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Countervailing Duties on Transnational Subsidies: WTO Review of the EU Case Against Indonesian Stainless Steel

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Article	Abstract
<p>Keywords: Countervailing Duty; European Union Foreign Subsidies Regulation; GATT 1994; SCM Agreement; Transnational Subsidy.</p> <p>Article History Received: Apr 2, 2025; Reviewed: July 5, 2025; Accepted: July 14, 2025; Published: July 31, 2025.</p> <p>DOI: 10.28946/slrev.v9i2.4745</p>	<p>Transnational subsidies are financial assistance provided by one country to industries operating in another country, with the aim of increasing global trade. Transnational subsidies are used frequently in practical cooperation between countries. However, since the European Union imposed countervailing duties on products from Egypt and subsequently on Indonesian stainless-steel products, the concept of transnational subsidies has given rise to debate regarding subsidy regulations in international trade law. This research aims to analyse the existence of transnational subsidy regulations under WTO regulations and the validity of applying the European Union's compensation import duty burden to stainless steel products from Indonesia, which are suspected of receiving financial assistance from China through a cooperation project between the Chinese and Indonesian governments. This research is normative juridical in nature, utilising statutory, conceptual and case approaches. The research results show that the transnational subsidy provisions regulated in the EU FSR are in accordance with the aim of prohibiting subsidies in international trade; however, they are not recognised in the provisions of the SCM Agreement and GATT 1994.</p>

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INTRODUCTION

Transnational subsidies are financial contributions made by one country to industries operating in another country. Csongor Istvan Nagy defines transnational subsidies as financial contributions made by the governments of WTO member countries outside their jurisdiction.¹ According to Luca Rubini, subsidies are those that cross national or transnational borders and are not defined in the terms of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) or the GATT 1994.² Article 1.1(a).1 of the SCM Agreement states that what is meant

¹ Csongor Istvan Nagy, "Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?," no. 148 (n.d.).

² Luca Rubini, "Are Transnational Subsidies Regulated by EU and WTO Law?: The General Court Has Spoken (Case T-480/20 and Case T-540/20)," *The European University Institute*, no. 9 (2023).

by subsidies is "financial contribution by a government or any public body within the territory of a member". This definition is confirmed in Article 2 and footnote number 63 of the SCM Agreement, which states that subsidies are financial assistance provided by WTO member countries to companies operating in their territory.

The emergence of the term transnational subsidies as a topic of discussion among academics and international trade practitioners strengthened when the European Union imposed retaliatory import duties on Glass Fibre Fabric and Glass Filament products from Egypt³. This topic was heated again by the European Union imposing sanctions on stainless steel products from Indonesia based on the European Commission's decision on March 15 2022⁴. The European Union's decision, as stated through the European Commission, indicates that Egypt and Indonesia are WTO member countries with international obligations. In this case, to comply with the subsidy regulations stipulated in the SCM Agreement. Therefore, as countries operated by companies receiving financial assistance from China, Egypt, and Indonesia can be held responsible through the transfer of responsibility mechanism regulated in Article 11 of the Responsibility of the State for International Wrongful Act 2001, if proven to have violated international obligations.

According to Article 11 of ARSIWA, the mechanism for transferring responsibility to the state is called attribution⁵. The attribution of responsibility to Indonesia is based on the premise that several companies operating in the Morowali Industrial Park have received financial assistance from China⁶. In fact, according to the European Commission, Indonesia is proactively seeking funding sources through a series of bilateral agreements with China⁷. This is the reason for the Commission to impose attribution responsibility on Indonesia as the *host country* for acts of violation of international obligations committed by China.

Apart from relying on the interpretation of the definition of subsidies as regulated in the SCM Agreement, the Commission also based its accusations and decisions on the subsidy provisions regulated unilaterally in the European Union Foreign Subsidies Regulation (EU FSR). The definition set out in Article 3 of the EU FSR states that a subsidy is a financial contribution provided directly or indirectly by a third country, which confers a benefit, and is limited to one or more undertakings or industries. This differs from the definition of subsidies in Article 1 of the SCM Agreement, which requires financial assistance from WTO member countries to companies within their jurisdiction.

This difference in definition between the EU FSR and the SCM Agreement has sparked debate due to differing understandings between the EU and Indonesia. The difference in understanding about subsidies became clearer when Indonesia submitted a request for

³ The General Court, "Judgment of 1.3. 2023 - Case T-480/20 (EXTRACTS) Hengshi Egypt Fibreglass Fabrics and Jushi Egypt for Fibreglass Industry V Commission," 2023.

⁴ The European Commission, "Commission Implementing Regulation (EU) 2022/433 of March 15 2022," *Official Journal of the European Union (Brussels: Official Journal of the European Union, March 16, 2022)*, 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0433&qid=1724263386678>.

⁵ State Responsibility for International Wrongful Acts, "Conduct Which Is Not Attributable to a State under the Preceding Articles Shall Nevertheless Be Considered an Act of That State under International Law If and to the Extent That the State Acknowledges and Adopts the Conduct in Question as Its Own," n.d.

⁶ PT. Indonesia Ruipu Nickel and Chrome Alloy (IRNC) and PT. Jindal Stainless Indonesia, "No Title," n.d.

⁷ The European Commission, "Commission Implementing Regulation (EU) 2022/433 of March 15 2022," n.d., 543.

consultation to the Dispute Settlement Body (DSB) under the World Trade Organisation (WTO).⁸ Indonesia's objection to the European Commission's decision is based on the provisions of the SCM Agreement and considers that the WTO subsidy regulations do not justify the European Commission's decision.⁹ Indonesia's objection to the application of the BMI to its non-fatal products. The DSB has followed up by forming a panel for the DS616 case on May 30 2023, and its composition was drawn up on September 13 2023.¹⁰ However, until early 2025, there has been no further development regarding the position of this case at the WTO.

The debate about transnational subsidies has also attracted the interest of several researchers and academics, including Gary N. Horlick. Gary stated that the SCM Agreement does not recognise subsidies provided outside the jurisdiction of the granting country¹¹. Victor Crochet and Vineet Hedge reference this view. According to him, the terms within the territory of a member, their relation to cross-border subsidies, depend on Article 2 of the SCM Agreement¹². In another article, Crochet and Weihuan Zhou emphasised that the interpretation of the SCM Agreement, using Article 11 of the ARSIWA, is irrelevant in the case of transnational subsidies, as the same legal document contains special rules that regulate these actions in a separate discussion. This means that there is a separation of regulations in this case¹³.

Different from the view above. There is another view expressed by Gustavo Hernandez, that the subsidies referred to in the SCM Agreement do not have to be within the jurisdiction of the subsidy provider¹⁴. This view is supported by Lorand Bartels by saying that the term 'within the territory of a member' does not refer to the legal meaning of enforcement between the giver and recipient of the subsidy¹⁵. However, existing research has not fully accommodated the evaluation of cases of return import duties on stainless steel from Indonesia.

The case of transnational subsidies is a relatively new development in international trade disputes. Apart from that, there are differences in views by various research groups and WTO member countries. This difference is mainly due to the different approaches used by both parties. One party, including the European Union, agrees with accommodating transnational subsidies in SCM subsidy regulations through a teleological approach. Meanwhile, the Indonesian side places more emphasis on a textual approach. These differences in views have distinct implications for their practical application.

⁸ Dispute Settlement, "European Union-Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia," n.d., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds616_e.htm.

⁹ Third Party Submission of The United States of America, "European Union-Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia (DS616)," 2024.

¹⁰ Panel, "Communication from The Panel; European Union-Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia," 2024.

¹¹ Gary N. Horlick, "An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures," *Global Trade and Customs Journal* 8, no. 9 (2013): 297–99, <https://doi.org/https://doi.org/10.54648/GTCJ2013041>.

¹² Crochet Hegde, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," no. 13 (n.d.).

¹³ Weihuan Zhou Victor Crochet, "Attribution to the State: A Critique of Cross-Border Subsidies," *UNSW Law Research* 24, no. 18 (2024), <https://www.cibel.unsw.edu.au/research/CIBEL-working-paper-series>.

¹⁴ Gustavo E Luengo Hernandez, "Regulation of Subsidies and State AIDS in WTO and EC Law: Conflicts in International Trade Law (European Monographs) (European Monographs Series Set) (Alphen Aan Den Rijn: Kluwer Law International, 2007)," n.d., 106.

¹⁵ Lorand Bartels, "Does WTO Law Really Not Regulated 'Foreign Subsidies'?", *TradeLinks*, 2020.

For this reason, this paper aims to analyse subsidy regulations under WTO provisions in relation to transnational subsidies and examine the legality of applying countervailing import duties imposed by the European Union on Indonesia for stainless steel products that are suspected of receiving financial assistance from the Chinese government.

RESEARCH METHODS

To answer the research question, this paper employs a normative juridical research method, incorporating legislative, conceptual, and casuistic approaches. The required legal materials were obtained through literature study. The legal materials are collected and analysed based on the research objectives, particularly to address the problem formulation. V.M. Gawas stated that doctrinal research focuses on legal principles, rules, and concepts. This research is supported by a case study approach, as decided by the European Commission, particularly in the case of Indonesian Stainless Steel.

ANALYSIS AND DISCUSSION

The Position of Transnational Subsidies Under the WTO

The international legal basis for subsidies under the WTO can be found in GATT 1994 and the SCM Agreement. GATT 1994 does not provide a clear definition of subsidies¹⁶. Article XVI GATT 1994¹⁷. only regulates provisions regarding notification obligations for member countries to other member countries when carrying out subsidies¹⁸, including budget assistance to increase exports or reduce imports¹⁹. This article is also used as a rule of thumb in identifying the existence of subsidy practices by WTO member countries²⁰, especially before the subsidy provisions are regulated in more detail in the Agreement on Subsidies and Countervailing Measures (SCM Agreement)²¹.

The definition of subsidy based on Article 1.1(a)(1) of the SCM Agreement is a financial contribution by a government or any public body within the territory of a member. Apart from containing provisions regarding the definition of subsidies and mechanisms for providing countermeasures for providing subsidies²², The subsidy provisions also contain subsidy classifications, namely, prohibited subsidies, *actionable subsidies* and *non-actionable subsidies*²³. Furthermore, this provision provides provisions that prohibit subsidies as well as

¹⁶ Richard Edward Baldwin, "WTO Trade Policy Review: A Must for Surveillance," *Journal of World Trade* 46, no. 3 (2012): 537.

¹⁷ GATT 1994, "Article 1 Paragraph 1: 'if Any Contracting Party Grants or Maintains Any Subsidy, Including Any Form of Income or Price Support, Which Operates Directly or Indirectly to Increase Exports of Any Product from, or to Reduce Imports of Any Product into, Its T,'" 1994.

¹⁸ International Trade Centre, "The WTO Agreement on Subsidies and Countervailing Measures," *Export Promotion and the WTO*, no. 4 (2009), <https://doi.org/https://doi.org/10.18356/211dcdaa-en>.

¹⁹ Robert Gulotty, "WTO Subsidy Disciplines," *World Trade Review* 21, no. 3 (2022): 334, <https://doi.org/https://doi.org/10.1017/S1474745622000118>.

²⁰ Cartagena, "WTO GATT And Uruguay Round Results," 1997, 146.

²¹ Joseph Wira Koesnaldi Peter Van Den Bossche, Daniar Natakusumah, "No Title," *Introduction to WTO (World Trade Organization) Law (Jakarta: Yayasan Obor Indonesia*, no. 44 (2010).

²² Ding Ru, "The 'Public Body' Issue in The WTO: Proposing a Comparative Institutional Approach to International Issue State-Owned Enterprises (SOES)," *Thesis, Georgetown University Law Centre*, 2018, 219.

²³ Intran Griya Purnamasari, "Arrangement and Implementation of Indonesia-European Union Biodiesel Subsidies in the Agreement on Subsidies and Countervailing Measures," *Lex Reanaissan*, no. 1 (2021): 122.

actionable subsidies limited to specific subsidies according to the provisions of Article 2 of the *SCM Agreement*²⁴.

Based on these provisions, several researchers have attempted to provide a more detailed explanation of the meaning of subsidies. Andreas F. Lowenfeld explains that subsidies are financial assistance that comes from public funds and is given to certain groups²⁵. Public funds provided in the form of subsidies are funds distributed through the government or public bodies that provide benefits to certain companies or industries²⁶. According to Ismer, the subsidy referred to in the SCM Agreement is a financial contribution from the government that provides benefits to certain parties²⁷.

According to Gea M. Lee, the subsidy provisions regulated in the SCM Agreement strengthen the subsidy regulations contained in articles XVI and VI of the GATT 1994²⁸. Gea said that an important element in determining whether there is a subsidy action or not is the existence of a financial contribution from the government, and providing benefits to the recipient²⁹. Regarding the elements that must be fulfilled, Mitsuo Mathushita also responded that the important elements for determining the existence of a subsidy are; 1). Financial contributions from the government or public bodies, 2). Providing benefits for the recipient, and 3). Given specifically and limited to certain parties³⁰. They do not emphasise the jurisdictional aspect. This is what differentiates him from Garry N. Horlick.

According to Horlick, the SCM Agreement defines subsidies as financial assistance provided within the jurisdiction of the granting country. Furthermore, he said that the SCM Agreement does not recognise financial assistance outside the jurisdiction of the provider³¹. Victor Crochet and Vineet Hedge reference this view. According to him, the term within the territory of a member, its relation to cross-border subsidies, depends on Article 2 of the SCM Agreement³².

The financial contribution from the government, referred to as a subsidy in the provisions of the SCM Agreement, is a specific subsidy³³. Article 2.1 of the SCM Agreement defines specific subsidies as; In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is

²⁴ Yapei Huang Ximeng Wen, "China-US Currency Subsidy Dispute from WTO Perspective: Review and Response," *Advances in Economics and Management Research*, no. 3 (2023): 136, <https://doi.org/https://doi.org/10.56028/aemr.3.1.135>;

²⁵ Andreas F. Lowenfeld, "International Economic Law, 2nd Ed," *New York: Oxford University Press*, 2008.

²⁶ Sunyana Sasmal Bernard M. Hoekman, Petros C. Mavroidis, "Managing Externalities in the WTO: The Agreement on Fisheries Subsidies," *San Domenico*, 2022, 4888.

²⁷ Roland Ismer et Al, "Supporting the Transition to Climate-Neutral Production: An Evaluation Under the Agreement on Subsidies and Countervailing Measures," *Journal of International Economic Law*, no. 2 (2023): 220, <https://doi.org/https://doi.org/10.1093/jiel/jgac058>.

²⁸ G.M. Lee, "Subsidies and Countervailing Duties," *Handbook of Commercial Policy* 1 (2016): 33, <https://doi.org/https://doi.org/10.1016/bs.hescop.2016.04.009>.

²⁹ Lee, "2," n.d.

³⁰ Purnamasari, "Regulation and Implementation of Indonesia-European Union Biodiesel Subsidies in the Agreement on Subsidies and Countervailing Measures," n.d., 122.

³¹ Gary N. Horlick, "An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures," *Global Trade and Customs Journal* 8, no. 9 (2013): 297–99, <https://doi.org/https://doi.org/10.54648/GTCJ2013041>.

³² Crochet Hegde, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," n.d., 13.

³³ Article 2.1, "SCM Agreement," n.d.

specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority,...,” Then in article 2.2; “A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific....,”

According to the specific provisions in Article 2, subsidies that can be subject to retaliatory measures are those given on a limited basis to specific companies or industries within the jurisdiction. The granting authority or subsidiser³⁴. Countermeasures cannot be applied to non-specific subsidies within the meaning of article 2 of the SCM Agreement³⁵. The two subsidy criteria that can be retaliated against when meeting specific elements are prohibited subsidies³⁶ and actionable subsidies³⁷.

Prohibited subsidies are a type of subsidy that is prohibited under Part II of Article 3 of the SCM Agreement. This type of subsidy is divided into two, namely subsidies for export products and substitute products for imported goods³⁸ and is a specific subsidy³⁹. This type of subsidy can be repaid with remedial action in the form of compensation or through eliminating the subsidy⁴⁰. Provisions of retaliation for actions prohibited subsidy regulated in article 4.7 of the SCM Agreement, namely withdrawal of subsidies without delay⁴¹.

The second type of subsidy is an actionable subsidy. This type of subsidy is regulated in part III, Article 5 of the SCM Agreement. Luca Rubini explains actionable subsidies as those that are all the subsidies other than the prohibited ones⁴². Daniel Brou and Michela Ruta emphasised that subsidies included in this category are permissible subsidies, but if they have a negative impact on other countries, especially importing countries, they can be subject to retaliatory action⁴³. So, actionable subsidies are a subsidy that can be followed up if it is proven to have a bad effect on the importing country⁴⁴. Proof of a relationship between the practice of subsidies by one country and the losses suffered by another country is a condition that must be met before implementing retaliatory measures (countervailing duty)⁴⁵.

³⁴ Wonhee, “Legality of R&D Subsidies in the WTO,” *Thesis for the Degree of Master, Seoul National University*, 2012, 23.

³⁵ Wen Huang, “China-US Currency Subsidy Dispute from WTO Perspective: Review and Response,” n.d., 136.

³⁶ David Palmeter Joseph F. Francois, “US – Countervailing Duty Investigation of DRAMS,” *World Trade Review* 7, no. 1 (2008): 225, <https://doi.org/https://doi.org/10.1017/S1474745608003728>.

³⁷ Lee, “Subsidies and Countervailing Duties,” n.d., 24.

³⁸ Lee, “Legality of R&D Subsidies in the WTO,” n.d., 23.

³⁹ Wen Huang, “China-US Currency Subsidy Dispute from WTO Perspective: Review and Response,” n.d., 135.

⁴⁰ Nils Meier-Kaienburg, “The WTO’s Toughest Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute over Aircraft Subsidies,” *Journal of Air Law and Commerce* 71, no. 2 (2006): 203.

⁴¹ Hillman Bown, “WTO’ing a Resolution to the China Subsidy Problem,” n.d., 13.

⁴² Luca Rubini, “What Shapes the Law? Reflection on the History, Law, Politics and Economics of International and European Subsidy Disciplines,” *San Dominico: European University Institute*, 2016, 53.

⁴³ Michele Ruta Daniel Brou, “A Commitment Theory of Subsidy Agreements,” *The B.E. Journal of Economic Analysis & Policy* 13, no. 1 (2013): 239–70, <https://doi.org/https://doi.org/10.1515/bejeap-2012-0061>.

⁴⁴ Csongor István Nagy, “Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?,” *Central European Journal of Comparative Law* 2, no. 1 (2021): 152, <https://doi.org/https://doi.org/10.47078/2021.1.147-162>.

⁴⁵ Jackson Erpenbach, “The Federal Coal Leasing Program as an Actionable Subsidy Under International Trade Law,” *Michigan Journal of Environmental & Administrative Law*, 2020, 522, <https://doi.org/https://doi.org/10.36640/mjeal.9.2.federal>.

From this explanation, it is evident that subsidies, which are legal and may be subject to retaliatory measures, are financial contributions provided on a limited basis by the government or public bodies to specific companies or industries within their jurisdiction. This explanation is used to confirm whether the cross-border subsidy provisions regulated by the European Union are in accordance with the subsidy provisions under the WTO.

In contrast to WTO provisions, article 3 of the EU FSR defines subsidies as; financial contribution which is provided directly or indirectly by a third country, which confers a benefit and which is limited to one or more undertakings or industries. According to this provision, a subsidy is a financial contribution by a third country, either directly or indirectly, to an industry on a limited basis. This regulation indicates that territorial boundaries between subsidy providers and recipients are not an obstacle to determining whether or not subsidies are being carried out by other countries.

According to Marc Benitah, as quoted by Victor Crochet and Vineet Hedge, cross-border or transnational subsidies are a subsidy granted to a benefit recipient manufacturing the product at issues outside the country of the granting government⁴⁶. Csongor Istvan Nagy defines transnational subsidies as financial contributions made by the governments of WTO member countries outside their jurisdiction⁴⁷. This subsidy is also defined as a subsidy given by a country to companies operating in the jurisdiction of another country⁴⁸, with the aim of increasing production and exports and operating within the European Union, whether provided directly or indirectly⁴⁹.

This regulation applies from January 12, 2023, to prevent distortion of the European Union's internal market⁵⁰ and bridging the absence of regulations to apply to subsidy cases outside the subsidy provider's territory⁵¹. This objective is useful for protecting the European Union's domestic market from negative impacts arising from cross-border subsidy practices through BRI policies (Belt and Road Initiative) from China⁵². The FSR is also useful for filling legal gaps regarding foreign subsidies that have not been accommodated in EU legal provisions⁵³.

This unilateral EU provision states that subjects who make limited financial contributions to companies operating in the EU domestic market constitute a category of subsidies within the

⁴⁶ Vineet Hedge, Victor Crochet, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," *Journal of International Economic Law* 23, no. 4 (2020): 2, <https://doi.org/https://doi.org/10.1093/jiel/jgaa029>.

⁴⁷ Nagy, "Foreign Subsidies, Distortions and Acquisitions: Can the Playing Field Be Levelled?," n.d., 148.

⁴⁸ Arpit Mehra, "Beyond Territorial Reach: Transnational Subsidies and The Evolving Landscape," 2024, Lakshmisri.com.

⁴⁹ Tianziran Li, "Legal Issues in the European Unions Anti-Cross Border Subsidy Measures: A Study," *Advances in Economics, Management and Political Sciences* 83, no. 1 (2024): 33, <https://doi.org/https://doi.org/10.54254/2754-1169/83/20240713>.

⁵⁰ Li, "Legal Issues in the European Unions Anti-Cross Border Subsidy Measures: A Study," n.d.

⁵¹ Pierfrancesco Mattiolo Jan Blockx, "The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?," *European Foreign Affairs Review* 28 (2023): 53–74, <https://doi.org/https://doi.org/10.54648/EEER2023014>.

⁵² Crochet Hedge, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," n.d., 2.

⁵³ Lena Hornkohl, "The Role of Third Parties in the Enforcement of the Foreign Subsidies Regulation: Complaints, Participation, Judicial Review, and Private Enforcement," *SSRN Electronic Journal*, 2023, <https://doi.org/https://doi.org/10.2139/ssrn.4433639>.

meaning of the regulation, including actions carried out by foreign public bodies that can be attributed to acts of the country receiving the subsidy (host country)⁵⁴.

European Union subsidy regulations that contain elements of crossing a country's territorial borders. This is the basis of the difference between subsidies as defined by the EU FSR and those outlined in Article 2 of the SCM Agreement. The provisions of the SCM Agreement require that the subsidies referred to in the agreement are limited to subsidies provided to recipients who are within the jurisdiction of the provider⁵⁵.

Prohibited and actionable subsidy provisions in the SCM Agreement are limited to specific types of subsidies and are detrimental to other countries⁵⁶. Transnational subsidies, as financial contributions by the government to business entities operating outside the jurisdiction of the provider are not regulated in the SCM Agreement or GATT 1994⁵⁷. Transnational subsidies do not meet the specific criteria as stated in article 2 of the SCM Agreement⁵⁸.

Based on the specific criteria of Article 2 of the SCM Agreement, transnational subsidies do not include subsidies referred to in the provisions of the SCM Agreement⁵⁹. This means that subsidies outside the jurisdiction of the provider of financial assistance are not recognised in WTO provisions. The subsidies referred to in the SCM Agreement are subsidies provided in the area providing the subsidy⁶⁰. So, financial assistance provided to companies or industries operating outside the subsidy provider's area does not include subsidies regulated in the SCM Agreement. Good as prohibited subsidies nor actionable subsidies.

The definition of subsidy written in Article 1.1(a)(1) of the SCM Agreement is the source of differences between experts in understanding the term within the territory of a member⁶¹. Gustavo Hernandez expressed the first view, that the subsidies referred to in the SCM Agreement do not have to be within the jurisdiction of the subsidy provider⁶². This view is supported by Lorand Bartels by saying that the term 'within the territory of a member' does not refer to the meaning of jurisdiction between the giver and recipient of the subsidy⁶³.

In contrast to this view, Gary N. Horlick actually emphasised that subsidies provided outside the jurisdiction of the granting country are not part of the subsidies referred to in the SCM

⁵⁴ Amedeo Rizzo, "The EU Foreign Subsidies Regulation: A Structural Change to the Internal Market," *SSRN Electronic Journal*, 2023, 7, <https://doi.org/https://doi.org/10.2139/ssrn.4609016>.

⁵⁵ Sridharan Attoreys Lakshmikumaran, "Beyond Territorial Reach: Transnational Subsidies and The Evolving Landscape," *London: Lexology*, 2024, <https://www.lexology.com/library/detail.aspx?g=f8b34c63-9e54-4a17-8475-cc23cb90818e>.

⁵⁶ Hillman Bown, "WTO'ing a Resolution to the China Subsidy Problem," n.d., 5.

⁵⁷ Luca Rubini, "Are Transnational Subsidies Regulated by EU and WTO Law?: The General Court Has Spoken," *The European University Institute*, 2023, 10.

⁵⁸ Sasnal Hoekman, mavroidis, "Managing Externalities in the WTO: The Agreement on Fisheries Subsidies," n.d., 12.

⁵⁹ Hegde Crochet, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," n.d., 20.

⁶⁰ SCM Agreement, "The Recipient Firm Is a Firm in the Territory of the Subsidizing Member," n.d., footnote number 63.

⁶¹ Sparsha Janardhan William Alan Reinsch, "Crossing the Line: Transnational Subsidy," *CSIS*, 2022.

⁶² Gustavo E Luengo Hernandez, "Regulation of Subsidies and State AIDS in Wto and EC Law: Conflicts in International Trade Law (European Monographs) (European Monographs Series Set) (Alphen Aan Den Rijn: Kluwer Law International, 2007)," 2007, 106.

⁶³ Lorand Bartels, "Does WTO Law Really Not Regulated 'Foreign Subsidies'?", *TradeLinks (Linlaters Trade Policy)*, 2020.

Agreement⁶⁴. Apart from that, there is another view put forward by Victor Crochet and Vineet Hedge, that the term within the territory of a member, in relation to territorial boundaries between grantors and recipients of subsidies, depends on the provisions stipulated in article 2 of the SCM Agreement which explicitly states "a subsidy needs to be given to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority"⁶⁵.

Article 2 of the SCM Agreement regarding specific subsidies states that subsidies that are provided on a limited basis and are beneficial to certain businesses or industries within a country's jurisdiction are the type of subsidies referred to in this agreement⁶⁶. Financial contributions from the government to beneficiaries operating outside the donor's jurisdiction do not fall into the subsidy category referred to in the provisions of the SCM Agreement because they do not comply with the provisions specific to which are regulated in Article 2 of the agreement. This is also confirmed by footnote number 63⁶⁷ SCM Agreement that the recipient company is a company that is within the jurisdiction of the subsidising country.

Based on the analysis conducted using a legislative approach and a conceptual approach, it can be understood that transnational subsidies are not recognised in international trade regulations. Transnational subsidies do not meet the specific elements set out in Article 2 of the SCM Agreement. According to Article 2 of the SCM Agreement, a subsidy is defined as financial assistance provided by a government to an industry or company located within the jurisdiction of that government. This is also reinforced in footnote number 63 of the SCM Agreement, which states that the recipient must be a company operating within the territory of the government providing the subsidy. Therefore, transnational subsidies are not recognised in international trade regulations under the WTO regime.

Legality of European Union Compulsory Import Duty on Indonesian Stainless Steel

The difference in understanding between Indonesia and the European Union regarding the legality of applying import duties in return for stainless steel, which is suspected of receiving an injection of funds in the form of subsidies from the Chinese government, is a reason to research the meaning of the text of the SCM Agreement further. This difference in understanding is motivated by differences in the interpretation of these provisions. To bridge these differences, interpretation of the SCM Agreement and other international provisions relating to subsidies is needed.

Interpretation of international agreements is used to reveal the meaning of ambiguous texts (vague)⁶⁸. The purpose of the Interpretation of the *SCM* Agreement is to clarify the meaning of the existing text⁶⁹. The legal basis for regulating the guidelines for interpreting international

⁶⁴ Horlick, "An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures,."

⁶⁵ Hegde Crochet, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement," n.d., 13.

⁶⁶ SCM Agreement, "Article 2 Concerning Specific," n.d.

⁶⁷ SCM Agreement, "Footnote Number 63 Regarding the Explanation of 'the Recipient Firm', That the Subsidy Recipient Must Be within the Jurisdiction of the Subsidy Provider," n.d.

⁶⁸ Arion Sintong Hutapea Winanda Kusuma, "No Title," *International Treaty Law*, 2022, 38.

⁶⁹ Isabelle Van Damme, "Treaty Interpretation by the WTO Appellate Body," *The European Journal of International Law*, no. 3 (2010), <https://doi.org/https://doi.org/10.1093/acprof:oso/9780199562237.003.0006>.

agreements is the Vienna Convention on the Law of Treaties (VCLT) of 1969. The SCM Agreement interpretation guidelines are based on the provisions regulated in the VCLT in accordance with article 3.2 Dispute Settlement Understanding (DSU)⁷⁰ as an agreement which contains mechanisms for resolving disputes between WTO members.⁷¹ This legal basis is strengthened by the use of VCLT as a reference for interpretation in the US-Gasoline case, especially Article 31.

Article 31 VCLT states that the interpretation of international agreements must be carried out in good faith and that the text must be interpreted in accordance with the commonly used meaning. According to ⁷² Eszter Polgari, the methods that can be used to interpret international agreements are: 1). Subjective method, namely understanding the text of the agreement based on the intentions of the parties; 2). Objective method to reveal the literal meaning of the text; 3). Teleological, revealing the meaning of the text based on the object and purpose of the agreement.

Based on the flow of interpretation of international agreements, Jawahir Thontowi differentiates them into three, namely preparatory work, textual school and teleological flow⁷³. Flow preparatory work emphasises the will of the parties as a reference in interpreting the agreement. While textual schools continue to refer to the text of the agreement as the primary reference for understanding and interpreting the agreement. The teleological school places more emphasis on the general aim or purpose of making an agreement⁷⁴.

The methods and flow of interpretation of international agreements outlined above are a means of understanding the legality of the European Union's implementation of countervailing duties for SSCRF products from Indonesia. This interpretation is intended to reveal the meaning of the phrase within the territory of a member found in article 1.1(a)(1) and understanding specific in article 2 of the SCM Agreement. The following is the interpretation of this term based on the three existing interpretation methods according to the interpretation guidelines for Article 31 VCLT.

Preparatory Work

Preparatory work or negotiation history is an interpretation method that contains draft agreements and official documents used during the negotiation process⁷⁵. This interpretation emphasises the will of the parties found in official records at the time of treaty negotiations⁷⁶. According to this provision, to understand subsidies provided outside the jurisdiction of the granting country, you must pay attention to the specific provisions in Article 2 of the SCM Agreement. As a result of

⁷⁰ Dispute Settlement Understanding (DSU), "Pasal 3.2; "The Dispute Settlement System of the WTO Is a Central Element in Providing Security and Predictability to the Multilateral Trading System. The Members Recognise That It Serves to Preserve the Rights and Obligations of Members under the Covered Ag," n.d.

⁷¹ Dispute Settlement Understanding (DSU), "Article 1 Paragraph 2," n.d.

⁷² Eszter Polgari, "The Role of the Vienna Rules in the Interpretation of the ECHR," *Erasmus Law Review* 14, no. 2 (2021): 83, <https://doi.org/https://doi.org/10.5553/ELR.000193>.

⁷³ Jawahir Thontowi, "No Title," *Law and International Relations*, 2016, 108.

⁷⁴ Ninne Zahara Silviani, "Interpretation of International Agreements Regarding Historical Rights in UNCLOS 1982," *Straits Journal* 6, no. 2 (2019): 161, <https://doi.org/https://doi.org/10.31629/selat.v6i2.1067>.

⁷⁵ "International Trade Law Research Guide, "Georgetown Law Library," *Georgetown Law*, n.d., <https://guides.ll.georgetown.edu/c.php?g=363556&p=4074597>.

⁷⁶ The European Convention on Human Rights, "Preparatory Works Is the Documents Were Produced during the Drafting of the Convention," n.d., <https://www.coe.int/en/web/human-rights-convention/preparatory-works>.

research by Alan O. Sykes, this article is an additional provision adopted from the US anti-subsidy regulations. One of the important elements in the specific concept, according to Article 2 of the SCM Agreement, is subsidies provided within the territory of the subsidising country⁷⁷.

According to Gary N. Horlick, as cited by Victor Crochet and Vineet Hegde, the term within the territory of a member is a term deliberately added as an intervention in US interests. This relates to World Bank loans to Brazil, post-war development by Japan to Korea and US aid funds to West Germany which later became known as the Marshall Plan⁷⁸.

From this explanation, it follows that the parties involved in the negotiations for the formation of the SCM Agreement wish to limit the characteristics of subsidies that can be subject to retaliatory action, namely subsidies provided by the government to companies within the jurisdiction of the granting country.

Textual

Textual interpretation is the most important interpretation in interpreting international agreements⁷⁹. Evan Criddle emphasised that interpretation must start from an explanation of the text of the agreement⁸⁰. This is in accordance with the panel's statement in the US-Poultry case in 2010, as quoted by Blanco Mantilla, that interpretation must be aimed at clarifying ambiguous meanings⁸¹. The interpretation materials used are the text of the agreement, appendices, footnotes, and documents directly related to the agreement to be interpreted⁸².

Phrases within the territory of a member Article 1.1(a)(1) of the SCM Agreement can be linked to several articles and explanations in the agreement, namely article 2, article 25.2 and footnote number 63. According to Article 2.1 of the SCM, the subsidies referred to in Article 1 are those provided on a limited basis within the jurisdiction of the provider. Article 2.2 confirms that subsidies provided in the jurisdiction of the provider are specific to that jurisdiction.

Apart from that, confirmation of terms within the territory of a member can also be referred to in Article 25.2 and footnote number 63. Article 25.2 of the SCM Agreement provides guidelines for member countries to submit notifications if they meet the provisions of Article 1 and cumulatively with the provisions of Article 2 regarding specific criteria⁸³. Then footnote number 63 emphasises that the recipient of a subsidy is a business or industry that is within the jurisdiction of the provider of financial assistance⁸⁴.

Based on textual interpretation, financial contributions made outside the jurisdiction of the subsidising country cannot be subject to retaliation. This is based on the reason that cross-border

⁷⁷ Cartagena, "WTO GATT And Uruguay Round Results," n.d., 151.

⁷⁸ Horlick, "An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures," n.d.

⁷⁹ Polgári, "The Role of the Vienna Rules in the Interpretation of the ECHR," n.d., 85.

⁸⁰ Evan Criddle, "The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation," n.d., 438, <http://ssrn.com/abstract=1004197>.

⁸¹ White, "The Interpretation of the WTO Agreement," n.d., 103.

⁸² Steven R Ratner, "International Law Rules on Treaty Interpretation," *The Law and Practice of the Northern Ireland Protocol*, Ed. Christopher McCrudden, 2022, 84, https://repository.law.umich.edu/book_chapters/279.

⁸³ Cartagena, "WTO GATT And Uruguay Round Results," n.d.

⁸⁴ Footnote number 63 SCM Agreement, "The Recipient Firm Is a Firm in the Territory of the Subsidizing Member," n.d.

or transnational subsidies are not part of the provisions regulated in the SCM Agreement. Thus, the SCM Agreement does not provide room for the implementation of countervailing duties regarding subsidy practices carried out across borders (transnational subsidies).

Teleological

According to this school, the interpretation of international agreements must emphasise the aims and objectives of making the agreement⁸⁵. In this case, the SCM Agreement is intended to prevent unfair competition between WTO member countries⁸⁶. This serves as a reference for interpreting the meaning of the text in the agreement and applying it to concrete cases. According to its aim, negotiations for approval of the SCM Agreement are to improve and perfect the provisions of articles VI and XVI of GATT 1994⁸⁷. In the US-Export Restraints case, the Panel concluded that the purpose of the SCM Agreement was to address the issue of subsidies that undermine global trade⁸⁸. Judging from its objectives, the SCM Agreement does not require fraudulent actions in international trade, whether subsidies within or outside the jurisdiction of WTO member countries.

This interpretation was followed by the European Commission to apply countervailing import duties on stainless steel products from Indonesia. The Commission considers that subsidies provided by China distort the European Union's domestic market. The Commission considers that market distortions resulting from subsidy practices are in accordance with the aims and objectives of establishing the SCM Agreement. Therefore, the commission uses article 31 (3) VCLT to link the SCM Agreement with article 11 ARSIWA to attribute China's subsidy actions to the responsibility of the Indonesian Government⁸⁹.

The application of Article 11 ARSIWA was criticised by Victor Crochet and Weihuan Zhou⁹⁰. Both of them are of the view that Article 11 ARSIWA⁹¹ is not relevant to apply in this case, because the provisions regarding the responsibility of a country for the actions of another country have been regulated separately in Chapter IV ARSIWA⁹². This chapter is more relevant to use in the DS616 case because it relates to state responsibility for actions carried out by other states. In this case, Indonesia is responsible for the subsidies provided by the Chinese government for industries operating in Morowali.

⁸⁵ United Nations, "Vienna Convention on the Law of Treaties," *United Nations*, 1969, Article 31.

⁸⁶ Robert Gulotty, "WTO Subsidy Disciplines," *World Trade Review* 21, no. 3 (n.d.): 332, <https://doi.org/https://doi.org/10.1017/S1474745622000118>.

⁸⁷ Cartagena, "WTO GATT And Uruguay Round Results," n.d., 147.

⁸⁸ Report of the Panel, "United States - Measures Treating Exports Restraints as Subsidies WT/DS194/R," 2001, [https://www.worldtradelaw.net/document.php?id=reports/wtopanels/us-exportrestraints\(panel\).pdf&mode=download#page=1](https://www.worldtradelaw.net/document.php?id=reports/wtopanels/us-exportrestraints(panel).pdf&mode=download#page=1).

⁸⁹ The European Commission, "Commission Implementing Regulation (EU) 2022/433 of March 15 2022," n.d., paragraph 695.

⁹⁰ Victor Crochet Weihuan Zhou, "Attribution to the State: A Critique of Cross-Border Subsidies," *UNSW Law Research* 24, no. 18 (2024): 8, <https://www.cibel.unsw.edu.au/research/CIBEL-working-paper-series>.

⁹¹ Article 11 Articles on Responsibility of States for Internationally Wrongful Acts, "Conduct Which Is Not Attributable to a State under the Preceding Articles Shall Nevertheless Be Considered an Act of the State under International Law If and to the Extent That the State Acknowledges and Adopts the Conduct in Question as Its Own," n.d.

⁹² Articles on Responsibility of States for Internationally Wrongful Acts, "Chapter IV Tentang Responsibility of a State in Connection with the Act of Another State," n.d.

The application of attribution of responsibility to the state based on ARSIWA provisions can only be carried out if; there is a violation of international obligations and the action in question can be delegated to the state⁹³. From a teleological interpretation, the existence of subsidies provided by the Chinese Government to Indonesia is the basis for stating that there has been a violation of international obligations based on provisions prohibiting subsidies. This is in line with the Panel's opinion in the DS194 US-Export Restraints case, which states that every intervention carried out by the government must be categorised as a subsidy if it has the potential to damage the market⁹⁴.

Meanwhile, in the case of DS616, the European Union stated that Indonesia fulfilled the elements; it knows and actively seeks funding support from China for the development of the Morowali Industrial Park. However, Article 11 ARSIWA, as postulated by the European Commission, is not in accordance with the intent of the regulation⁹⁵.

The legal basis that supports the European Commission's decision to impose countervailing import duties on Indonesian stainless steel products is the EU FSR. However, this provision is unilateral and only applies to European Union member countries⁹⁶. This means that the regulation does not apply to Indonesia, so the EU FSR does not have the power to apply it in determining it countervailing duty on Indonesian stainless steel products. International trade disputes and settlements made by WTO members must be based on multilaterally agreed provisions, including regulations that apply under the WTO⁹⁷.

Based on the rules of interpretation used in interpreting international agreements, namely in Article 31 VCLT, it is clear that the European Union's accusations have no legality under international trade rules. Article 11 ARSIWA, used by the European Union as a means of interpretation to attribute China's responsibility to Indonesia, cannot be applied because the rules regarding the attribution of responsibility to a country due to the actions of another country are regulated separately in a different article of the regulation. Thus, there is no legal basis to justify the countervailing duty by the European Union against Indonesian Stainless Steel Products. The provisions regarding subsidies used by the European Union do not apply to Indonesia because they are unilateral in nature for European Union members.

CONCLUSION

Financial contributions provided outside the jurisdiction of WTO member countries are not a type of subsidy referred to in the provisions of the SCM Agreement and GATT 1994. These two provisions do not recognise the term transnational subsidies. The transnational subsidy

⁹³ Sefriani, "International Law; An Introduction," *Jakarta: RajaGrafindo Persada*, 2014, 269.

⁹⁴ Report of the Panel, "United States-Measures Treating Exports Restraints as Subsidies WT/DS194/R," 2001, 88, [https://www.worldtradelaw.net/document.php?id=reports/wtopanels/usexportrestraints\(panel\).pdf&mode=download#page=1](https://www.worldtradelaw.net/document.php?id=reports/wtopanels/usexportrestraints(panel).pdf&mode=download#page=1).

⁹⁵ Paragraph 543, "The European Commission, "Commission Implementing Regulation (EU) 2022/433 of March 15 2022," *Official Journal of the European Union (Brussels: Official Journal of the European Union, March 16, 2022)*, n.d., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0433&qid=1724263386678>.

⁹⁶ Mattiolo Pierfrancesco Blockx Jan, "The Foreign Subsidies Regulation: Calling Foul While Upping The Ante?," *European Foreign Affairs Review* 28, no. S1 (2023): 53–73.

⁹⁷ WTO, "No Title," n.d., https://www.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

regulations set out in Article 3 of the EU FSR do not meet the criteria specific to the SCM Agreement, as referred to in Article 2, which states that the subsidy in question must be given on a limited basis to certain industries within the donor's jurisdiction.

The legal basis for the European Union's decision to impose countervailing import duties on Indonesian stainless steel products is the EU FSR, which only applies to European Union member countries and does not apply to Indonesia. Although this decision can be justified based on the objectives of the SCM Agreement because China's action in providing financial assistance for the development of the Morowali Industrial Park as an implementation of bilateral cooperation between China and Indonesia can be categorised as a subsidy that creates unfair competition in international trade, textually, this action cannot be subject to sanctions in return for import duties because it does not fulfill the specific elements based on article 2 of the SCM Agreement. Apart from that, the application of Article 11 ARSIWA to attribute China's actions to Indonesia is also inappropriate because there is no strong legal basis to prove the elements of a violation of international obligations in this case. Therefore, the decision issued by the European Commission does not have the legality of international subsidy regulations, especially agreements under the WTO. Cooperation, such as that carried out by Indonesia and China in this case, can have a negative impact on international trade due to government involvement and has the potential to conflict with the SCM Agreement, a multilateral regulation aimed at preventing unfair competition.

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