DISCIPLINING THE RESPONSES TO CROSS-BORDER SUBSIDIES: THE CASE STUDY OF EU TRADE REMEDY INVESTIGATION AGAINST PRODUCTS FROM INDONESIA AND IMPLICATIONS FOR THAILAND

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ABSTRACT

The escalating geopolitical tensions between China and the United States have intensified competition in the trade field, with subsidies playing a significant role. This dynamic is particularly relevant for Indonesia and Thailand, both of which are strategically positioned in global trade relations with China, the EU, and the US. On the one hand, both countries have emerged as the most attractive destinations for China's BRI investment in ASEAN; on the other hand, they are increasingly subjected to trade remedy investigations by the EU and the US. This research explores how trade remedy rules are applied to cross-border subsidies, focusing on the practices of the EU in the BRI context. By analysing existing WTO subsidy rules and the EU's actions against products from Indonesia, this research sheds light on the implications for Thailand in securing its economic interests in the global market. The analysis reveals that, while WTO rules offer remedies for certain subsidies, cross-border subsidies pose unique challenges due to their transnational nature. Case studies indicate that the EU has expanded the application of WTO trade remedy rules to address these issues under the BRI. A WTO-consistent approach to cross-border subsidies must strike a delicate balance between mitigating their trade-distortive effects and facilitating development. For Thailand to remain competitive as a leading investment destination in ASEAN, leverage the benefits of the BRI, and assist its industries to move up the value chain, it is crucial to prioritize development needs in its proposal for WTO subsidy rule reforms.
Keywords: WTO Subsidy Rules, Cross-Border Subsides, Trade Remedies, the BRI

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I. INTRODUCTION

With the increasing geopolitical confrontation between China and the US, there has been a corresponding fight in the trade field to which the subsidy issue is a significant contributor. The Belt and Road Initiative (BRI), launched in 2013, has further intensified this tension, with China spearheading large-scale investments in infrastructure and production capacity across participating countries on the one hand, and the US and the EU taking countervailing measures against cross-border subsidies on the other hand. This trend is particularly evident for Indonesia and Thailand, strategically positioned in international trade relations with China on one side and the US and EU on the other. As both countries increasingly find themselves subjected to trade remedy investigations, this raises important questions about the limits of trade remedies in response to subsidy practices in international trade .Historically, subsidies were primarily directed toward domestic producers in exporting countries, and the regulatory responses are domestically focused. The case of Indonesia prompts us to consider to what extent a third country should be held accountable for China's subsidy practices .In this regard, insights gained from Indonesia's experience as a target of an EU anti-subsidy investigation in the context of the BRI will be highly valuable for Thailand.

The scope of this research is limited to cross-border subsidies in the context of international trade in goods under the BRI .The examination specifically centres on WTO rules governing subsidies, notably the GATT 1994 and the SCM Agreement.

II. THE RULES OF THE GAME AS SUCH

Are Cross-Border Subsidies Caught in the Net of WTO Law?

For many centuries, trade was mostly about raw materials or finished products from country A being exported to country B for use or consumption in the latter country. However, when Country A starts to invest in Country B, and the business established in Country B (i.e. Company B) starts manufacturing and exporting its products to Country C, a cross-border subsidy may arise. This occurs if Country A grants a preferential loan to Company B for production, resulting in the subsidised products entering into the commerce of Country C as an importing country. In this scenario, is there a specific subsidy within the meaning of the SCM Agreement when the recipient of the benefit (i.e. Company B) operates outside the territory of the subsiding Member (i.e. Country A)?

Subsidies, in general, are subject to an intricate set of rules under WTO law. In the field of trade in goods, the GATT 1994 established basic rules on WTO treatment of subsidies and provided for the manner in which WTO Members may respond to injurious subsidised trade. This is further expanded upon by the SCM Agreement with detailed rules concerning subsidies and countervailing measures.

1) The definition of subsidy under the SCM Agreement

The SCM Agreement contains a detailed and comprehensive definition of the concept of “subsidy”. Broadly speaking, a subsidy exists in the WTO context, if there is a financial contribution by a government or any public body within the territory of a Member, which confers a benefit. According to Article 1.1 of the SCM Agreement, this general “subsidy” definition is set forth “for the purpose of this Agreement”. Therefore, wherever the word “subsidy” appears throughout the SCM Agreement, this definition applies.

A further reading and analysis of the legal text of Article 1.1 of the SCM Agreement indicate that there are three constituent elements of the concept of “subsidy”, namely (i) a financial contribution; (ii) a financial contribution by a government or any public body within the territory of a Member; (iii) a financial contribution conferring a benefit. In this regard, we address in turn these three elements in the context of cross-border subsidies under the Belt and Road Initiative.

2) Financial Contribution

Article 1.1 of the SCM Agreement provides an exhaustive list of the types of transactions that constitute financial contributions, which are presented as four main categories: (i) direct transfer of funds, (ii) government revenue, otherwise due, that is forgone or not collected, (iii) provision or purchase by a government, and (iv) payments to a funding mechanism or financial contribution through a private body. As the Appellate Body noted in *US-Softwood Lumber IV (2004)*, while the list provided is exhaustive, the concept of "financial contribution" remains broad.

In terms of direct transfers of funds, grants, loans and equity infusion are expressly cited as examples. However, the Appellate Body found in *Japan-DRAMs (Korea) (2007)* that "direct transfers of funds are not confined to situations where there is an incremental flow of funds to the recipient that enhances the net worth of the recipient". Instead, it captures "conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient". Therefore, transactions that are similar to those expressly cited are also covered by the provision of Article 1.1(a)(1)(i) of the SCM Agreement, such as bank acceptance drafts equivalent to short-term loans or credit lines that are free of charge.

With regard to cross-border subsidies and in the context of the Belt and Road Initiative, financing takes mainly the form of loans from Chinese banks, investment funds and also multilateral financial institutions. The China Development Bank (CDB) was the largest funding source for the BRI and had provided around $196 billion in loans by the end of 2018, accounting for 26 percent of the total amount of the BRI financing. Meanwhile, the credit lines provided by the Bank of China amounted to $130 billion, supporting more than 600 projects in countries and regions along the Belt and Road. The source of BRI financing includes other forms of lending from Chinese government-sponsored bilateral funds and equity financing of Chinese state-owned enterprises. These transactions may arguably fall within the meaning of "direct transfer of funds" and thus constitute "financial contribution" in Article 1.1(a)(1) of the SCM Agreement.

3) Financial Contribution by "a Government or a Public Body"

Article 1(a)(1) of the SCM Agreement further provides that a financial contribution must be made by "a government or a public body within the territory of a Member" to be qualified as a subsidy under Article 1.1. In this section, we will first address the issue of the "public body" and subsequently discuss the limitations pertaining to "the territory of a Member."

a) Public Body

In the context of Article 1(a)(1) of the SCM Agreement, public bodies refer not to any entity controlled by the government, but to entities that share essential characteristics with the government. In this respect, the Appellate Body found that "the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body". In other words, "government" and "a public body" both possess, exercise or are vested with governmental authority. The Appellate Body recognised that a public body's precise contours and characteristics vary depending on the entity, state, and specific case. Therefore, a holistic assessment is necessary, focusing on the entity itself, its core characteristics, and its relationship with the government, while also considering the legal and economic environment in which the entity operates.

Taking this back to the scenario of cross-border subsidies under the BRI, while financial contributions do not come directly from the Chinese government, its state-owned banks are usually the major sponsors behind the funding entities of the BRI. These entities may thus fall within the scope of a public body under Article 1.1(a)(1) of the SCM Agreement as entities that possess, exercise or are vested with governmental authority. In addition, the conduct of a private body may also be attributed to a government when there is an additional link established between the government and the conduct of a "private body", giving rise to a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. However, the contentious issue regarding cross-border subsidies under the BRI is whether the exporting country should be held accountable for China's subsidy practices, especially when the Chinese government or its public bodies providing the subsidy are not located within its territory.

b) Within the Territory of a Member

Article 1.1(a)(1) of the SCM Agreement reads that 'there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")'.The phrase "within the territory of a Member" sets territorial confinement for the collective term "government" that appears in parentheses and that encompasses both "a government" and "any public body", rather than the term "financial contribution".

This understanding is supported by the legislative history mentioned by Horlick, where the term "within the territory' in Article 1.1 of the SCM Agreement was added with regard to the US negotiators' concerns of opening a "can of worms" as the US was the largest single donor of overseas assistance at that time. Similarly, the WTO Expert Group on Trade Financing in 2004 noted that no Member has challenged aid provided by multilateral development institutions as a subsidy in the WTO context, with many members believing it falls outside the scope of the SCM Agreement. In other words, the modifier term "within the territory of a Member" in the definition of subsidy under the SCM Agreement only refers to the subsidy provider (i.e. a government or a public body) and does not concern the "financial contribution" or the "recipient" thereof. WTO case law and the legal text per se say little about whether the "Member" under Article 1.1 of the SCM Agreement should be understood as meaning the Member whose goods are allegedly subsidised, i.e. the exporting Member. However, based on the foregoing analysis, it is clear that Article 1.1 of the SCM Agreement sets no territorial limitation on the location of the recipient of the benefit and does not exclude subsidies given to a recipient outside the territory of the subsidising Member. In this sense, cross-border subsidies arguably fall within the scope of subsidies defined by the SCM Agreement.

4) Financial contribution "conferring a benefit"

A financial contribution by a government or public body qualifies as a subsidy under Article 1.1 of the SCM Agreement only if it confers a benefit. In other words, a "financial contribution" and a "benefit" are two separate legal elements that collectively determine the existence of a subsidy within the meaning of Article 1.1 of the SCM Agreement.

With regard to "benefit" within the meaning of Article 1.1(b) of the SCM Agreement, the Appellate Body held that it implies some kind of comparison in determining whether a "benefit" has been "conferred and thus makes the recipient better off. In this sense, there must be a recipient of the benefit, and the focus of the inquiry under Article 1.1(b) of the SCM Agreement should be on this recipient rather than the granting authority. This is supported by Article 14 of the SCM Agreement, which provides guidelines for calculating the amount of a subsidy in terms of "the benefit to the recipient".

Moreover, the recipient of the benefit can be different from the recipient of the financial contribution. This is the case for buyer export credit, where the recipient of the financial contribution is the foreign buyer, but a subsidy is defined in terms of the benefit received by the exporting producers from whom the buyer purchased. Indeed, the recipient of the benefit needs to be 'the producer of the exported goods subject to the countervailing investigation'.

This situation aligns with the scenario of cross-border subsidies, where the recipient of the financial contribution is the parent company at home, while the recipient of the benefit is the subsidiary established overseas as an exporting producer. Therefore, it can be argued that a financial contribution in the context of cross-border subsidies confers a benefit on a recipient (beyond the territory), thereby constituting a subsidy within the meaning of Article 1.1 of the SCM Agreement.

What Remedies are Available against Cross-Border Subsidies under WTO Law?

The WTO rules on subsidies and responses thereto are set out in Articles VI and XVI of the GATT 1994 and, most importantly, in the SCM Agreement. These rules, including the disciplines on remedies, do not apply to all subsidies but only to subsidies that are specific in one of the following ways.

1) Requirement of "Specificity" of the Subsidy

The first situation where a subsidy is deemed "specific" involves a government targeting a particular company, industry, or group of companies or industries for subsidisation (enterprise or industry specificity). The second situation involves a government targeting producers in specified parts of its territory for subsidisation (regional specificity). The third situation involves a government targeting export goods or goods using domestic inputs for subsidisation (specificity of prohibited subsidies).

In this vein, subsidies with enterprise or industry specificity and subsidies with regional specificity are not prohibited but are actionable under the SCM Agreement. In other words, these subsidies are challengeable when they cause adverse effects to the interests of other WTO Members. In contrast, subsidies contingent upon either export performance (i.e. export subsidies) or the use of domestic over imported goods (i.e. import substitution subsidies) are deemed specific in themselves and thus prohibited.

For actionable subsidies, the requirement of specificity poses an additional limitation on the location of the recipient of the subsidy, where the subsidies are specific to certain enterprises "within the jurisdiction of the granting authority". While there has been limited discourse in WTO jurisprudence regarding the phrase "within the jurisdiction", the legislative history of the SCM Agreement and the view taken by the Appellate Body supported that the term "jurisdiction" in Article 2.1 of the SCM Agreement is meant to be seen in the spectrum of territory. In other words, for actionable subsidies, the subsidy recipient needs to be located within the territory of the subsidising Member.

2) Multilateral Remedies

The SCM Agreement provides multilateral remedies for both prohibited subsidies and actional subsidies in Article 4 and Article 7 respectively. They are principally the remedies for breach of the WTO law, including consultation, adjudication, recommendation for withdrawal and authorised countermeasures in the event of noncompliance.

As discussed above, the specificity requirement outlined in Articles 1.2 and 2 of the SCM Agreement mandates that subsidies must be specific to certain enterprises within the territory of the granting Member to be actionable. In this sense, cross-border subsidies are not within the realm of actionable subsidies eligible for multilateral remedies under the SCM Agreement, given that the recipients of such subsidies are located beyond the territory of the granting Member. In terms of prohibited subsidies, cross-border subsidies may qualify as export subsidies when they are contingent upon export performance. However, it seems unlikely that the provision of cross-border subsidies is conditional on the use of domestic over imported goods and thus constitutes import subsidisation subsidies.

Based on the foregoing analysis, it could be argued that WTO law, mainly the GATT 1994 and the SCM Agreement, does provide multilateral remedies against cross-border subsidies. However, the availability of such remedies is limited. On the one hand, cross-border subsidies would not qualify as actionable subsidies eligible for remedies under Article 7 of the SCM Agreement due to the absence of the subsidy recipient within the territory of the subsidizing member. On the other hand, while cross-border subsidies could be classified as prohibited subsidies and thus subject to remedies under Article 4 of the SCM Agreement if their provision is contingent upon exportation, it is unlikely that they would be specific to be considered import substitution subsidies and therefore prohibited.

3) Unilateral Remedies

Apart from resorting to multilateral remedies, Article VI of the GATT 1994 and Part V of the SCM Agreement allow WTO Members to take unilateral countervailing measures against prohibited and actionable subsidies which cause injury to the domestic industry, provided that the substantive and procedural requirements set out in WTO law and corresponding domestic regulation governing countervailing measures are observed. In this regard, the SCM Agreement provides for three types of countervailing measures, namely provisional countervailing measures (Article 17), voluntary undertakings (Article 18), and definitive countervailing duties (Article 19).

According to Article 1.2 and Article 2 of the SCM Agreement, the availability of unilateral remedies or countervailing measures under the WTO law for actionable subsidies is also on the condition that the subsidy recipient is "within the jurisdiction of the granting authority". As discussed above, this is not the case for cross-border subsidies. More specifically, in the context of cross-border subsidies, no countervailing measure is authorised against the subsidising Member under WTO law due to the absence of the subsidy recipient within its territory; Likewise, no countervailing measure is authorised against the exporting Member as it is not the granting authority. While countervailing measures could be available for cross-border subsidies contingent upon export performance with the specificity of prohibited subsidies, the procedural framework outlined in Part V of the SCM Agreement does not address the subsidising Member if it is not the exporting Member.

In short, while WTO law enables Members to take unilateral countervailing measures against injurious subsidies, certain conditions must be met. Challenges arise in cases of cross-border subsidies, where the absence of the subsidy recipient within the granting authority's jurisdiction limits the effectiveness of countervailing measures. Moreover, procedural aspects of the WTO law suggest a presumption that subsidising and exporting Members are one and the same entity, potentially excluding cross-border subsidies from countervailing measures.

III. THE RULES OF THE GAME AS APPLIED

This chapter seeks to analyse the trade remedy practices employed by the European Union in addressing the issue of cross-border subsidies, particularly within the context of the BRI. By examining the recent practices of the EU, recognized as one of the world's leading trade players and a frequent user of trade remedies, this chapter aims to provide a clearer understanding of how the existing trade remedy rules apply to cross-border subsidies in practice. The analysis will focus primarily on the EU's anti-subsidy investigation against imports of cold-rolled steel from Indonesia.

Case Background

In January 2021, the EU Commission received a complaint to initiate an anti-subsidy investigation concerning imports of stainless steel cold-rolled flat products ("SSCR") from Indonesia. The complainants alleged that the exporting producer in Indonesia (i.e. IRNC) is located in the Morowali Industrial Park ("the Morowali Park"), which was established through bilateral cooperation between the governments of China and Indonesia and is managed by a Sino-Indonesian company, IMIP, that formally started its operations in October 2013. The complainant contended that the producers in Indonesia benefit from financial contributions linked to the development of Indonesian industry through Chinese investment especially in the context of BRI launched in 2013. In this regard, the complainant highlighted that the government of Indonesia not only actively sought, acknowledged and adopted as its own the Chinese financing, but it also allegedly exercised pressure on the Chinese government to support Chinese companies to move their smelting activities to Indonesia. In response to these complaints, the EU Commission initiated the anti-subsidy investigation in February 2021, which it subsequently concluded in March 2022.

Forms of Financial Contribution
The cross-border subsidies targeted by the EU Commission in the case at hand are mainly preferential financing from China, which accounts for more than one-third of the subsidies deemed as provided by the government of Indonesia and subsequently countervailed. Given that the concept of "financial contribution" under Article 1.1 of the SCM Agreement is inherently broad, the preferential financing identified by the EU Commission takes multiple forms, including direct transfers of funds, provision of goods, and payments to funding mechanisms.
More specifically, support for capital investment constitutes over 70 per cent of the total subsidy amount established as preferential financing by the EU Commission. This includes equity injection, the provision of capital in kind for less than adequate remuneration, and interest-free loans from the shareholders of the companies under investigation. Additionally, loans and credit lines extended by China's state-owned banks (i.e. Eximbank, China Development Bank, Bank of China, Industrial and Commercial Bank of China) are recognised as other forms of preferential financing and thus fall under the financial contribution identified by the EU Commission.
Government or Public Body
As previously mentioned, Article 1.1(a)(1) of the SCM Agreement stipulates that the entity providing the financial contribution must be "a government or any public body within the territory of a Member." However, both WTO case law and the text of the SCM Agreement itself offer limited guidance on whether the term "Member" in this context refers specifically to the Member whose goods are allegedly subsidized, i.e., the exporting Member. On this point, how the EU transposed the SCM Agreement into its domestic law through the Basic Regulation sheds light on the interpretation of this provision.
According to Article 2 of the Basic Regulation, the term "government" is previously defined as "a government or any public body within the territory of the country of origin or export". Article 3 further provides that a subsidy exists only if "there is a financial contribution by a government in the country of origin or export". Together, these provisions indicate that the government or public body providing the financial contribution must be located within the territory of the exporting country, excluding the scenarios of cross-border subsidies.
However, the EU Commission opted to countervail the cross-border subsidies in the case at hand by introducing an external "acknowledgement and adoption" rationale. Meanwhile, it applied by analogy the intrinsic links established by the Basic Regulation, the SCM Agreement and relevant WTO case law between the government act and the conduct of the private body to the relation between the action of China and the government of Indonesia. This reasoning led to the conclusion that the preferential financing granted by the Chinese government could be considered a financial contribution by the Indonesian government.
1) The "acknowledgement and adoption" rationale
Firstly, rather than focusing on the territory where the provider of the financial contribution is located, the EU Commission argues that the phrase "by the government" in the chapeau Article 1.1(a)(1) of the SCM Agreement should be interpreted in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Article 31(3)(c) of the VCLT requires that "any relevant rules of international law applicable in the relations between the parties" be considered when interpreting the terms of a treaty. In this context, the EU Commission, citing the Appellate Body's findings in US-Anti-Dumping and Countervailing Duties (China) (2011), considered Article 11 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) to be a relevant rule of international law. Article 11 of the ILC Articles states that conduct not initially attributable to a State can still "be considered an act of that State under international law if, and to the extent that, the State acknowledges and adopts the conduct as its own."

On this basis, the EU Commission highlighted several documents and agreements of bilateral cooperation between the Indonesian and Chinese governments, including the Memorandum of Understanding under the Belt and Road Initiative (BRI). It further argued that the close collaboration within the Morowali Park, along with the fact that the park is managed by IMIP—a Chinese-Indonesian company entrusted by both governments—demonstrates joint management by the Indonesian and Chinese governments. Based on this evidence, both in text and practice, the EU Commission concluded that the Indonesian government had induced, actively sought, acknowledged, and endorsed the Chinese preferential financing. Therefore, the Commission determined that the preferential financing provided by the Chinese government to SSCR exporting producers in Morowali Park amounted to a financial contribution by the Indonesian government.

By applying the "acknowledgement and adoption" rationale, the EU Commission bypassed the requirement of "within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement, as well as the requirement of "in the country of origin or export" in its Basic Regulation. However, the foundation of this rationale, i.e. the ILC Articles, remains questionable.

First, the Commission's reliance on Article 11 of the ILC Articles as a relevant rule of international law to interpret the term "by the government" in Article 1.1(a)(1) of the SCM Agreement in light of Article 31(3)(c) of the VCLT is unpersuasive. WTO Appellate Body jurisprudence allows reference to general international law in interpreting WTO rules only when three conditions are met: 1) the rule constitutes international law; 2) it is relevant; and 3) it applies to WTO Members. Not all provisions of the ILC Articles automatically meet these criteria, and each provision's relevance must be assessed on a case-by-case basis. In this case, Article 11 of the ILC Articles, which addresses the attribution of conduct between states, is not relevant to Article 1 of the SCM Agreement, as the latter does not concern inter-state attribution issues. Therefore, Article 11 of the ILC Articles is not applicable for interpretation in the case at hand.

Second, the US-Anti-Dumping and Countervailing Duties (China) (2011) case is distinguishable and not directly applicable to the present case. In US-Anti-Dumping and Countervailing Duties (China) (2011), the Appellate Body recognized that certain provisions of the ILC Articles could be considered "relevant" rules of international law, but only to the extent that Articles 4, 5, and 8 of the ILC Articles correspond to the types of entities whose actions may be attributed to a government under the SCM Agreement. Specifically, Article 4 relates to state organs akin to a "government" under Article 1.1(a)(1) of the SCM Agreement; Article 5 pertains to entities exercising governmental authority, comparable to a "public body" under the same provision; and Article 8 addresses persons directed or controlled by a state, similar to a "private body" entrusted or directed by the government under Article 1.1(a)(1)(iv) of the SCM Agreement. However, the Appellate Body did not extend this consideration to Article 11 of the ILC Articles, which deals with a state's acknowledgement and adoption of conduct. Similarly, this omission suggests that Article 11 was not deemed relevant for interpreting Article 1.1(a)(1) of the SCM Agreement

2) The "demonstrable link"

In addition to relying on external rules of international law for the interpretation of WTO provisions and the provisions of the Basic Regulation, the Commission also sought to anchor its reasoning within the WTO framework.

As previously noted, the WTO Appellate Body has underscored the necessity of establishing a demonstrable link between governmental actions and the conduct of a "private body" giving rise to a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. In this context, the Commission asserted that the possibility of governments to provide financial contributions indirectly through private entities is neither exogenous to the Basic Regulation nor to the SCM Agreement. Specifically, when governments entrust or direct private entities to undertake certain actions, a pivotal consideration is the existence of a demonstrable link between the government's action and the conduct of the private body. In the matter at hand, there exists a clear and explicit link between the preferential financing by China and the Government of Indonesia. Thus, the Commission determined that the preferential financing granted by China can be attributed to the government of Indonesia

Admittedly, a demonstrable link may serve as a basis for attributing the actions of a private entity to a government. However, it does not provide a basis for analogously attributing the actions of one state to another in WTO law, as Article 1 of the SCM Agreement contains no provisions addressing the attribution of conduct between two states with respect to subsidies.

Benefits Conferred

As analysed above, a financial contribution by a government or public body qualifies as a subsidy under Article 1.1 of the SCM Agreement only if it confers a benefit. According to Article 14 of the SCM Agreement, the calculation of the benefit implies some kind of comparison and a benchmark reflective of the prevailing market conditions in the country of the financial contribution provider. On this basis, the use of out-of-country benchmarks is allowed when in-country prices are distorted as a result of governmental intervention in the market.

In the case at hand, the EU Commission disregarded the benchmark from the Indonesian market concerning loans from Chinese banks, as it did not reflect the specific circumstances of the case. Instead, the benchmarks are selected from the Chinese financial market, adding the risk premium linked to the investment in Indonesia. In establishing the benchmark for purchases of production equipment, the EU Commission referred to European or American equipment as a benchmark in the absence of any reply from Chinese-related companies on the origin of the equipment.

It is apparent that Indonesia, as an exporting country in this matter, assumes a relatively passive role in the selection of benchmarks for the calculation of the benefits conferred. In contrast, the EU Commission, as the investigating authority, possesses considerable discretion in determining the appropriate benchmark for cross-border subsidies. It may select a benchmark from China (as the *de facto* financial contribution provider) or from Indonesia (as the *de Jure* provider as a result of the "acknowledgement and adoption" rationale). Moreover, the Commission retains the option to construct an out-of-country benchmark given the specific circumstances of the case at hand.

Specificity

As previously discussed, WTO trade remedy rules do not apply to all subsidies but only to subsidies that are specific and thus actionable or prohibited. Additionally, the availability of countervailing measures under the WTO law for actionable subsidies is contingent upon the subsidy recipient being "within the jurisdiction of the granting authority".

Similarly, the EU Commission circumvented the requirement that the subsidy recipient be "within the jurisdiction of the granting authority" by applying the "acknowledgement and adopting" rationale, thereby treating the Indonesian government as the granting authority for the preferential financing from China. Relying on this flawed reasoning, the EU Commission concluded that the countervailable subsidies covered by the cooperation between Indonesia and China were regionally specific, as they were limited to companies operating in Morowali Park, which falls within the jurisdiction of the Indonesian government as the granting authority.

In this respect, the EU Commission failed to provide any evidence demonstrating that the "preferential financing" was either *de jure* or *de facto* limited to companies in Morowali Park. Moreover, even if the Indonesian government is accountable for the actions of the Chinese government (*quod non*), there remains a significant logical gap between the assertion that the Indonesian government is accountable and the claim that it is the granting authority itself.

IV. IMPLICATIONS FOR THAILAND

Thailand as an Exporting Country

Thailand has a similar situation to that of Indonesia in the previously examined case, wherein China provides preferential financing in the context of the BRI and the bilateral cooperation for cross-border investment projects. The EU's approach to incorporating third-party subsidies from China into its investigations signals a shift in how trade remedies are interpreted and applied, thereby raising the stakes for Thai exporters who may face similar challenges.

More specifically, the EU's approach—characterizing subsidies provided by third countries as domestic subsidies through treaty interpretation and attribution analysis—complicates the regulatory landscape for exporting countries like Thailand. This methodology increases the difficulty for Thai exporters to fully cooperate with investigating authorities, as they are not the granting authority for the subsidies in question and contain no relevant information, potentially undermining their ability to present a robust defence.

Furthermore, by applying the "acknowledgement and adoption rationale", the investigating authority can extend controversial trade remedy practices traditionally applied to China to third countries in the context of cross-border subsidies. This includes methodologies such as public body analysis, non-market economy considerations, significant market distortion assessments, and out-of-country or surrogate benchmarks. The case of Indonesia is not an isolated instance. Indeed, it reflects a systemic practice followed by the EU Commission in its countervailing measures against glass fibre products from Egypt, which also pertains to cross-border subsidies. Consequently, the EU's approach to addressing cross-border subsidies is expected to broaden the scope of trade remedy rules and increase the potential for abuse of countervailing measures. In this context, Thailand, as an exporting Member, has to bear the impact of such measures on its own given that the countervailing duties are imposed against imports originating therein.

Thailand on the Receiving End of the BRI

It is worth noting that Egypt and Indonesia serve as pivotal countries in the "Silk Road Economic Belt" and the "21st Century Maritime Silk Road" respectively, highlighting the EU's targeted approach towards investment and trade activities along the Belt and the Road.

Thailand was among the first countries to engage with China's BRI shortly after its inception in 2013. Since then, Thailand has attracted significant Chinese investment in key sectors such as energy, logistics, and manufacturing, benefiting from BRI-related financial support. The Rayong Industrial Park in Thailand exemplifies bilateral cooperation between Thailand and China under the BRI. Supported by Chinese investment, the park has developed a tyre manufacturing base, which leverages Thailand's natural rubber resources and helps mitigate the impact of the U.S.'s anti-dumping and countervailing measures on Chinese tyre products.

Indeed, foreign investment has played a crucial role in driving development. Developing countries have increasingly recognized it as a key factor for economic growth, modernization, higher income, and job creation. This holds for countries receiving BRI-related investment. In this sense, bluntly applying the SCM Agreement's rules to cross-border subsidies could substantially restrict the ability of developing countries to boost their development by attracting foreign companies. Such an approach could undermine Thailand's capacity to capitalise on growth opportunities and to assist its industries to move up the value chain in the context of the BRI, potentially depriving the country of the benefits derived from foreign investment.

Proposal for Thailand's Position

Admittedly, cross-border subsidies may have potential trade-distortive effects. Such subsidies should not be exempt from the disciplines of WTO subsidy rules merely because they are granted to enterprises established outside the territory of the granting Member. A WTO-consistent approach that aligns with Thailand's interests would strike a balance by, on the one hand, mitigating trade-distortive effects, while on the other, safeguarding the interests of investment-receiving countries.

Based on the foregoing analysis, the responses to cross-border subsidies under the SCM Agreement should be confined to instances where such subsidies constitute prohibited subsidies. According to Article 3 of the SCM Agreement, prohibited subsidies are those contingent upon export performance (i.e., export subsidies) or the use of domestic over imported goods (i.e., import substitution subsidies). These subsidies are prohibited due to their recognised trade-distortive effects and are unlikely to foster the developmental objectives pursued by receiving Members. Accordingly, importing Members should be entitled to challenge the use of such subsidies and eliminate their trade-distorting effects. In the meantime, remedies for addressing cross-border subsidies should primarily operate at the multilateral level, allowing the affected importing Member to address the issue directly with the granting Member, who is the *de facto* provider of the subsidies, without adversely affecting the exporting Members benefiting from them.

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