Mamut, *Ibid*, para 322

⁵² Mamut, *Ibid*, para. 314

⁵³ Frank Engelen, *Ibid*

⁵⁴ Art. 107(1) of the TFEU

⁵⁵ C-143/99, *Adria-Wien Pipeline*. Para. 41

⁵⁶ C-143/99, *Adria-Wien Pipeline*, Para. 41.

Summary

To sum up this chapter, taking into account the rules prohibiting unlawful State aid and provisions forbidding Export Subsidies, one can conclude that both sets of rules aimed at guaranteeing that the granted measures would not influence business decisions and alter cross-border neutrality. In other words, the position of beneficiaries is strengthened by an unlawful State aid and illegal export subsidy in comparison with that of their competitors. Consequently, the measure in question distorts the “intra-EU” and “international” trade and should, therefore, be subject to prohibitory disciplines.

However, there are some differences between these notions; State aid is prohibited in domestic situations as well,⁵⁷ whereas the Export Subsidy only applies to cross-border situations.⁵⁸ Moreover, the notion of “state aid” covers positive benefits, such as *subsidies* and loans, and other measures which alleviate the charges that are “normally” included in the budget of an undertaking.⁵⁹ Thus, the prohibition of the state aid has a broader scope than the prohibition of Export Subsidies. In addition, Art. 107(1) TFEU requires that an advantage is granted to a certain group of undertakings while the Subsidies look at the specify test.

⁵⁷ Marie-Ann Mamut, *Ibid*, pg. 85

⁵⁸ John H. Jackson, *Ibid*

⁵⁹ Frank Engelen, *Ibid*

CHAPTER 3- THE REMEDIES UNDER THE STATE AID PROVISIONS AND THE EXPORT SUBSIDY RULES

In the previous chapter the similarities and disparities between State aid and Export subsidy were discussed. It was argued that these two notions are analogous in many aspects and as a result they can be compared in a joint review. In this chapter, the remedial aspects of recovery of State aid under the EU law and withdrawal of Export subsidies under the SCM agreement are being discussed in more details.

3.1 Remedial Aspects of Recovery of illegal Aid/Subsidy

From the perspective of law, a remedy is any of the approaches available at law for the enforcement, protection, or *recovery* of rights or for obtaining *redress* for their violation”.⁶⁰ In this vein, the SCM Agreement provides for Withdrawal of the subsidy as a remedy for violations of export subsidies rules; Article 4.7 of the SCM Agreement states that if the measure in question is found to be a prohibited subsidy the subsidizing Member should withdraw the subsidy without any delay. Unfortunately, while it seems clear the agreement asks for swift compliance with the prohibition, it has often not been obvious what exactly *withdrawing the subsidy* entails”.⁶¹

Therefore, there are some uncertainties regarding the “Withdrawal” of unlawful the Export Subsidies. In the SCM Agreement there is no definition of “*Withdrawal*” and its necessities.⁶² In addition, the effect of withdrawal is not clear; it is not lucid if the withdrawal of subsidies should be interpreted as a retrospective or a prospective remedy?

By taking assistance from the rules on State aid and in line with the objectives and goals they both follow in prohibition of distortionary measures, this chapter seeks to shed some light on these issues.

3.1.1 Recovery of Granted State Aid under the Procedural Regulation (Regulation No. 659/1999)

To compare recovery of prohibited measure under Article 4.7 of the SCM Agreement to Article 14 of the Council Regulation No 659/1999, we must consider what do the “*Recovery*” and the “*Withdrawal*” of unlawful measure mean?

⁶⁰ Oxford Dictionary of Law, Oxford University Press, Sixth Edition, 2006, pg. 545

⁶¹ Andrew J. Green, et al. Ibid, at pg. 34

⁶² Tsai-yu Lin, Ibid, pg. 27

In the EU context, when a member state grants an unlawful aid, such as a subsidy,⁶³ to certain undertaking or business, the aid must be recovered without delay.⁶⁴ In this vein, the recovery means to reinstate and re-establish the situation which preceded the distortion of competition by the illegal State aid.⁶⁵ Therefore, the recipient of such State aid is not only obliged to repay the aid in question, but is also required to pay the interest at an appropriate rate fixed by the Commission to fully restore the *status quo ante*.⁶⁶ Insofar as the economic advantage of an illegal aid is not restricted to its nominal amount, the obligation to pay the interest seems appropriate and reasonable. Hence, by so doing, the beneficiary will concede the advantage produced by the prohibited aid measure and the preceded situation will be restored.⁶⁷ Or as stressed by the Court in the *Commission v Italy*,⁶⁸ restoration of the previously existing situation is achieved once the forbidden and incompatible aid is repaid by the recipient who thereby forfeits the benefit which they enjoyed over their competitors in the market, and the situation as it existed preceding the granting of the aid is reinstated.⁶⁹

Under the EU law, the recovery is, thus, designed in such a way that it would remedy the distortion of competition caused by the effect of the aid and reinstates the previously existing situation. In other words, the recipients of the aid have to pay the tax that they were supposed to have been liable for.

3.1.2 Recovery of Granted Subsidy under the SCM Agreement

3.1.2.1 Background

Being part of the public international law, the remedies provided for in the SCM agreement must be studied in line with the characteristics of this law. Accordingly, before, turning to definition and interpretation of the effects of “withdrawal of Export subsidy” it is necessary to have a short look on the nature of remedies under international law.

In the area of public international law, “cessation and non-repetition” is commonly considered the foremost *remedy* for an internationally unlawful act.⁷⁰ This type of remedy also exists under

⁶³ Subsidizing a particular undertaking(s), is a form of illegal state aid; see: Frank Engelen, *Ibid*

⁶⁴ Articles 14(2) and 14(3) of the Regulation No. 659/1999

⁶⁵ Martin Elofsson, *Recovery of Illegal State Aid from a Beneficiary’s View - The exception of legitimate expectations, the (mal)functioning air bag of the State aid policy?*, 2009, pg. 15

⁶⁶ Article 14(2) of the Regulation No. 659/1999

⁶⁷ Case C-350/93, *Commission v Italy* [1995] ECR I-699, paras. 21-22 and Case C-110/02, *Commission v Council* [2004] ECR I-06333, para. 42.

⁶⁸ Case C-348/93, *Commission v Italy* [1995] ECR I-673

⁶⁹ Case C-348/93, *Commission v Italy* [1995] ECR I-673, para. 27.

⁷⁰ Sungjoon Cho, *The Nature of Remedies in International Trade Law*, *University of Pittsburgh Law Review*, Vol. 65:763, (2004), pg. 771

the WTO system, namely the “withdrawal of the questioned measure” to be consistent with the WTO rules.⁷¹ In this respect, cessation has two legal effects in the WTO system. First, by ceasing the measure in question, the dispute will be resolved and this will remedy the circumstances from which the complaining party has suffered.⁷² Second, by bringing the illegal measure into conformity with the WTO laws, it finally leads to achievement of the objectives and purposes that the WTO law follows, such as liberalization of trade and sustainable development.⁷³

However, what is still controversial is whether a losing party has truly remedied the distortive situation, i.e., whether it has *really* “withdrawn” its measure that was recognized as an infringement of the SCM agreement or it has simply window-dressed the illegal measure while still keeping the distortive consequences alive.⁷⁴ This question even becomes more complex by recalling the fact that there is no definition for “Withdrawal” under the SCM agreement.⁷⁵

In particular, the question is whether the distorted competition reinstated by merely “cessation and non-repetition” if we interpret “Withdrawal” as such? In other words, when the granted illegal measure has strengthened the position of recipient in compared with of its competitors, is it possible to provide the equal treatment of economic operators and restore the situation existed prior to the granting of the measure by mere cessation and non-repetition? These questions will be addressed in the next parts.

3.1.2.2 Definition of “Withdrawal of Export Subsidy”

As it was already mentioned, the SCM Agreement does not provide a definition for “*withdrawal*” of the subsidy and its necessities.⁷⁶ It is essential, therefore, to define it in line with the objectives the SCM agreement follows. In other words, to determine the meaning of withdrawal the author will take the teleological interpretation method to interpret it in conformity with the objects of the SCM Agreement. Accordingly, it is necessary to define withdrawal in the light of the objectives and purposes followed by the SCM agreement. In *Brazil — Aircraft*, the panel considered that the purpose of the SCM Agreement is to prohibit subsidies which are distortive to international trade. The panel stipulated that: The purpose of the SCM Agreement is to enforce multilateral disciplines in order to prohibit subsidies which are distortive to international trade.⁷⁷ The panel report also added, that it is for this reason that the SCM Agreement prohibits two types of

⁷¹ Sungjoon Cho, *Ibid*, pg. 772

⁷² Sungjoon Cho, *Ibid*, pg. 772

⁷³ Sungjoon Cho, *Ibid*, pg. 772

⁷⁴ Sungjoon Cho, *Ibid*, pg. 772

⁷⁵ Tsai-yu Lin, *Ibid*, pg. 27

⁷⁶ Tsai-yu Lin, *Ibid*, pg. 27

⁷⁷ Panel Report in *Brazil — Aircraft*, para. 7.26.

subsidies — subsidies contingent upon exportation and upon the use of domestic over imported goods — that are *specifically intended to influence trade*.”⁷⁸

In another case, *Canada — Aircraft*, the panel considered that the object and purpose of the SCM Agreement could properly be sum up as the imposition of multilateral disciplines on the premise that some sorts of government interference *distort* international trade, [or] have the *potential to distort* [international trade].⁷⁹

In light of the foregoing, the SCM Agreement aims at protection of international trade from any *distortive* or *potential* interference of the governments. Reasonably, it leads to the conclusion that any violative measure must be recovered in order to re-establish the situation preceded the distortions. In other words, in the light of objectives of the SCM Agreement, it is understandable that insofar as recovery of granted measure is concerned the “withdrawal of export subsidy” has a meaning similar to the “recovery of prohibited State aid” under the EU law. To put it another way, the “withdrawal” indicates to remove or to take away what has been granted to the recipient of the export subsidy, similar to what was discussed regarding the recovery of an unlawful State aid. This standpoint can be affirmed by the reading of appellate body from the meaning of “withdrawal” in *Brazil – Export Financing Program for Aircraft*. In this case, the appellate body defined the meaning of “Withdrawal”:

*“Turning to the ordinary meaning of “withdraw”, we observe first that this word has been defined as “remove” or “take away” and as “to take away what has been enjoyed; to take from.” This definition suggests that “withdrawal” of a subsidy, under Article 4.7 of the SCM Agreement, refers to the “removal” or “taking away” of that subsidy. . . . In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to “withdraw” prohibited export subsidies, in the sense of “removing” or “taking away”.*⁸⁰

In addition, in *Australia – Automotive Leather* the panel stressed that to "Withdraw a subsidy"... differs from to "bring the measure into conformity", with the recommendation required pursuant to Article 19.1 of the DSU.⁸¹

Taking into account the definition of withdrawal in these cases i.e. *“to take away what has been enjoyed; to take from”*, it can be argued that in a similar way, Article 14(1) of the Council

⁷⁸ Panel Report in *Brazil — Aircraft*, para. 7.26.

⁷⁹ Panel Report, *Canada — Aircraft*, para. 9.119

⁸⁰ Appellate Body Report, *Brazil – Export Financing Programme for Aircraft* (Article 21.5 – Canada), ¶ 45, WT/DS46/AB/RW (July 21,2000)

⁸¹ Panel Report, *Australia – Automotive Leather*, para. 6.42

Regulation No 659/1999 has applied the word “recover”- however this recovery includes interest at an appropriate rate- this article stipulates that where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to “*recover*” the aid from the beneficiary.⁸² However, the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.”⁸³

What is now clear is that according to these two regimes the granted measure must be withdrawn or recovered from the beneficiary swiftly. But the effect of this withdrawal is still an unanswered question under the SCM Agreement. In other words, it is not clear that if this withdrawal is a retrospective or prospective remedy?

3.2 The Effect of Remedy; Retrospective or Prospective?

There are some important questions concerning the effect of “withdrawing the subsidy”.⁸⁴ In other words, is the withdrawal to be interpreted as a *retrospective* or a *prospective* remedy? In the EU context, the answer is clear. According to article 14(2) of the Council Regulation No 659/1999 the unlawful aid should be recovered pursuant to a recovery decision which also includes interest at an appropriate rate fixed by the Commission. “Interest shall be payable from *the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.*”⁸⁵ The question arises here is that insofar as “*taking away what has been enjoyed*” is concerned and inasmuch as prohibition of *distortion of cross-border trade* is the case,⁸⁶ under both SCM agreement⁸⁷ and State aid rules, is it possible to take a similar approach regarding Export Subsidies as it has been taken under State aid rules?

In the author’s own view the remedial approach taken by the EU under State aid rules which provides for a remedy intended to fully restore the *status quo ante* by compelling the recipient of the prohibited aid to repay the benefits it may have enjoyed in the past, is a very appropriate approach for redressing the negative impacts of a distortive measure. The reason is that, the economic advantage of a prohibited aid is not only limited to its nominal amount but its interests as well. Under this approach, the recovery is designed in such a way that it would remedy the

⁸² Article 14(1) of the Regulation No. 659/1999

⁸³ See; chapter 4 of this thesis.

⁸⁴ See; Andrew J. Green, Michael Trebilcock and Vivien Milat, “The Enduring Problem of WTO Export Subsidies Rules”, American Law & Economics, Association Annual Meetings 2007, at. Pg. 34 and Tsai-yu Lin, Remedies for Export Subsidies in the Context of Article 4 of the SCM Agreement: Rethinking some Present Issues, 2008, at pg. 3

⁸⁵ Article 14(2) of the Regulation No. 659/1999

⁸⁶ Panel Report, Canada — Aircraft, para. 9.119

⁸⁷ Panel Report, Canada — Aircraft, para. 9.119

distortion of competition caused by the effect of the aid and re-establish the previously existing situation by imposing *interest* on the beneficiary. Therefore, from this perspective this attitude seems to be a flawless approach.

Regarding to recovery of export subsidies, the question on the effects of this recovery for the first time arose in Australia-Automotive leather case.

3.2.1 Australia – Automotive Leather

The Facts

The Australia- Automotive Leather is a landmark case, since this was the first time that a WTO judicative body was challenged by this complex problem.⁸⁸ The case concerned certain aids provided by the government of Australia to Howe, a wholly-owned subsidiary of Australian Leather Upholstery Pty. Ltd., which was owned by Australian Leather Holdings, Limited ("ALH"). Howe was the only producer and exporter of automotive leather in Australia. The initial Panel order to withdraw the subsidy which had been found to be illegal. Howe reimbursed part of the subsidy which was considered to be the “prospective element”.⁸⁹

As an alternative, the government granted a new loan to Howe’s parent company.⁹⁰ The United States argued that this was not enough and proposed a different formula for calculating how much Howe should pay off based on the “prospective portion” of the subsidy.⁹¹ In addition, it was alleged that the new loan was structured in a way that annulled any financial effect on Howe from the repayment.⁹²

The Issues

In this case, the important legal issues were the “definition of withdrawal of export subsidy” and the “effect of this remedy”. In this case, both of these approaches to remedies were totally prospective; in fact, the panel noted that Australia, like the United States, argued that only a

⁸⁸ Andrew J. Green, et al. Ibid, at pp. 43-45

⁸⁹ Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States(2000), WTO Doc. WT/DS126/RW at para. 6.3 (Panel Report).

⁹⁰ Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States(2000), WTO Doc. WT/DS126/RW at paras. 5.2 - 5.10 (Panel Report).

⁹¹ Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States (2000), WTO Doc. WT/DS126/RW at para. 6.10 (Panel Report).

⁹² Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States(2000), WTO Doc. WT/DS126/RW at para. 6.13 (Panel Report).

“prospective” remedy is imaginable under Article 4.7 of the SCM Agreement.⁹³ The Panel, however, rebuffed to bind itself to these arguments.⁹⁴ The panel, instead, examined what exactly “withdrawal of the subsidy” involves.

Decision

Regarding to what the withdrawal of an export subsidy actually entails, the panel believed that according to the ordinary meaning of the term "withdraw the subsidy", read in context, and in light of its object and purpose, and in order to give it effective meaning, it can be concluded that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement **is not merely limited to prospective action** but it may cover repayment of the prohibited subsidy as well.⁹⁵ In terms of the effect of this remedy, the Panel was of the view that “withdrawal” is not limited to merely prospective actions, but it may include repayment of outlawed subsidies.⁹⁶ The Panel concluded that complete repayment of the subsidy in question, *however without interest*, was necessary.⁹⁷

Implications for the Effect of Remedy

Before implementation of panel’s decision in *Australia – Automotive Leather* case, it was broadly understood by WTO Members that the SCM agreement did not provide for retrospective remedies.⁹⁸ In this vein, the decision in *Australian – Automotive Leather* which explicitly stated that to "withdraw a subsidy" is not limited to purely prospective action, but may encompass repayment of prohibited subsidies,⁹⁹ was surprising and, therefore, several members countered it.¹⁰⁰ However, in practice, it is still strongly anchored between WTO members that remedies

⁹³ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.14 (Panel Report).

⁹⁴ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.18-9 (Panel Report).

⁹⁵ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.39 (Panel Report).

⁹⁶ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.42 (Panel Report).

⁹⁷ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.48 (Panel Report).

⁹⁸ Gavin Goh and Andreas R. Ziegler, “Retrospective Remedies in the WTO After *Automotive Leather*”, 6 *JInt’l Econ L* 545 (2003) at 548.

⁹⁹ *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather– Recourse to Article 21.5 of the DSU by the United States*(2000), WTO Doc. WT/DS126/RW at para. 6.42 (Panel Report).

¹⁰⁰ Andrew J. Green, et al. *Ibid*, at pg. 36

have only prospective effect; this is notwithstanding the fact that in *Australia – Automotive Leather* the panel provided for the retrospective effect of withdrawal of subsidy.¹⁰¹

3.2.2 Advantages of the “Retrospective Approach”

The proposed retrospective approach has some important consequences;

1. The retrospective approach would have an *ex ante* control effect and it prevents the governments from subsidizing export products. Since the retrospective approach strongly discourages member states from providing subsidies due to the fact that they can anticipate that the recipient firm will normally not be able to repay the subsidy if it is successfully challenged through the WTO.¹⁰²
2. It would also discourage firms from reliance on governmental measures with the potential of being considered contingent on exports out of a well-founded fear that, years later, governments would be required by the WTO to recover subsidies from undertakings or, even worse, export buyers.¹⁰³
3. When the recipient of subsidy is obliged to recover it without delay this recovery leads to reinstatement of the *status quo ante*; the situation which preceded the distortion of competition by the illegal subsidy. Accordingly, the member state is not only required to cease subsidizing the beneficiary, but is also required to recover it from the recipient of export subsidy. By so doing, the beneficiary will concede the advantage produced by the prohibited aid measure and it will protect a level playing field between competitors in the same market.

The application of a retrospective remedy would therefore align with a view of the prohibition on export subsidies as responding to negative effects of disturbance of cross-border neutrality. This remedy would be more severe and consequently it dissuades the use of export subsidies.¹⁰⁴

The only question that still remains unanswered is; if we interpret the effect of remedy as a retrospective remedy is that in conformity with the principle of legal certainty and principle of protection of the legitimate expectations. In other words, would an export oriented firm, for instance, participate in a new investment if it knew the risk of withdrawal of the export subsidy and if it was anticipated it would be risked by being required to pay back the controversial measure? This question will be addressed in the next chapter.

¹⁰¹ Andrew J. Green, et al. Ibid, at pg. 37

¹⁰² Andrew J. Green, et al. Ibid, at pg. 37

¹⁰³ Andrew J. Green, et al. Ibid, at pg. 37

¹⁰⁴ Andrew J. Green, et al. Ibid, at pg. 37

Summary

To sum up, there is no concrete definition for the “withdrawal of export subsidies” under the SCM agreement. In lights of the purpose of the SCM one can define it as “*taking away what has been enjoyed by recipient of Subsidy*”. This approach which entails recovery of granted subsidy, not merely ceasing it, can be affirmed in panels’ decisions in *Australia-Automotive leather*¹⁰⁵ and *Brazil – Export Financing Program for Aircraft*.¹⁰⁶ The same approach has been adopted in connection with recovery of illegal state aid under the EU rules, although, under the latter rules repayment of interest is also necessary.

What is still not clear under SCM agreement is the effect of this remedy. Before implementation of panel’s decision in *Australia – Automotive* it was broadly believed that the SCM agreement only provides for prospective remedies.¹⁰⁷ However, notwithstanding the fact that in *Australia – Automotive Leather* the decision provided for the retrospective effect of withdrawal of subsidy, it is still strongly believed by WTO members that remedies have only prospective effect.¹⁰⁸ In comparison, EU rules on State aid provide for a remedy that is intended to fully restore the *status quo ante* by depriving the beneficiary of the aid from the benefits it may have enjoyed in the past. According to article 14(2) of the Council Regulation No 659/1999 an unlawful aid must be “recovered” in addition to “interest” at an appropriate rate payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

The approach adopted by the EU, appears to be more efficient in dealing with recovery of illegitimate granted measures; since under such a system, the member state in question is not only required to cease subsidizing the beneficiary, but is also required to recover it from the recipient of export subsidy, consequently, the preceded situation will be restored in the best possible way. In addition, by adoption of a retrospective approach towards remedies, the governments are strongly discouraged from providing export subsidies since they can predict that the recipient firm will not be able to repay the subsidy if it is successfully challenged through the WTO. Thus, it prevents them from subsidizing export products.¹⁰⁹ In other words, this automatically, provides for an *ex ante* control in subsidizing export products.

¹⁰⁵ See: Sec. 3.2.1 of this Thesis.

¹⁰⁶ See: Sec. 3.1.2.2 of this Thesis.

¹⁰⁷ Goh and Ziegler, *Ibid*, pg. 548

¹⁰⁸ Andrew J. Green, et al. *Ibid*, at pg. 37

¹⁰⁹ Andrew J. Green, et al. *Ibid*, at pg. 37

Chapter 4- The Principle of the Protection of Legitimate Expectations

4.1 Definition

The principle of protection of legitimate expectations evolved in the laws of the EU from 1970.¹¹⁰ The European Court of Justice has incorporated the legitimate expectations principle into its review of legality since the 1970s.¹¹¹ It aimed at keeping the balance between public interests and individuals expectations.¹¹² According to this principle if any person holds certain reasonable expectations with regard to future activity of the government, this individual can require those expectations to be satisfied unless there exist convincing public interest.¹¹³ To put it another way, this principle provides for security of participants on the market against any unreasonable and unforeseeable effects, as results of judicatures' discretionary right to implement new rules or decisions.¹¹⁴

The principle of legitimate expectations is similar to the principle of legal certainty, which ensures citizens to be certain about activities of the state that might affect their rights and be able to act according to the situation.¹¹⁵ The principle of legal certainty shall secure that a citizen can predict possible State action affecting him and act accordingly. Thus, legal certainty and legitimate expectations are interrelated principles, which provide a common justification in the need for security and predictability. The implementation of legitimate expectations and legal certainty principles has to generally guarantee the human needs of safety and predictability.¹¹⁶ While applying the principle of legitimate expectations, the European Court of Justice stressed that “there cannot be any doubt about the law, applied at that moment in a particular area and about fairness or illegality of any law or actions”.¹¹⁷

In other words, this principle prevents the retroactive application of the law, especially if it concerns the laws that establish any kind of penalties. Legal certainty is an objective value and has to ensure the processes of legislation and administration.

¹¹⁰ Birutė Pranevičienė and Kristina Mikalaukaitė-Šostakienė, *Guarantee of Principles of Legitimate Expectation, Legal Certainty and Legal Security in the Territorial Planning Process*, 2012, Pg. 647

¹¹¹ Case 112/77 August Topfer and Co GmbH v. Commission [1978] ECR 1019

¹¹² Birutė Pranevičienė and Kristina Mikalaukaitė-Šostakienė, *Ibid*, Pg. 647

¹¹³ Giraud Adrien, *Common Market Law Review* 45: 1399–1431, Kluwer International (2008) *A Study of the Notion of Legitimate Expectations in State aid Recovery Proceedings: “Abandon All Hope, Ye Who Enter Hhere”?*, pg. 3-4

¹¹⁴ Giraud Adrien *Ibid*, pg. 4

¹¹⁵ Birutė Pranevičienė and Kristina Mikalaukaitė-Šostakienė, *Ibid*, pg. 648

¹¹⁶ Birutė Pranevičienė and Kristina Mikalaukaitė-Šostakienė, *Ibid*, pg. 648

¹¹⁷ R. v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa, Case C-331/88, 1990 ECR I-4023.

The question arises is that is it possible to recover an illegitimate measure when a government confers an advantageous measure to recipient and accordingly the beneficiary has legitimate expectation?

4.2 Legitimate Expectations and Recovery of State aid

Pursuant to Article 288 of the TFEU, commission's decisions are totally binding for those to whom they are addressed. As a result, the Member State to which a recovery decision is addressed is obliged to implement this decision.¹¹⁸ In this context, the national court has no jurisdiction to declare the commission's decision invalid and it has to implement it.¹¹⁹

However, in the EU context, apart from *de minimis rule* which indicates that an aid of no more than EUR 200,000 granted over a period of three fiscal years does not regard as state aid within the meaning of Article 107(1) TFEU,¹²⁰ there can be some exceptional circumstances in which the recovery of unlawful State aid would not be appropriate.

According to the "*SFEI-doctrine*",¹²¹ national courts may refrain from ordering recovery when exceptional circumstances prevail.¹²² In addition to this doctrine, the Procedural Regulation imposes a restriction on the Commission's power to order recovery of illegal and incompatible aid. Article 14(1) of the Procedural Regulation provides that the Commission shall not compel recovery of the aid if this would be in conflict with a general principle of law. The general principles of law most often invoked in this respect are the principles of the "*protection of legitimate expectation*"¹²³ and the principle of "*legal certainty*"¹²⁴. What is important regarding the possibility to invoke the principle of protection of legitimate expectations is that this principle is only for the recipient of the aid and not the member state involved that may have

¹¹⁸ Case 94/87, Commission v Germany, [1989] ECR 175.

¹¹⁹ Commission notice on the enforcement of State aid law by national courts, (2009/C 85/01),, pg. 14

¹²⁰ Commission Regulation (EC) No 1998/2006, of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid, L 379/5 (2006), Par. 8. However, it should be noticed that Regarding to road transport this specific ceiling is EUR 100 000.

¹²¹ Case 120/73 Gebrüder Lorenz GmbH [1973] ECR 01471 para. 8 and Case C-39/94 Syndicat Français de l'Express International (SFEI) [1996] ECR I-3547.

¹²² Commission notice on the enforcement of State aid law by national courts, (2009/C 85/01), Par. 32

¹²³ On the principle of the protection of the legitimate expectations, see Case C-24/95, Alcan, [1997] ECR I-1591, paragraph 25, Case C-5/89, BUG-Alutechnik, [1990] ECR I-3437, paragraphs 13 and 14. For an example where the ECJ recognised the existence of legitimate expectations on the side of the beneficiary, see Case C-223/85, RSV, [1987] ECR 4617.

¹²⁴ On the principle of legal certainty, see T-115/94, Opel Austria GmbH v Council, [1997] ECR II-00039 and Case C-372/97, Italy v Commission, [2004] ECR I-3679, paragraphs 116 to 118, Joined Cases C-74/00 P and C-75/00, P Falck and Acciaierie di Bolzano v Commission, [2002] ECR I-7869, paragraph 140. See also Case T-308/00, Saltzgitter v Commission, [2004] ECR II-01933, paragraph 166.

such expectations.¹²⁵ In addition, the recipient can only claim legitimate expectations when they are the result of an EU institution's conduct.¹²⁶ In other words, a recipient cannot invoke legitimate expectations to Commission or ECJ because of any conducts done by national authorities.

It is important to note that a review of the jurisprudence indicates that the ECJ has always given a very restrictive interpretation to these principles in the context of recovery.¹²⁷ In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead “*legitimate expectation*” against a Commission recovery order.¹²⁸ For instance, in the *Commission v Germany*,¹²⁹ the ECJ held that, if the aid has not been granted in conformity with State aid rules, an undertaking cannot entertain a legitimate expectation and a diligent businessman is normally expected be able to find out whether that procedure has been met.¹³⁰

4.3 Legitimate Expectations and Recovery of Export Subsidy

In the WTO context, this issue raises the same question; would an export-oriented industry invest in new facilities if it knew the risk of retraction of the export subsidy and if it was expected it would be risked by being ordered to repay the measure at issue?

The WTO, however, has not concerned itself at all with the domestic legal issues that might arise from its recommendations, reflecting a principle in international law that domestic law cannot be an excuse for not performing international obligations.¹³¹ Article 27 of the Vienna Convention on

¹²⁵ As provided by Case C-5/89 *Commission v Germany*, para. 17: “a member state whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 (now 87 & 88) of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness.”

¹²⁶ Case T-109/01 *Fleruren Compost*, para. 137

¹²⁷ Notice from the Commission Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (2007/C 272/05) Official Journal of the European Union, Par. 20

¹²⁸ Case C-5/89, *Commission v Germany*, cited above footnote 51, paragraph 14; Case C-169/95, *Spain v Commission*, [1997] ECR I-135, paragraph 51; and Case C-148/04, *Unicredito Italiano*, [2005] ECR I-11137, paragraph 104.

¹²⁹ Case C-5/89 *Commission v Germany*

¹³⁰ Commission notice on the enforcement of State aid law by national courts, (2009/C 85/01) Par. 32. This fact has been invoked by the ECJ in these cases: Case C-5/89, *Commission v Germany*, cited above footnote 51, paragraph 14; Case C-24/95, *Alcan Deutschland*, [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03, *Atzeni and Others*, cited above footnote 34, paragraph 64

¹³¹ Andrew J. Green, et. Al, *Ibid*, Pg. 44

the Law of Treaties explicitly states that “A party may not invoke the provisions of its internal law as justification for the failure to perform a treaty.”¹³²

Summary

The question that may arise in regard to implementation of a recovery decision is whether the recovery of an unlawful measure is in conformity with legitimate expectations principle and legal certainty? In the EU context, the answer is clear. Due to the fact that a diligent businessman is expected to be able to verify whether the aid he received was in accordance with the State aid rules or not, it has been always held by the ECJ that a recipient of prohibited aid cannot plead principle of “*legitimate expectation*” against a Commission recovery decision. In addition, this principle may be invoked only by the recipient of the aid and not the member states concerned. And the recipient can only entertain legitimate expectations when they are the outcome of an EU institution’s conduct. Therefore, a beneficiary cannot appeal to the ECJ or the Commission because of a national author’s conduct.

The same question may arise in respect to withdrawal of export subsidy. Would an export-oriented business invest in new facilities if it knew the risk of recovery of the export subsidy and if it was expected it would be risked by being ordered to pay back the granted Export subsidy? Being public international law, the WTO, has never concerned itself with the domestic legal issues that might arise from its recommendations.¹³³ This reflects an important principle in international law that domestic law cannot be a justification for not implementing international obligations.¹³⁴

¹³² Goh and Ziegler, Ibid, pg. 555-556.

¹³³ Andrew J. Green, et. Al, Ibid, Pg. 44

¹³⁴ Article 27 of the Vienna Convention on the Law of Treaties

Chapter 5- Concluding Remarks and implications for withdrawal of export subsidies

This contribution sought to provide an analytical and comparative framework for the Recovery of WTO export subsidies and EU State aids as a remedy for violation of the rules which prohibit granting of these unlawful measures. In the lights of all foregoing, it can be concluded that “*Withdrawal*” of Export subsidies, has a similar meaning to “*Recovery*” of State aids. The withdrawal can be defined as to “remove” or “to take away” the unlawful measure which has been enjoyed by recipient; not a mere “cessation and non-repetition”. To withdraw a subsidy also differs from to bring the measure in question into conformity with the recommendation of a WTO judicative body. Nevertheless, this recovery does not include the interest as it is the case in terms of State aid provisions. After the decision of WTO judicative body in Australia-Automotive Leather the WTO came one step closer to a more efficient approach in recovery of unlawful Export subsidies. Prior to implementation of panel’s decision in this case, it was broadly understood by WTO Members that the SCM agreement did not provide for retrospective remedies. This case for the first time indicated that the recovery of subsidy is not limited to purely prospective action, but it may encompass repayment of prohibited subsidies.

However, contrary to what discussed in regard to State aid, the WTO’s judicative bodies are still reluctant to include “the order of repayment of interests of illegal export subsidies” in their decisions and to reinstate *status quo ante* by requiring the beneficiary of the illegal export subsidy to pay back what they have enjoyed in the past. It will be, therefore, interesting to see in the future how far that WTO judicative bodies will go in this respect and order for repayment of interest of an unlawful export subsidy as the EU implements in terms of illegal State aid.

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