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# Attribution to the State: A Critique of Cross-Border Subsidies

Weihuan Zhou\* & Victor Crochet\*\*

## ABSTRACT

While industrial policy and subsidies proliferate worldwide, the emergence of cross-border subsidies is intensifying legal and policy debate on how the rules of the World Trade Organization (WTO) can be applied to address the spillover effects of such subsidies. Amid this debate, this paper tackles a relatively more fundamental, yet under-explored, issue relating to attribution of state responsibility. We argue that the European Commission's approach to attributing subsidies provided by one government to another government has overstretched the attribution rules under public international law and the WTO subsidy rules, setting a harmful precedent for similar abuses beyond subsidies. We propose non-violation claims as a viable and more balanced response to the challenges posed by cross-border subsidies. We call upon governments to retreat from unilateralism and resolve these challenges via cooperation.

Keywords: Attribution; Belt & Road Initiative; Cross-border subsidies; Economic cooperation; Public international law; State responsibility; Trade and Investment; WTO.

## I. INTRODUCTION

Subsidies are one of the most controversial issues in the world trading system. While governments rely on all kinds of subsidies in pursuit of preferred policy objectives, they are also concerned about the spillover effect of subsidies on international economic activities.<sup>1</sup> Driven by post-COVID economic recovery, geopolitical tensions and strategic competition among major powers, development interests and an array of emerging challenges, industrial policy has returned to the centre of domestic economic policymaking worldwide, leading to a fast-developing global subsidy race.<sup>2</sup> Some of these policies and subsidies are adopted for shared

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<sup>1</sup> Lorenzo Rotunno and Michele Ruta, 'Trade Spillovers of Domestic Subsidies', International Monetary Fund WP/24/41 (Mar. 2024).

<sup>2</sup> Simon Evenett, et al., 'The Return of Industrial Subsidy in Data', International Monetary Fund WP/24/1 (Jan. 2024), <https://www.imf.org/en/Publications/WP/Issues/2023/12/23/The-Return-of-Industrial-Policy-in-Data-542828>; Anna Ilyina et al., 'Industrial Policy is Back But the Bar to Get it Right Is High', IMF

legitimate goals (such as environmental protection and climate action), whereas others are employed to foster select industries or entities to outcompete foreign counterparts or even gain global dominance in strategic sectors, critical supply chains, advanced technologies, etc.

How subsidies may be disciplined is thus a global challenge, requiring a collective response by all governments involved.<sup>3</sup> The fundamental difficulty, as witnessed in the development of World Trade Organization (WTO) rules on industrial subsidies, concerns a balancing act between constraining trade-distortive subsidies and preserving policy space for legitimate use of subsidies.<sup>4</sup> To strike a balance, the WTO Agreement on Subsidies and Countervailing Measures (ASCM) prohibits only two types of subsidies (i.e. export and local content subsidies), hence leaving room for governments to use other types.<sup>5</sup> These other subsidies are ‘actionable’ only, which means that although they may be successfully challenged by an importing country under the WTO, the subsidising government is not required to withdraw such WTO-unlawful subsidies, but can decide to remove their adverse effect instead. The other way for an importing country to address an adverse effect is through countervailing investigations which often lead to the imposition of countervailing measures, typically in the form of import tariffs, on subsidised imports. Compared to WTO litigation, countervailing measures are much more frequently used by governments to offset the distortive effect of subsidies.<sup>6</sup>

Despite the controversies over subsidies and the relevant WTO rules, subsidies have long been perceived as a tool to support domestic industries, and it is domestic-based subsidies that have been the subject of countervailing actions and WTO disputes for decades.<sup>7</sup> With the emergence of so-called ‘cross-border subsidies’ in recent times, however, this situation has changed dramatically. In essence, cross-border subsidies are subsidies provided by governments to support economic activities of entities in an overseas market, as opposed to a domestic market. As a typical case, where subsidies are provided by the government of country A to support the production of goods in country B, these subsidies may lead to the sale of these goods at lower prices when exported to country C, thereby affecting the domestic import-competing producers in country C.<sup>8</sup> Thus, like traditional subsidies, cross-border subsidies may generate the same negative spillovers.

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Blog (12 Apr. 2024), <https://www.imf.org/en/Blogs/Articles/2024/04/12/industrial-policy-is-back-but-the-bar-to-get-it-right-is-high>.

<sup>3</sup> IMF, OECD, World Bank and WTO, ‘Subsidies, Trade, and International Cooperation’, (Apr. 2022), [https://www.wto.org/english/res\\_e/booksp\\_e/repintcoosub22\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/repintcoosub22_e.pdf).

<sup>4</sup> John Jackson, *World Trade and the Law of the GATT* (Indianapolis: Bobbs-Merrill Co., Inc., 1969) 367-69; Terence Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992) Vol II* (Deventer: Kluwer Law and Taxation Publishers, 1993) 833-884.

<sup>5</sup> *Agreement on Subsidies and Countervailing Measures* (ASCM), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (1994). There was also a category of non-actionable subsidies, including certain subsidies for R&D, environmental protection and regional development, which were permitted under the ASCM. However, this category expired as WTO Members failed to reach a consensus to renew it by 31 December 1999. See Articles 8 & 31 of ASCM; WTO, Committee on Subsidies and Countervailing Measures, Minutes of the Special Meeting Held on 20 December 1999, G/SCM/M/22 (17 Feb. 2000).

<sup>6</sup> Statistics are available and regularly updated on the WTO’s Trade Remedies Data Portal: <https://trade-remedies.wto.org/en>.

<sup>7</sup> See generally Marc Benitah, *The WTO Law of Subsidies, A Comprehensive Approach* (Wolters Kluwer, 2019).

<sup>8</sup> This is the focus of this article. Another emerging case concerns subsidies provided to support investment, production of goods or provision of services by entities of country A in country B, thereby affecting competition in country B. This category is the target of the EU’s Foreign Subsidies Regulation enacted in 2022. See Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign

The European Commission (EC) has led the battle against cross-border subsidies through a series of countervailing investigations in just a few years, targeting subsidies provided by the Chinese government for its firms' investment in overseas markets, especially projects related to the Belt & Road Initiative (BRI). In these investigations, the EC decided to impose countervailing measures on goods imported into the European Union (EU) that were produced by firms receiving Chinese subsidies in Egypt and Indonesia.<sup>9</sup> The EC's actions have further complicated and intensified the debate over international regulation of industrial subsidies. A growing body of work has criticised the legality of these actions under the ASCM.<sup>10</sup> One of the EC's measures even triggered a WTO dispute, which is similarly focused on the WTO-legality of countervailing cross-border subsidies.<sup>11</sup>

A more fundamental, yet under-explored issue, however, concerns the EC's application of the doctrine of "attribution" as part of the public international law on state responsibility. This doctrine is codified in the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission (ILC) at its fifty-third session in 2001 (hereinafter 'ILC Articles').<sup>12</sup> The doctrine sets forth principles and criteria for determining "whether the conduct of a natural person or other such intermediary can be considered an 'act of state', and thus be capable of giving rise to state responsibility."<sup>13</sup> The EC's countervailing actions against cross-border subsidies relied exclusively on ILC Article 11, which provides that:

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.

In essence, the EC decided that the governments of the exporting countries (i.e. Egypt and Indonesia) *acknowledged* and *adopted* subsidies provided by the Chinese government, and therefore the conduct of the Chinese government – i.e. the provision of WTO-unlawful

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Subsidies Distorting the Internal Market, L330/1 (23 December 2022). This regulation is beyond the scope of this paper. For discussions, see Victor Crochet and Marcus Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law', (2021)20(3) *World Trade Review* 343; Csongor István Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?', (2023)57(6) *Journal of World Trade* 889.

<sup>9</sup> European Commission, 'Commission Implementing Regulation (EU) 2020/776 of 12 June 2020' (15 Jun. 2020) OJ L189/1 [hereinafter 'Egypt Glass Fibre Fabrics Decision']; European Commission, 'Commission Implementing Regulation (EU) 2020/870 of 24 June 2020' (25 Jun. 2020) OJ L201/10 [hereinafter 'Egypt Filament Glass Fibre Products Decision']; European Commission, 'Commission Implementing Regulation (EU) 2022/433 of 15 March 2022' (16 Mar. 2022) OJ L88/24 [hereinafter 'Indonesia Stainless Steel Cold-Rolled Flat Products Decision'].

<sup>10</sup> Victor Crochet and Vineet Hegde, 'China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement', (2020)23(4) *Journal of International Economic Law* 841; 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)', RSC Policy Paper 2023/09 (2023), <https://cadmus.eui.eu/handle/1814/75894>; Ru Ding and Yiqian Xiang, 'Emerging Rules on Cross-border Subsidies: A Typological Analysis and Proposals for China's Approach', (2022)12(2) *Journal of WTO and China* 45.

<sup>11</sup> WTO, *European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia*, Request for the establishment of a panel by Indonesia, WT/DS616/2 (dated 18 Apr. 2023).

<sup>12</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10, A/56/10 (Nov. 2001) Chapter IV.E, [https://legal.un.org/ilc/documentation/english/reports/a\\_56\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf). See also Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski et al. (eds.) *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 550-551.

<sup>13</sup> James Crawford, *State Responsibility: the General Part* (Cambridge: Cambridge University Press) 113.

subsidies – was attributable to the other two governments. The practical effect of this decision was that the EC could then treat the Chinese subsidies as being provided by the governments of Egypt and Indonesia themselves so as to enable the countervailing actions against subsidised imports from these two countries. Relying on ILC Article 11 was necessary because under Article 3 of the EU Basic Anti-Subsidy Regulation, a subsidy exists only when it is provided by “a government in the country of origin or export”.<sup>14</sup>

This paper criticises the EC’s application of the *attribution* rules contemplated in ILC Article 11. Section II briefly reviews the development of this article, focusing on its intended function and the condition of *acknowledgement* and *adoption*. In light of the findings in Section II, Section III discusses the extent to which the EC’s decisions have overly stretched the attribution rules under both the public international law and the WTO ASCM. This section also expounds some worrisome implications of the EC’s approach which essentially penalises common practices of international trade and investment cooperation through unilateral measures that are likely to provoke tit-for-tat actions. Faced with the mounting concerns about the adverse effect of cross-border subsidies, Section IV offers two alternative options for addressing such effect, both within the parameters of the WTO rules and without the need to stretch the attributions rules in unjustifiable ways. In particular, we show how “non-violation complaints” can offer a more viable and rational approach to tackle cross-border subsidies. Section V concludes.

## II. STATE ATTRIBUTION UNDER ARTICLE 11

Under ILC Article 2, a state is held accountable for an internationally wrongful act only if the act can be attributable to it under international law. Accordingly, the doctrine of attribution sets forth the rules and criteria for establishing whether an act of state organs or non-state entities can be treated as that of the state. The different categories of attribution, codified in ILC Articles 4-11, distinguish between general rules applicable to standard circumstances and special rules for exceptional circumstances. The former involves the conduct of state organs and agencies exercising government authority (Articles 4-7) and *de facto* organs under the direction or control of a state (Article 8).<sup>15</sup> The latter deals with conduct by non-state entities exercising certain government authority (Article 9), in an insurrectional movement (Article 10), or “acknowledged and adopted by a State as its own” (Article 11).<sup>16</sup>

Thus, it can be observed that the attribution rules target primarily the conduct of state organs or non-state actors rather than that of another state. Some commentators have even opined that Article 11 targets non-state entities having no official capacity only, as a major distinction between the general and exceptional rules.<sup>17</sup> Another important observation is that although Article 11 has been described as a “residual category”, it was not intended to cover all circumstances which are not captured by the other articles.<sup>18</sup> Quite the contrary, its intended function is narrowly focused on addressing *ex post* ratification of conduct, i.e. where such

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<sup>14</sup> This is different from the definition of subsidies under the ASCM, as further discussed in Sections III.2 and IV.1 below.

<sup>15</sup> See above n 13, Crawford, *State Responsibility*, 114-165.

<sup>16</sup> *Ibid.*, ch 6.

<sup>17</sup> Marko Milanovic, ‘State Responsibility for Acts of Non-state Actors’, (2009)22(2) *Leiden Journal of International Law* 307, 314.

<sup>18</sup> See above n 13, Crawford, *State Responsibility*, 116.

conduct is not or cannot be attributed to the state at the time of the conduct, but is only *subsequently* acknowledged and adopted by the state.<sup>19</sup>

The key problem that Article 11 aims to address came out of two cases, i.e. *Lighthouses*<sup>20</sup> and *Tehran Hostages*,<sup>21</sup> as documented in the relevant drafting record and ILC Commentaries.<sup>22</sup> The former case involved a situation where a new state explicitly endorsed and continued the conduct of its predecessor after the state succession. In the latter, the Iranian state was found to have adopted the wrongful act of Iranian militants, i.e. the seizure of the US embassy, through policies and statements which continued the act. Thus, both cases concerned an *ex post* adoption of a past act. *Lighthouses* did attribute the conduct of one state to another state, but this occurred in the specific context of state succession. It was concerns about these limited circumstances that led to the addition of Article 11 to the attribution rules.

In addition, the drafting record of Article 11 shows that “acknowledgement and adoption” is intended to be a single, cumulative condition which entails a high evidentiary standard.<sup>23</sup> The ILC Commentaries draw a clear distinction between this condition and cases “where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it.”<sup>24</sup> Thus, the condition can be established only based on “clear and unequivocal” acts of a state amounting to an adoption of the conduct in question as its own.<sup>25</sup>

In applying Article 11 in *Sušica Camp* (2002), the International Criminal Tribunal for the Former Yugoslavia found that merely being a “beneficiary” of illegal acts of non-state actors was insufficient to establish an “adoption” or “acknowledgement”.<sup>26</sup> In *Luigiterzo Bosca v. Lithuania* (2013), Lithuania created a state entity to undertake the privatisation of state property. The wrongful act arose from the entity’s privatisation of a state-owned wine company and its decision to annul the successful bid by the claimant Italian company, allegedly in breach of the bilateral investment treaty (BIT) between Lithuania and Italy. The Permanent Court of Arbitration attributed the act of the entity to the government of Lithuania based on evidence showing that the government explicitly approved the decision.<sup>27</sup> In *Bilcon of Delaware et al v. Canada* (2015), the alleged wrongful act concerned the rejection of the claimant companies’ investment proposal in Nova Scotia, Canada, which contravened Canada’s obligations under the North American Free Trade Agreement. This rejection was based on environmental

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<sup>19</sup> International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2008) 52 [hereinafter ‘ILC Commentaries’]; above n 13, Crawford, *State Responsibility*, 116.

<sup>20</sup> *Lighthouses Case (The Government of the French Republic v The Government of the Greek Republic) (Judgment)* [1934] PCIJ (ser A/B) No 62.

<sup>21</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3.

<sup>22</sup> See above n 19, ILC Commentaries, 52-53; United Nations, Yearbook of the International Law Commission 1998: VOL 1, A/CN.4/SER.A/1998 (2000) 249, 251 [hereinafter ‘ILC Yearbook 1998’]. See also above n 13, Crawford, *State Responsibility*, 182-184.

<sup>23</sup> See above n 22, ILC Yearbook 1998, 268, para. 48.

<sup>24</sup> See above n 19, ILC Commentaries, 53.

<sup>25</sup> *Ibid.*

<sup>26</sup> United Nations, ‘Materials on the Responsibility of States for Internationally Wrongful Acts’, ST/LEG/SER.B/25/Rev.1 (2023) 173-175. See also Simon Olleson, ‘The Impact of the ILC’s Articles on Responsibility of States for International Wrongful Acts’, *British Institute of International and Comparative Law* (2001) 96-99.

<sup>27</sup> *Luigiterzo Bosca v Republic of Lithuania (Award)* (Permanent Court of Arbitration, Case No 2011-05, 17 May 2013), para. 128.

grounds pursuant to the recommendations of a Joint Review Panel. The Permanent Court of Arbitration held that even if the panel was not treated as an organ of the Canadian government, its findings and recommendations were unequivocally accepted by the government in its decision to dismiss the investment.<sup>28</sup> Similarly, *Saint-Gobain v. Venezuela* (2016) concerned the respondent’s expropriation of the claimant’s subsidiary in Venezuela in violation of the France-Venezuela BIT. The tribunal, composed under the arbitration rules of the International Centre for Settlement of Investment Disputes, found that while the government of Venezuela did not empower the union members concerned to carry out a plant takeover as part of the expropriation, it subsequently adopted this act as its own by, *inter alia*, making it an integral part of the government’s nationalisation process.<sup>29</sup> In *Makuchyan and Minasyan v. Azerbaijan and Hungary* (2020), the European Court of Human Rights considered whether the wrongful act of a member of the Azerbaijani army was subsequently acknowledged and adopted by the Azerbaijani government. The court observed that Article 11 “sets a very high threshold for State responsibility for an act otherwise non-attributable to a State at the time of its commission.”<sup>30</sup> It held that attributing the conduct to the state required evidence showing that “the Azerbaijani authorities ‘acknowledge’ and ‘adopt’ them as acts perpetrated by the State of Azerbaijan – thus directly and categorically assuming responsibility for” the conduct.<sup>31</sup> The court found that the state did subsequently approve and endorse the act by promoting the person as a national hero and in the military ranks, and awarding him salary arrears and a flat.<sup>32</sup> However, it was not convinced that these acts of the state amounted to “clear and unequivocal” “acknowledgement” and “adoption” of the wrongful act as its own.<sup>33</sup>

WTO tribunals have considered the attribution rules only briefly in a few cases. In *US – Anti-Dumping and Countervailing Duties (China)* (2011), the Appellate Body discussed the role of ILC Articles 4, 5 and 8 in assessing whether China’s State-owned commercial banks were public bodies within the meaning of Article 1.1(a)(1) of the ASCM.<sup>34</sup> The Appellate Body did not comment on Article 11 specifically but merely used ILC Article 5 to support its interpretation of the term “public body”.<sup>35</sup> In *Saudi Arabia – IPRs* (2020), the panel opined that Article 11 “only applies to conduct that is not otherwise attributable to a state” under the general circumstances involving government organs or agencies.<sup>36</sup>

In summary, the development and application of ILC Article 11 has confirmed the aforesaid three core features of the attribution rules in a rather consistent manner. First, Article 11 addresses the conduct of non-state actors without governmental authority and does not cover

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<sup>28</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada (Award of Jurisdiction and Liability)* (Permanent Court of Arbitration, Case No 2009-04, 17 Mar. 2015), paras. 323-324.

<sup>29</sup> *Saint-Gobain Performance Plastics Europe v Bolivarian Republic of Venezuela (Decision on Liability and the Principles of Quantum)* (ICSID Tribunal, Case No ARB/12/13, 30 Dec. 2016), paras. 447-464.

<sup>30</sup> *Makuchyan and Minasyan v Azerbaijan and Hungary* (European Court of Human Rights, Fourth Section, Application No 17247/13, 26 May 2020), para. 112.

<sup>31</sup> *Ibid.*, para. 113.

<sup>32</sup> *Ibid.*, paras. 115-117.

<sup>33</sup> *Ibid.*, para. 118.

<sup>34</sup> Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 Mar. 2011), paras. 308-313.

<sup>35</sup> *Ibid.*, paras. 310-311.

<sup>36</sup> WTO Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, WT/DS567/R (circulated 16 Jun. 2020), para. 7.161.



the attribution of conduct between states except in case of state successions. Here, it is worth noting that relationship between states for their respective actions is governed separately under Chapter IV of the ILC Articles, titled “Responsibility of a State in Connection with the Act of Another State”. Given the general principle of “independent responsibility”, Chapter IV confines itself to providing responsibility (rather than attribution) for acts by one state to another state only in a handful of exceptional cases.<sup>37</sup> One of the cases, perhaps the most relevant for our purpose, allows responsibility for conduct of one state by another state only where the conduct is *directed* and *controlled* by the latter (Article 17). The terms “direction and control” require actual domination of the conduct as opposed to mere influence, incitement, or suggestion.<sup>38</sup> Thus, Chapter IV provides supportive context for the observation that Article 11 does not apply to attribution of conduct between states.

Second, Article 11 targets conduct which cannot be attributed to a state at the time of commission, but which is subsequently accepted by the state. This means that Article 11 does not apply to conduct that can be attributed to a state when the conduct takes place based on the other ILC Articles (e.g. Articles 4, 5 & 8).

Third, Article 11 imposes a high standard for justifying attribution of conduct that is non-attributable under the general rules, evidently to confine the applicability of Article 11 to limited circumstances. Thus, the condition of “acknowledgement and adoption” requires acts of a state unequivocally accepting the wrongful conduct of non-state actors as its own, hence assuming responsibility for the conduct.

### III. STRETCHING THE RULES OF ATTRIBUTION

The boundaries of ILC Article 11 discussed above are critical for our assessment of the EC’s attribution of the conduct of the Chinese government to other governments in the three consecutive countervailing investigations: the Egypt Glass Fibre Fabrics (GFF) Decision (2020), Egypt Filament Glass Fibre Products (GFR) Decision (2020), and Indonesia Stainless Steel Cold-Rolled Flat Products Decision (2022).<sup>39</sup> All cases involved highly similar facts and findings in relation to the attribution of conduct. They concerned a wide spectrum of subsidies provided by the Chinese government, including through state and non-state banks and other entities, in the form of grants, policy loans, export credits, government provision of goods and services, tax reduction and exemption, etc. These subsidies were provided to Chinese companies investing in designated areas of the host countries via their holding/parent companies in China. The designated areas included, respectively, the China – Egypt Suez Economic and Trade Cooperation (SETC) Zone and the Indonesian Morowali Industrial Park (Morowali Park), which were established to promote cooperation between the host governments and China. Such cooperation served the strategic and economic needs of both sides. Egypt and Indonesia relied on Chinese investment for capital, know-how and technologies to foster specific domestic industries and economic growth more generally. For Egypt, the main goal was to promote the development of the Suez Canal Area, one of its poorest regions. For Indonesia, it was to build

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<sup>37</sup> See above n 19, ILC Commentaries, 64.

<sup>38</sup> *Ibid.*, 68-69.

<sup>39</sup> The summary of the key facts below is based on above n 9, Egypt Glass Fibre Fabrics Decision (2020), recitals 647-659, 678-683; Egypt Filament Glass Fibre Products Decision (2020), recitals 35-48; Indonesia Stainless Steel Cold-Rolled Flat Products Decision (2022), recitals 304-323, 544, 594.

domestic smelters or processing capabilities in the nickel sector to capitalise on its abundant nickel ore reserves. On the other side, China sought to promote its “Go Global” policy and the BRI, thereby expanding exports of high-tech products (such as GFF and GFR), further advancing technological capabilities and moving up value chains, or in the case of Indonesia, securing the necessary supply of nickel.

### 1. ILC Article 11

The EC’s findings were predominantly based on cooperative instruments (such as memorandum of understanding (MOU), written agreements) and joint or individual policies, actions, and statements developed gradually by the host governments and China over a long period of time. This collection of evidence, in the EC’s view, amply demonstrated that the host governments were not only fully aware of the Chinese subsidies, but they welcomed and expected (Egypt) or actively encouraged and sought (Indonesia) China’s commitment to provide the subsidies, as well as facilitated their implementation in the designated areas.<sup>40</sup> Adding to this was also evidence showing that Egypt and Indonesia recognised the SETC Zone and Morowali Park respectively as designated overseas trade and investment areas for Chinese companies. Accordingly, the EC concluded that the host governments endorsed (Egypt) or unequivocally acknowledged and adopted (Indonesia) the Chinese subsidies as their own.

The EC’s application of ILC Article 11 overstretched the boundaries of the attribution rules, precisely in terms of the three key parameters discussed in Section II. Firstly, the EC attributed the conduct of one state to another state, which is beyond the scope of ILC Article 11 and covered by other ILC articles (i.e. Chapter IV).

Second, the cooperative documents and actions identified by the EC show clearly that the provision of subsidies occurred after a series of negotiations which led to the conclusion, implementation, and further development of the relevant cooperative initiatives/projects. Therefore, the alleged welcoming, encouraging or seeking of Chinese subsidies generally predated the provision of the subsidies, contrary to situations of *ex post* ratification which Article 11 is designed to cover. The EC’s reasoning offered no substantive evidence or analysis to specifically identify Chinese subsidies which were *subsequently* adopted by acts of the host governments.

Third, welcoming or expecting Chinese subsidies or acknowledging their benefits for the pursuit and accomplishment of the cooperation or the strategic goals of the host governments is insufficient to pass the high evidentiary bar embedded in the condition of “acknowledgement and adoption”. These acts were mere acknowledgement or at most approval of the subsidies. Being a beneficiary of the subsidies did not constitute “acknowledgement and adoption” either (as shown in the *Sušica Camp* decision). Nor could actively seeking the subsidies be treated as acknowledging and adopting the subsidies as if they were provided by the host governments themselves. Although the host governments arguably endorsed the subsidies, there was no evidence to suggest that they unequivocally assumed responsibility for the provision of the subsidies. Rather, what is manifest from the evidence on record was the host governments and China joining forces to co-develop select projects/industries in the former’s markets through

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<sup>40</sup> The summary of the key findings is based on above n 9, Egypt Glass Fibre Fabrics Decision (2020), recitals 676-697; Egypt Filament Glass Fibre Products Decision (2020), recitals 72-85; Indonesia Stainless Steel Cold-Rolled Flat Products Decision (2022), recitals 568-677.

formal cooperative arrangements. Such arrangements are common among all economies, as further discussed below. The point to make here is that under these arrangements, the host governments and China made *independent* commitments to promote the cooperation including through subsidies, hence assuming responsibility for the provision of their own subsidies.

In short, ILC Article 11 cannot be stretched to the situation of attribution of cross-border subsidies as the EC does. Accepting the EC's line of reasoning would amount to treating the ILC Articles as an international treaty, the provision of which can be extended through legal interpretation. This is not the case. The ILC Articles constitute, at most, a codification of customary international law and can, as a result, only be applied to situations for which there is previous state practice and *opinio juris*.<sup>41</sup>

## 2. ASCM Article 1.1(a)(1)

Besides ILC Article 11, the EC also stretched the attribution rules envisaged in Article 1.1(a)(1) of the ASCM. In other words, the EC's approach to attribution is not permitted under the ASCM in determining the existence of subsidies, which is a precondition for the application of countervailing measures. Where a "financial contribution" is granted by a "government" of a WTO Member (i.e. state organs) or a "public body" "within the territory of a Member", Article 1.1(a)(1) allows for attribution of the conduct of these actors to the government. As regards private entities, Article 1.1(a)(1)(iv) requires that the provision of subsidies is entrusted or directed by a government. Indeed, the references to "a government" and "within the territory of a Member" do not provide a definitive answer for whether Article 1.1(a)(1) provides scope for consideration of cross-border subsidies.<sup>42</sup> Nevertheless, it is abundantly clear that the options for attribution under Article 1.1(a)(1) are confined to the conduct of state organs, public bodies or private entities, hence excluding attribution between states.

Furthermore, even assuming that the EC's approach was justifiable under ILC Article 11, it still cannot be reconciled with ASCM's attribution rules. The latter, as *lex specialis*, should prevail to the extent of such inconsistencies. In this regard, ILC Article 55 states that the ILC articles "do not apply where and to the extent that the conditions for the existence of an internationally wrongful act ... are governed by special rules of international law." The Commentaries on this article contemplate WTO agreements as such special rules.<sup>43</sup> This principle of *lex specialis* would therefore allow WTO tribunals to exclude the application of ILC Article 11 if it was interpreted to allow attribution between states.

Finally, it is worth noting that whether ILC Article 11 constitutes customary international law remains controversial.<sup>44</sup> In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body did not resolve this issue either. As noted earlier, while the Appellate Body used ILC Article 5 to assist its interpretation of "public body", it stressed that the attribution rules being applied are those set out in Article 1.1(a)(1).<sup>45</sup> The Appellate Body's consideration of Article 5

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<sup>41</sup> See generally Fernando Lusa Bordin, 'Reflections on Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law', (2014)63(3) *International & Comparative Law Quarterly* 535.

<sup>42</sup> For a detailed discussion, see above n 10, Crochet and Hegde, 'Transnational Production Subsidies Under the WTO SCM Agreement', 847-855.

<sup>43</sup> See above n 19, ILC Commentaries, 140.

<sup>44</sup> Carlo de Stefano, *Attribution in International Law and Arbitration* (Oxford: Oxford University Press, 2020) 12-15; above n 41, Bordin, 'The Authority of Codification Conventions and ILC Draft Articles in International Law'.

<sup>45</sup> See above n 34, Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 310-316.

was based on its observation of “similarities in the core principles and functions” between that provision and Article 1.1(a)(1) in terms of attribution.<sup>46</sup> Thus, WTO tribunals have maintained certain latitude in deciding whether and how to use the attribution rules under the ILC Articles. Since Article 1.1(a)(1) does not contain rules of attribution in case of adoption and acknowledgment, it does not share similarities with ILC Article 11, which provides the basis for WTO tribunals to not consider the latter in interpreting the former.

### 3. *Worrisome implications*

The EC’s approach to tackling cross-border subsidies by interpreting the ASCM in light of ILC Article 11 has significant policy and practical ramifications. It effectively and unjustifiably penalises common and legitimate practices of governments. For home countries, such practices involve fostering outbound investment through financial and non-financial support for strategic policy and economic goals. For host countries especially emerging economies, these involve using foreign investment to promote industrialisation and economic development. It is also the sovereign right of these countries to pursue these objectives through mutually beneficial joint initiatives or arrangements which are standard ways of international economic cooperation. The fact that China’s outbound investment policies have been remarkably ambitious does not justify linking the underlying problems overwhelmingly or even solely to China.

Statistics have shown that all major advanced economies have maintained incentive schemes in a variety of forms to promote outbound investment in developing economies since the 1950s.<sup>47</sup> As the authors have discussed elsewhere,<sup>48</sup> such investment is a necessary, rational response to the need for internationalising production operations in foreign markets to exploit low labour, environmental and other production and compliance costs, redeploy home resources to more advanced sectors and higher value-added activities, amongst other policy and commercial motivations. US and EU firms led this internationalisation process, followed by those in Japan and South Korea. Furthermore, China is not the only emerging economy that has taken similar approaches. Russian, Saudi, and Indian firms, for example, have also been walking in the footsteps of their predecessors.

Today, all kinds of subsidies, including those employed to promote outbound investment, are found in both state-dominated economies and more market-based ones. The US, the EU, and China each have resorted to subsidies not only for internal policy and economic needs but also as an external, strategic response to subsidies adopted among themselves.<sup>49</sup> The scale and detrimental effect of US and EU subsidies are no less significant compared to Chinese ones.<sup>50</sup> Well-known recent examples are the US’s Inflation Reduction Act of 2022 (IRA) and the EU’s Global Gateway initiative. The IRA commits billions of dollars to promote manufacturing,

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<sup>46</sup> *Ibid.*, para. 311.

<sup>47</sup> Karl Sauvant, et al., ‘Trends in FDI, Home Country Measures and Competitive Neutrality’ in Andrea K. Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (New York: Oxford University Press, 2014) 12-16.

<sup>48</sup> Victor Crochet and Weihuan Zhou, ‘Preventing the Anti-Circumvention Instrument from Undermining the Investment Development Path’, (2023)72(3) *International & Comparative Law Quarterly* 601, 604-607.

<sup>49</sup> Simon Evenett and Johannes Fritz, *Subsidies and Market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States* (London: CEPR Press, 2021) 6-7.

<sup>50</sup> *Ibid.*, 31-36.

advancement and deployment of technologies in clean energy industries.<sup>51</sup> A core strategic goal of the IRA is to reshore electric vehicle (EV) supply chains within the US and its allies while decoupling from China including the supply of critical minerals for EV production.<sup>52</sup> Similarly, the Global Gateway brings together EU Member States and their financial and development institutions, including the European Investment Bank and the European Bank for Reconstruction and Development, as well as private capital, to develop new projects (particularly infrastructure) in third countries.<sup>53</sup> As such, this initiative is widely perceived as the EU's global investment strategy that borrows from China's approaches, particularly the BRI, in order to compete with China. Both the IRA and the Global Gateway initiative involve economic and strategic cooperation among existing and potential partners, including through formal agreements. For instance, to include allies originally ineligible for the IRA subsidies, the US and Japan entered an Agreement on Strengthening Critical Minerals Supply Chains.<sup>54</sup> The US is also negotiating similar arrangements with other allies including the EU.<sup>55</sup> Increasing partnerships with governments around the globe have also been pursued and established under the Global Gateway initiative.<sup>56</sup>

Thus, the EU's actions against cross-border subsidies are essentially a unilateral punishment imposed on a longstanding, global phenomenon that remains significant and continues to evolve in policymaking and commercial decisions worldwide. In particular, the common practices of governments subsidising outbound investment mean that they all can become a target of countervailing actions. Indeed, the EC's application of ILC Article 11 may well hurt itself or its trusted partners. For example, can China use the negotiation and conclusion of a cooperative arrangement between the US and its allies to activate the latter's eligibility for the IRA subsidies as evidence of attribution of the IRA subsidies to US allies? The same can be applied to the EU's Global Gateway program, which resembles China's BRI and hence offers a convenient target of any tit-for-tat anti-subsidy actions that China may contemplate. In addition, it should be noted that countervailing actions against cross-border subsidies affect home and host governments, both of which may therefore retaliate.

Moreover, it is possible to apply the EC's interpretation of Article 11 to other WTO rules, trade and investment policies and cooperative arrangements. One example relates to the so-

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<sup>51</sup> The White House, 'Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action' (Jan. 2023), <https://www.whitehouse.gov/wpcontent/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf>.

<sup>52</sup> Chad Bown, 'Industrial Policy for Electric Vehicle Supply Chains and the US-EU Fight over the Inflation Reduction Act', PIIE Working Papers 23-1 (May 2023), <https://www.piie.com/publications/working-papers/industrial-policy-electric-vehicle-supply-chains-and-us-eu-fight-over>.

<sup>53</sup> European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'The Global Gateway, JOIN(2021) 30 Final', <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021JC0030>. For a detailed discussion of EU's strategies on critical minerals, see generally Victor Crochet and Weihuan Zhou, 'Critical Insecurities? The European Union's Strategy for a Stable Supply of Minerals', (2024)27(1) *Journal of International Economic Law* 147.

<sup>54</sup> Office of the United States Trade Representative, 'United States and Japan Sign Critical Minerals Agreement' (28 Mar. 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/march/united-states-and-japan-sign-critical-minerals-agreement>.

<sup>55</sup> European Commission, 'EU Moves Forward with Critical Minerals Agreement Negotiations with the US' (14 Jun. 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3214](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3214).

<sup>56</sup> European Commission, 'Global Gateway – Flagship Projects' (undated), [https://international-partnerships.ec.europa.eu/policies/global-gateway/global-gateway-flagship-projects\\_en](https://international-partnerships.ec.europa.eu/policies/global-gateway/global-gateway-flagship-projects_en).

called US-China Phase 1 trade deal,<sup>57</sup> which was concluded in 2020 to prevent further escalation of their bilateral trade war since 2017. To the extent that this agreement imposed predominantly one-sided obligations on China including a massive shopping list for China to prioritise the purchase of US goods and services over imports from other WTO Members, it entailed actions that could violate the most-favoured-nation principle codified in Article I:1 of the General Agreement on Tariffs and Trade<sup>58</sup> (GATT).<sup>59</sup> As China would have not undertaken such burdensome, non-reciprocal commitments in the absence of US pressure, can the US be held accountable for China's implementation of these commitments where a breach of WTO rules occurs? The EC's approach under Article 11 would suggest a positive answer because the US's inducement of the Chinese commitments and actions could constitute "acknowledgement and adoption" according to the evidentiary standard applied by the EC. A more recent example concerns the deal reached by the US and Norway to restrict China's access to critical technologies, particularly advanced chips.<sup>60</sup> Could China now argue that the Dutch export restrictions are attributable to the US and thus bring a WTO dispute against the US based on GATT Article XI:1? The key point here is that the EC's approach sets a harmful precedent for how the attribution rules may be (ab)used in broader contexts beyond subsidies. It generates a risk of governments attacking others' economic cooperation based on state-to-state attribution via unilateral measures.

Finally, it is worth iterating the legitimate interests of host governments in incentivising and using foreign investment as a major avenue to promote industrialisation and economic development. The positive effects of foreign investment on host economies, particularly emerging ones, have been well documented.<sup>61</sup> Despite the widespread concerns about the BRI, Chinese investment has brought enormous benefits (e.g. capital, skilled labour, knowhow, and advanced technologies) to a range of BRI-participating developing economies, which are evidenced voluminously, including in the EC's countervailing investigations discussed in Section II.<sup>62</sup> Thus, developing economies should be encouraged to make use of Chinese investment (including Chinese subsidies) to foster chosen industries, projects and regions which they do not have the resources and capabilities to fund and develop by themselves. This

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<sup>57</sup> Office of the United States Trade Representative, 'Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China' (15 Jan. 2020), [https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic\\_And\\_Trade\\_Agreement\\_Between\\_The\\_United\\_States\\_And\\_China\\_Text.pdf](https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf).

<sup>58</sup> *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>59</sup> For a summary of this deal, see Weihuan Zhou and Henry Gao, 'US-China Phase One Deal: A Brief Account', *Regulating for Globalization* blog (22 Jan. 2020), <https://regulatingforglobalization.com/2020/01/22/us-china-phase-one-deal-a-brief-account/>.

<sup>60</sup> Pieter Haeck et al., 'US, Netherlands Strike Deal on Blocking Chip Exports to China', *POLITICO* (27 Jan. 2023), <https://www.politico.eu/article/us-dutch-officials-meet-to-hammer-out-chips-control-deal-export-blocks-china/>.

<sup>61</sup> See e.g. OECD, 'Foreign Direct Investment for Development, Maximising Benefits, Minimising Costs' (24 Sep. 2002), [https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-for-development\\_9789264199286-en](https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-for-development_9789264199286-en).

<sup>62</sup> See also Christoph Nedopil, 'China Belt and Road Initiative (BRI) Investment Report 2023', Griffith Asia Institute (Feb. 2024), [https://www.griffith.edu.au/\\_data/assets/pdf\\_file/0033/1910697/Nedopil-2024-China-Belt-Road-Initiative-Investment-report.pdf](https://www.griffith.edu.au/_data/assets/pdf_file/0033/1910697/Nedopil-2024-China-Belt-Road-Initiative-Investment-report.pdf); Maggie Xiaoyang Chen and Chuanhao Lin, 'Foreign Investment across the Belt and Road: Patterns, Determinants and Effects', World Bank Policy Research Working Paper 8607 (10 Oct. 2018), <https://documents1.worldbank.org/curated/en/394671539175518256/pdf/WPS8607.pdf>.

legitimate right is acknowledged explicitly under Article 27.1 of the ASCM. It states that “Members recognize that subsidies may play an important role in economic development programmes of developing country Members.” This suggests that the application of the ASCM should pay attention to the development interests of emerging economies, including their use of foreign investment and subsidies. Although Article 27.1 does not impose a binding obligation, applying countervailing measures to penalise subsidies provided by a foreign government goes sharply against the spirit of this provision. In any event, as discussed earlier, in working with China under or beyond the BRI, developing economies merely seek to reap the benefits of Chinese investment and subsidies and cannot be regarded as also taking responsibility for such subsidies provided by a foreign government. While aimed at China, the EU’s countervailing actions rendered developing country casualties in the crossfire between world superpowers.

#### IV. CONTEMPLATING ALTERNATIVES

As noted in Section I, cross-border subsidies can generate similar adverse effects on trading partners as those of traditional subsidies. Concerns about this underlying problem not only drove the EC’s creative use of the attribution rules in the countervailing actions but also led the European General Court (the First Chamber) to rule in favour of the EC’s approach in the Egypt GFF and GFR decisions. The Court found that the EC’s application of the attribution rules was consistent with the EU’s Anti-Subsidy Regulation and the ASCM, without having to rely on ILC Article 11. In reaching these rulings, the Court stressed that:

it cannot be accepted that an economic and legal construct such as that of the SETC-Zone, conceived in close collaboration between the Government of China and the Government of Egypt at the highest level, is not covered by the basic anti-subsidy regulation, without this undermining that regulation’s effectiveness or its purpose and objectives.<sup>63</sup>

On appeal, while the Court of Justice of the EU has not delivered its judgment yet, the Advocate General agreed with the General Court that attribution was possible under the EU’s Anti-Subsidy Regulation and the ASCM because the term “by a government” itself allows state-to-state attribution so that recourse to ILC Article 11 is unnecessary.<sup>64</sup> This is also the approach adopted by the US.<sup>65</sup> Yet, as explained in Section III.2 above, Article 1.1 of the ASCM already provides for an exhaustive list of entities whose conduct can be attributed to a government. Reading the term “by a government” as encapsulating in and of itself all possible

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<sup>63</sup> Judgment of the General Court (First Chamber, Extended Composition), Case T-540/20 (1 Mar. 2023) para. 59; Judgment of the General Court (First Chamber, Extended Composition), Case T-480/20 (1 Mar. 2023) para. 92.

<sup>64</sup> Opinion of Advocate General ÁPETA, Joined Cases C-269/23 P and C-272/23 P (delivered on 16 May 2024), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=286168&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2925708>

<sup>65</sup> Department of Commerce, International Trade Administration, 19 CFR Part 351, Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, Federal Register (25 Mar. 2024); *European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia* (DS616), Third Party Submission of the United States of America (2 Feb. 2024), <https://ustr.gov/sites/default/files/enforcement/DS/DS616/US.3dPty.Sub.fin.pdf>.

attribution scenarios would render the *lex specialis* contemplated in Article 1.1 meaningless. Moreover, this interpretative approach contradicts other provisions of the ASCM, as discussed below.

While the negative spillovers of cross-border subsidies require attention by the international community, unilateral actions based on unjustified attribution of state responsibility are not a desirable approach to address a systemic problem. Do governments have better options under the current WTO rules? We offer two suggestions below.

### 1. Working around “jurisdiction” under ASCM

As foreshadowed in Section III.2, Article 1.1 of the ASCM provides scope for considering cross-border subsidies without needing to invoke the EU’s attribution methodology.<sup>66</sup> This provision does not require that the recipient of a financial contribution be located within the territory of the subsidising WTO Member, an interpretation also endorsed by WTO tribunals.<sup>67</sup> The reason why the EU had to rely on legal gymnastics by attributing the financial contribution of one Member to another is because its Basic Anti-Subsidy Regulation departs from the text of Article 1.1 of the ASCM by requiring that the financial contribution be granted by “the country of origin or export”.

The major textual constraint under WTO law is, instead, Article 2 of the ASCM, which requires a financial contribution to be “specific” to constitute an actionable subsidy. Thus, for a cross-border subsidy to be actionable, it must be specific to certain enterprises “within the jurisdiction of the granting authority”. This quoted text arguably imposes a territorial limitation on the location of the recipient of the subsidy. This understanding finds contextual support in other provisions of the ASCM, as discussed in more detail below. It is further confirmed by the negotiating history of the ASCM which indicates that the territorial scope of the agreement is limited to subsidies benefitting entities producing goods in the territory of the subsidising government.<sup>68</sup> According to one of the negotiators of the agreement, this was intended to exclude situations such as World Bank loans, war reparations, or aid from the coverage of the ASCM.<sup>69</sup>

However, this line of interpretation is not set in stone. Two counterarguments can be developed. First, the text of Article 2.1 itself can be read in a way that if a subsidy meets the principles enshrined in the subparagraphs of that provision, it would be found to be specific to certain enterprises within the jurisdiction of the granting authority regardless of the location of the recipient. This seems logical because Article 2 is not concerned about imposing an outward limit on the scope of which subsidies can be found to be specific, but is rather concerned about imposing an inward assessment to ensure that subsidies generally available throughout an

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<sup>66</sup> For a detailed discussion, see above n 10, Crochet and Hegde, ‘Transnational Production Subsidies Under the WTO SCM Agreement’, 847-855.

<sup>67</sup> WTO Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R (adopted 20 Aug. 1999) paras 2.1–2.6 and 4.19–4.20. This is also confirmed by Annex I of the ASCM regarding the illustrative list of export subsidies which covers export financing provided to a foreign buyer.

<sup>68</sup> Gary Horlick, ‘An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures’, (2013) 8(9) *Global Trade and Customs Journal* 297.

<sup>69</sup> *Ibid.*



economy are not condemned.<sup>70</sup> Second, the concept of jurisdiction could be interpreted as covering situations of extra-territorial jurisdictions based on the facts at hand. For example, in the case of China, when the recipient of a cross-border subsidy locates in a special economic zone set up abroad under the cooperation of the local government and that of China, it might be argued that China's jurisdiction extends to entities in that zone.

Moreover, legal work arounds to avoid the hurdle of "within the jurisdiction" in Article 2 of the ASCM are also available. Article 2.3 provides that prohibited subsidies contemplated in Article 3 shall be deemed specific. Similarly, Article 10.2 of China's Protocol of Accession to the WTO provides that subsidies granted to Chinese state-owned enterprises are deemed specific within the meaning of Article 2 of the ASCM if these enterprises are the predominant recipients of, or receive disproportionately large amounts of, such subsidies.<sup>71</sup>

These approaches would avoid the problems of the EC's methodology in terms of stretching the rules of attribution to international trade law, while allowing governments to act against cross-border subsidies within the ambit of WTO rules. Nevertheless, they carry their own problems or limitations. For example, the interpretation of a special economic zone as being within China's extra-territorial jurisdiction may open the floodgate for an expansive interpretation of "jurisdiction" in similar or other circumstances, hence leading to "overreaching" problems similar to those associated with the EC's attribution methodology. Moreover, the application of the "deemed specificity" provisions can address only some types of subsidies.

At the same time, these approaches can be subject to interpretative constraints under other provisions of the ASCM beyond Article 2. For instance, Articles 13 and 22 of the ASCM, which impose requirements of consultation, notification, etc. on an investigating authority, refer to the targeted Member consistently as the Member "the products of which may be/are subject to" a countervailing investigation. Articles 11.2(ii) and 11.8 of the ASCM then made it clear that this textual reference to the targeted Member necessarily means "the country or countries of origin or export in question". By granting the rights of consultation, notification etc. solely to the government of the country of origin or export, the ASCM arguably excludes a financial contribution by a WTO Member which is not the country of origin or export from its coverage. This seems to be rationale because in the context of cross-border subsidies, the exporting Member would have no power to provide information on subsidies granted by another government (i.e. the subsidising Member), while the subsidising Member would lose its procedural rights under the ASCM. Similarly, Article 18.1(a) of the ASCM envisages the possibility for a targeted Member to offer undertakings in response to countervailing investigations. Here, the targeted Member refers to the "government of the exporting Member" only. This is another evidence clearly demonstrating that the ASCM treats the government of the exporting Member and that of the subsidising Member as one and the same. This interpretation finds further support in footnote 63 to paragraph 2 of Annex IV which states that "[t]he recipient firm is a firm in the territory of the subsidizing Member". Similarly, Article

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<sup>70</sup> WTO Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R (adopted 21 Mar. 2005) para. 7.1143; WTO Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS46/R (adopted 23 Mar. 2012) para. 7.1237.

<sup>71</sup> *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001).

25.2 requires WTO Members to notify subsidies “granted or maintained within their territories” only.

As a result, while creative interpretation of the concept of “jurisdiction” in Article 2 of the ASCM may provide a way to address cross-border subsidies, it faces major legal hurdles and may create similar problems of overly stretching the current rules on industrial subsidies and hence provoke abuses.

## 2. *Developing non-violation claims*

A more, and perhaps the only, sensible option is to bring non-violation claims (NVCs) pursuant to Article XXIII:1(b) of the GATT. This provision came out of the original GATT negotiations in the 1940s. It was applied and clarified by several GATT panels and was further negotiated in the Uruguay Round before it was also codified in Article 26.1 of the WTO’s Dispute Settlement Understanding (DSU).<sup>72</sup> Article XXIII:1(b) and Article 26.1 maintain the avenue for governments to challenge measures which are not in breach of any WTO rules but which nullify or impair benefits under, or impede the attainment of objectives of the relevant covered agreement(s). It is clear from the historical development of these provisions that governments saw the importance of NVCs in addressing the issue of an incomplete GATT/WTO contract where the outcomes of tariff negotiations may be undermined by acts which were not foreseen at the time of the negotiations and hence were not captured by the GATT/WTO rulebook.<sup>73</sup> At the same time, however, governments have resorted to NVCs with caution and generally accepted the interpretative approach taken by GATT/WTO panels to confine the application of NVCs to limited circumstances. Thus, governments brought and won NVCs only in a few disputes throughout the life of the GATT/WTO. These disputes were predominantly concerned about action taken by an importing Member subsequent to the negotiation of its tariff concessions with an exporting Member leading to the nullification or impairment of benefits (i.e. market access opportunities) derived from the concessions for the latter.<sup>74</sup> In *Japan*

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<sup>72</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

<sup>73</sup> A detailed review of the historical development of the NVCs is beyond the scope of this paper and has been undertaken in a series of scholarly work. See eg. Robert Hudec, ‘The GATT Legal System: A Diplomat’s Jurisprudence’, (1970)4(5) *Journal of World Trade* 615; Armin von Bogdandy, ‘The Non-Violation Procedure of Article XXIII:2, GATT: Its Operational Rationale’, (1992)26(4) *Journal of World Trade* 95; Frieder Roessler, ‘The Concept of Nullification and Impairment in the Legal System of the World Trade Organization’ in Ernst-Ulrich Petersmann (eds) *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997) 125-42; Brett Williams, ‘Non-Violation Complaints in the WTO System’ in Paulo Mengozzi (eds) *International Trade Law on the 50th Anniversary of the Multilateral Trade System* (Milano: A. Giuffrè, 1999) 675-797; James Durling and Simon Lester, ‘Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy’, (1999)32 *George Washington Journal of International Law & Economics* 211; Graham Cook, ‘The Legalization of the Non-Violation Concept in the GATT/WTO System’, SSRN (2008). For a discussion of the issue of incomplete contract and under-utilisation of NVCs, see Robert Staiger and Alan Sykes, ‘How Important Can the Non-Violation Clause Be for the GATT/WTO?’, (2017)9(2) *American Economic Journal: Microeconomics* 149.

<sup>74</sup> Working Party Report, *The Australian Subsidy on Ammonium Sulphate*, GATT/CP.4/39 (adopted 3 Apr. 1950); GATT Panel Report, *Treatment by Germany of Imports of Sardines*, G/26 (adopted 31 Oct. 1952); GATT Panel Report, *European Community – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, L/5776 (dated 7 Feb. 1985); GATT Panel Report, *European Economic Community – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes*, L/5778 (dated 20 Feb. 1985); GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins (EEC – Oilseeds I)*, L/6627 (adopted 25 Jan. 1990). There were also a number of unsuccessful NVCs during the GATT. See GATT, Negotiating Group on Dispute Settlement, Non-Violation

– *Films* (1998), the WTO panel summarised the legal conditions for an NVC: (1) the existence of a governmental measure, (2) a benefit accruing to the complaining Member from the relevant tariff concession or agreement, and (3) the benefit is nullified or impaired as the result of the application of the measure.<sup>75</sup> The panel also iterated that “the non-violation remedy should be approached with caution and should remain an exceptional remedy.”<sup>76</sup>

While GATT/WTO panels have developed restrictive interpretation of NVCs,<sup>77</sup> we argue that their interpretation still provides room for establishing an NVC against cross-border subsidies. At a general level, there are at least three reasons for that optimistic observation. First, the legal conditions for NVCs remain unsettled. In the Uruguay Round negotiations, governments deliberately left out the conditions developed by GATT panels from the text of Article 26.1 of the DSU,<sup>78</sup> arguably leaving the flexibility for WTO tribunals to further develop or refine these conditions. In a handful of disputes where NVCs were raised, WTO panels seem to have maintained GATT panels’ restrictive approach.<sup>79</sup> However, WTO panels also recognised that NVCs must be assessed on a case-by-case basis and can be applied to benefits unrelated to a tariff concession but stemmed from a WTO agreement.<sup>80</sup> Second, a majority of the past NVCs, including the few successful ones, involved subsidy schemes, hence providing a solid precedent for applying NVCs to cross-border subsidies which as shown in Section III, are typical forms of financial contributions contemplated in the ASCM. Third, in adjudicating NVCs, GATT/WTO panels have focused on assessing whether a measure frustrated the competitive opportunities generated by tariff concessions rather than the impact on actual trade flows.<sup>81</sup> This means that an NVC may be brought even before cross-border subsidies have caused an increase of subsidised imports into adversely affected countries.

Thus, more specifically, affected Members like the EU can argue that the cross-border subsidies provided by the Chinese government to its investors overseas have the effect of upsetting the competitive opportunity that EU producers should have enjoyed in their home market. The *benefit*, which must be interpreted broadly,<sup>82</sup> comes out of the EU’s right to seek multilateral remedies or impose countervailing measures pursuant to GATT Article VI, as elaborated by the ASCM. Two complications can arise in this claim of “benefit”. One pertains

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Complaints under GATT Article XXIII:2 – Note by the Secretariat, GATT Doc. MTN.GNG/NG13/W/31 (14 Jul. 1989); above n 73, Cook, at 7.

<sup>75</sup> WTO Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Films)*, WT/DS44/R (adopted 22 Apr. 1998) paras. 10.41-89.

<sup>76</sup> *Ibid.* para. 10.37.

<sup>77</sup> See e.g. above n 73, Williams, at 723-51; and generally, Durling and Lester.

<sup>78</sup> See above n 73, Williams, at 775-77.

<sup>79</sup> See above n 75, WTO Panel Report, *Japan – Films*; WTO Panel Report, *Korea – Measures Affecting Government Procurement (Korea – Procurement)*, WT/DS163/R (adopted 19 Jun. 2000) paras. 7.84-126; WTO Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/R (adopted 5 Apr. 2001) paras. 8.276-304; WTO Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R (adopted 23 Jun. 2012) paras. 7.900-901.

<sup>80</sup> See above n 75, WTO Panel Report, *Japan – Films*, para. 10.38; above n 79, WTO Panel Report, *Korea – Procurement*, paras. 7.84-87; WTO Panel Report, *EC – Asbestos*, para. 8.283. See also above n 73, Durling and Lester, at 246-48.

<sup>81</sup> See e.g. above n 74, GATT Panel Report, *EEC – Oilseeds I*, paras. 144, 148; above n 79, WTO Panel Report, *Korea – Procurement*, para. 7.98; WTO Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU (US – COOL, Article 21.5)*, WT/DS384/RW, WT/DS386/RW (adopted 29 May 2015) para. 7.689. See also above n 73, Hudec, at 617; Durling and Lester, at 255-58.

<sup>82</sup> See above n 81, WTO Panel Report, *US – COOL, Article 21.5*, paras. 7.682-688.

to the fact that the benefit is related to the EU's own tariff concessions. This presents an atypical situation compared to past NVCs, which consistently involved a tariff concession of a responding Member that created more favourable market access for the relevant exports of a complaining Member.<sup>83</sup> The other complication involves the EU's evidentiary burden to show that the Chinese subsidies were not reasonably anticipated at the time when the concessions were made,<sup>84</sup> essentially during China's WTO accession negotiations.

These hurdles, however, are not so difficult to overcome. A plausible argument would be that when the EU offered reciprocal tariff concessions, there was a legitimate expectation that it would have access to WTO-permissible remedies to offset the impact of subsidised imports to maintain certain degree of market opportunities for domestic industries. That China now provides harmful subsidies not captured by GATT Article VI or the ASCM nullifies or impairs the benefit that the EU should have enjoyed via these remedies. Here, it should be noted that the "adverse effects" claims under Article 5 of the ASCM would not apply as it requires the existence of a subsidy within the meaning of the ASCM in the first place.<sup>85</sup>

On the question of whether the subsidies could have been reasonably anticipated during China's accession negotiations, the Working Party Report on the Accession of China (WPR) suggests that Members were unaware of issues related to cross-border subsidies. The discussions recorded in the WPR focussed on how the relevant economic policies, regulations, conduct of state entities, industrial subsidies may affect imports or investments into China, or how subsidised exports from China may impact trading partners.<sup>86</sup> It follows that Chinese cross-border subsidies, which only became prominent after the launch of the BRI twelve years after China's WTO accession, were not reasonably foreseeable by WTO Members.

Not only is an NVC against cross-border subsidies viable, but it also provides a more balanced approach to tackle such subsidies for three reasons. First, a successful NVC does not require the removal of the contested measure but merely requires the disputing parties to reach a mutually satisfactory adjustment (Article 26.1(b) of the DSU). This provides the flexibility for the subsidising government to maintain the subsidies in pursuit of its policy goals and for the affected government to take action to rebalance the relevant rights and obligations under the WTO framework. Such action may involve withdrawal of tariff concessions (which would lead to an outcome similar to what a countervailing measure can achieve), compensation, or even cooperation between the parties in other areas of trade and investment. NVCs therefore provide a better avenue for the subsidising and aggrieved governments to negotiate a compromise that would work for both without causing a decision on whether the subsidies are WTO-unlawful. Second, an NVC can leave developing countries outside the battle between

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<sup>83</sup> Thomas Cottier and Krista Nadakavukaren Schefer, 'Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future' in Ernst-Ulrich Petersmann (eds) *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997) 145-183, 148 (noting that NVCs were mainly supported and used by exporting countries).

<sup>84</sup> This is an established legal test as part of the "benefit" claim. See e.g. above n 75, WTO Panel Report, *Japan – Films*, para. 10.61; above n 81, WTO Panel Report, *US – COOL, Article 21.5*, para. 7.691.

<sup>85</sup> While Article 5(b) incorporates the "nullification or impairment of benefits" language, it is a rule or an obligation which gives rise to violation claims, hence different from NVCs. See above n 73, Cook, at 13. See also above n 83, Cottier and Schefer, at 155 (noting that this provision was meant to be an equivalent NVC against non-actionable subsidies under the ASCM).

<sup>86</sup> See, *inter alia*, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001) paras. 41-49, 155-176.

big powers because withdrawal of tariff concessions, compensation and other forms of adjustments can be applied directly to the subsidising government. In doing so, it leaves room for emerging economies to use foreign subsidies for industrialisation and economic development without having to face countervailing actions. Third, compared to a violation claim, an NVC can be adjudicated more efficiently. As some have proposed in the context of using NVCs to address security-based measures, a “shortened and simplified dispute settlement procedure” can be developed to determine “nullification or impairment of benefits”, and the actual level of benefits can be agreed upon by the parties or decided by an arbitrator under Article 21.3(c) of the DSU.<sup>87</sup> An NVC therefore can facilitate the settlement of disputes and the provision of remedies for the affected Member in a more timely fashion.

## V. CONCLUSION

As governments worldwide turn to unilateralism, including by way of industrial policy and subsidies, the international economic legal order is under severe attack. The WTO, as the backbone of the global trading system, is losing influence on domestic policymaking of individual Members which has become overwhelmingly inward-looking to prioritise national interests over international rules and obligations. Against this broader context, we have offered a thorough analysis of the EC’s approach to enable the imposition of countervailing measures against cross-border subsidies by attributing subsidies provided by one government to another government. This application of the attribution rules between states is unjustifiable and highly problematic and adds fuel to the ongoing crisis in globalisation and international trade cooperation.

More specifically, we have shown that the EC’s approach has overstretched the attribution rules under public international law and the WTO ASCM. More than that, it also has the effect of penalising common and legitimate practices of governments in economic cooperation, particularly the right and interest of emerging economies in using foreign investment for industrialisation and development. As such, the EC’s approach may provoke retaliation by targeted governments as well as similar abuses of the attribution rules beyond subsidies.

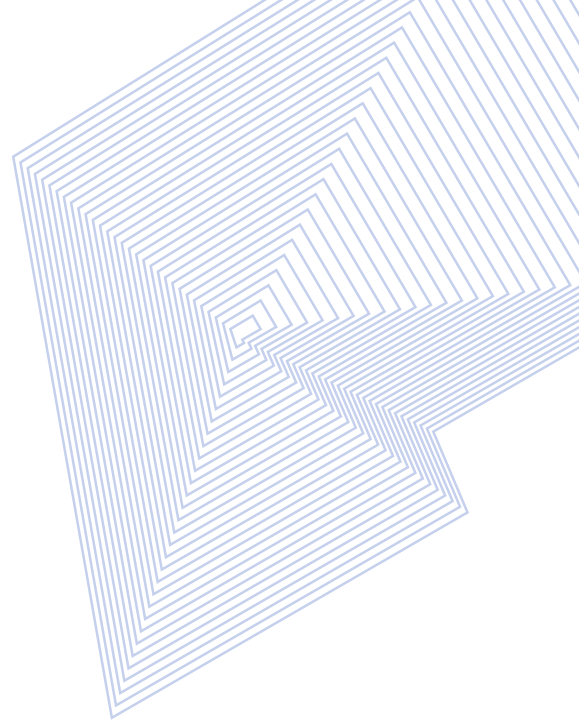
Cross-border subsidies do create real and systemic challenges for the global trading system. However, unilateral measures can only exaggerate the problems. The sensible solution lies in international cooperation based on credible, transparent and inclusive platforms and systems. Thus, governments are encouraged to work out a solution under the WTO framework. As negotiations take time, we have proposed NVCs as a viable and balanced way to address the spillovers of cross-border subsidies and to avoid unilateral actions that unjustifiably stretch the subsidy rules, jeopardise the development interests of emerging economies, and further undermine the international economic legal order.

Towards this end, we are fully aware of the reality that even if governments start using NVCs, countervailing actions will likely remain their preference in practice. Indeed, given the deep concerns about cross-border subsidies, it would only be realistic to anticipate that more

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<sup>87</sup> Nicolas Lamp, ‘At the Vanishing Point of Law: Rebalancing Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars’, (2019)22(4) *Journal of International Economic Law* 721, 739-41; Warren Maruyama and Alan Wolff, ‘Saving the WTO from the National Security Exception’, PIIE Working Paper 23-2 (May 2023) 19-20, <https://www.piie.com/sites/default/files/2023-05/wp23-2.pdf>; above n 72, DSU, Article 26.1(c).

countervailing actions will be deployed going forward. Nevertheless, faced with a weakening rules-based multilateral trading system, it falls upon us, who believe in the utility of the system, to remind governments of options based on agreed rules, damages associated with unilateral measures, and benefits of continuous cooperation.



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