EUROPEAN UNION – COUNTERVAILING AND ANTI-DUMPING DUTIES ON STAINLESS STEEL COLD-ROLLED FLAT PRODUCTS FROM INDONESIA

(DS616)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL TO THIRD PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING

May 13, 2024

TABLE OF REPORTS

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China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
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US – Hot-Rolled Steel (Panel)	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, as modified by Appellate Body Report WT/DS184/AB/R
US – Large Civil Aircraft (Second Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Origin Marking (Hong Kong, China)	Panel Report, *United States – Origin Marking Requirement*, WT/DS597/R, circulated 21 December 2022
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TABLE OF ABBREVIATIONS

Abbreviation	Definition
CVD	Countervailing Duty
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
GOC	Government of China
GOID	Government of Indonesia
SCM Agreement	Agreement on Subsidies and Countervailing Measures
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 CLAIMS CONCERNING PREFERENTIAL FINANCING AND OTHER SUPPORT BY CHINESE GRANTORS TO THE INDONESIAN SSCRFP PRODUCERS

1.1 Financial contribution

1. At paragraph 59 of its first written submission, the European Union asserts that:

> **The fact that there are at least three categories of entities whose conduct may be attributed to a Member, together with the terms used in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, indicate that there can be situations where the financial contribution of one WTO Member can be attributed to another WTO Member.**

Please respond to the European Union's position.

U.S. Response to Question 1:

1. It is not necessary for the Panel in this dispute to address the question of whether there are possibly more than three categories of entities whose conduct may be attributed to a Member for purposes of a financial contribution under Article 1.1(a)(1).

2. The EU has put forward an interpretation of "by a government," which is already one of those three categories of entities identified by the EU whose conduct may be attributed to a Member under Article 1.1, the other two being a private body entrusted or directed by a government, and a funding mechanism.

3. The Panel's task is to assess whether the EU's interpretation of "by a government," which contemplates a situation where the financial contribution of a Member may be attributed to the exporting Member as the exporting Member's subsidy in light of the specific evidence available, is a permissible reading of Article 1.1(a)(1).[1]

2. The European Union asserts at paragraph 79 of its first written submission that:

> **If the financial support can be attributed to the government of the country of export, and when there is a benefit conferred thereby, the resulting subsidy becomes a subsidy of the exporting country for the purpose of Article 18. Moreover, such a government can agree to eliminate or limit the subsidy or take other measures concerning its effect.**

Please comment on the European Union's view that the exporting Member "can agree to eliminate or limit the subsidy or take other measures concerning its effect".

U.S. Response to Question 2:

[1] U.S. Third Party Submission, para. 19.

4. Indonesia has argued that the procedural right provided in Article 18 requires that the Member providing the financial contribution and the exporting Member must be one and the same.[2]

5. The United States disagrees with Indonesia's argument. Depending on the facts of a given case, a commercial or political arrangement may be such that the exporting Member and another Member providing the financial contribution in the exporting Member's territory have joint, complementary roles in determining whether and how a subsidy arrangement is operationalized, which reasonably would include whether to "eliminate or limit the subsidy or take other measures concerning its effects" under Article 18.1. Therefore, there is no tension between the EU's interpretation of "by a government" in Article 1.1(a)(1) and the text in Article 18.1 contemplating a voluntary undertaking under which "the government of the exporting Member agrees to eliminate or limit the subsidy or take other measures concerning its effects."

3. The United States asserts at paragraph 17 of its third-party submission that "the SCM Agreement is interpreting and applying Article VI of the GATT 1994" and that "Article VI:3 of the GATT 1994 defines 'countervailing duty' as a special duty applied to offset 'any bounty or subsidy on the manufacture, production or export of such product,' – without specifying who provides such bounty or subsidy." Please comment on this assertion and the related assertion that the United States makes at paragraph 17 of its third-party submission that this context suggests that the scope of a countervailing duty "is not limited to offsetting just the direct financial support provided by the government of the country of production or export" and "reflects the practical recognition that a CVD should be able to offset a bounty or subsidy regardless of the geographic source of such bounty or subsidy…".

U.S. Response to Question 3:

6. The fact that the SCM Agreement interprets and applies the GATT 1994 is an important context that must not be overlooked. As explained in the U.S. third-party submission, Article VI:3 of the GATT 1994 does not limit the scope of a countervailing duty to offsetting just the direct financial support provided by the government of the country of production or export; in other words, it does not excuse or exempt subsidies simply because the financial contribution involves another Member that is not the exporting Member. Rather, the text of Article VI:3 uses non-restrictive language that a countervailing duty is levied for the purpose of offsetting *any* subsidy or bounty bestowed *directly or indirectly* on the manufacture, production, or export of *any* merchandise. Footnote 36 of the SCM Agreement uses almost identical language to define "countervailing duty", referring back to GATT 1994 Article VI:3.[3]

7. This is consistent with the fact that WTO Members generally maintain a longstanding and well-established right to impose countervailing duties when a Member's domestic industry is injured by subsidized imports.

[2] *See* Indonesia's First Written Submission, paras. 113-114.

[3] *See* U.S. Third Party Oral Statement, para. 15.

4. At paragraph 106 of its first written submission, the European Union asserts that:

> **Article 11 of the ILC Articles corresponds to a general principle of law or customary international law as regards the attribution of actions by one State to another.**

Please provide your reasoned views on whether Article 11 constitutes a customary rule of international law or a general principle of law.

U.S. Response to Question 4:

8. The question of whether ILC Article 11 is a customary rule of international law or a general principle of law, in the abstract, is not relevant to the Panel's task in this dispute. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) refers to the customary rules of *interpretation* of public international law – not simply the customary rules of public international law. As reflected in Panel Question 5, below, the status of ILC Article 11 would only be pertinent if examined under the Vienna Convention on the Law of Treaties ("VCLT") Article 31.3(c), and then only to the extent it satisfies the criteria reflected there, and then only for the purpose of interpretation. Thus, it is not necessary for the Panel in this dispute to address the question of whether Article 11 of the ILC Articles constitutes a customary rule of international law or a general principle of law. As explained in the U.S. third-party submission, the EU's interpretation is supported by the text of the SCM Agreement, which does not preclude the possibility that a financial contribution provided by a WTO Member may be attributed to another WTO Member, in light of the specific evidence available.[4] More specifically, the text of Article 1.1(a)(1) does not preclude an investigating authority from attributing to the government of the exporting Member a financial contribution provided by another Member if the particular facts and circumstances before the investigating authority warrant such a finding.[5] Such an attribution may be understood to mean that the financial contribution is appropriately treated as a financial contribution by the exporting Member (as is the case in the EU Commission's determination at issue here).[6]

9. Moreover, this approach is consistent with the object and purpose of the covered agreements. In fact, it would be contrary to the object and purpose of the relevant provisions in the SCM Agreement and the GATT 1994 if a Member were not able to countervail the subsidized products simply because the financial contribution was provided directly by another Member (for example, through a scheme such as the one at issue here) when it would otherwise countervail those same products.[7]

[4] U.S. Third Party Submission, para. 14.

[5] U.S. Third Party Submission, para. 19.

[6] U.S. Third Party Submission, para. 19.

[7] U.S. Third Party Submission, para. 19.

10. Therefore, it is not necessary for the Panel to look outside of the covered agreements (namely, the SCM Agreement and Article VI of the GATT 1994 as necessary context) in order to apply the relevant provisions in this dispute.

5. Please explain whether Article 11 of the ILC Articles is a "relevant" rule of international law applicable in the relations between the parties within the meaning of Article 31.3(c) of the Vienna Convention on the Law of Treaties (Vienna Convention).

U.S. Response to Question 5:

11. As noted in our response to question 4 above, it is not necessary for the Panel to look outside of the covered agreements, (namely, the SCM Agreement and Article VI of the GATT 1994 as necessary context) in order to apply the relevant provisions in this dispute.

12. DSU Article 3.2 refers to the customary rules of *interpretation* of public international law – not simply the customary rules of public international law. The interpretative approach found in VCLT Articles 31-33 can be understood to reflect the customary rules of interpretation of public international law. In relevant part, the VCLT provides that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context (text, preamble, annexes) and in light of the treaty's object and purpose. The Panel's question refers specifically to VCLT Article 31.3(c), which provides that, together with the context, there shall be taken into account any "relevant" rules of international law applicable in the relations between the parties. Thus, the Panel's question appears to ask whether ILC Article 11 is a "rule of international law" that is "applicable to the relations between the parties" and is "relevant". We address each of these three phrases below.

13. First, as to whether ILC Article 11 is a "rule of international law", we note the ILC Articles have not been adopted and it remains an open, and contested, question whether all of these provisions, details, and distinctions have risen to the status of customary international law.[8]

[8] In 2001, the United Nations General Assembly adopted a resolution on the ILC Articles, which indicated that the General Assembly:

> *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action . . . .

Resolution Adopted by the General Assembly, A/RES/56/83 (12 December 2001) (underlining added). The United Nations General Assembly adopted similar resolutions in 2004, 2007, and 2010. *See* Resolution Adopted by the General Assembly, A/RES/59/35 (2 December 2004) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)); Resolution Adopted by the General Assembly, A/RES/62/61 (6 December 2007) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)); "General Assembly, on Recommendation of Legal Committee, Adopts Texts on Measures to Eliminate Global Terrorism, Programme of International Legal Assistance; Also Adopts Texts on Rule of Law; Work of United Nations Commission on

That some parts of the ILC Articles might reflect customary international law does not mean that all of the details of the ILC Articles, including the ILC Commentaries, have attained this status.

14. Second, as to whether ILC Article 11 is a rule that is "applicable to the relations between the parties", it is only if these articles were customary international law could they be said to be "applicable in the relations between the parties" and, as a result, possibly relevant to an interpretative analysis under VCLT Article 31(3)(c). Here, not only do the EU and Indonesia appear to have different views, the broader WTO Membership appears to have differing views as well.

15. Third, as to whether ILC Article 11 is "relevant", it may, as a factual matter, be relevant in the sense that the EU Commission investigating authority refers to Article 11 in the underlying determination, but it does not appear to be to inform the understanding of the ordinary meaning of SCM Agreement Article 1.

16. Finally, the phrase in VCLT Article 31.3 "there shall be taken into account" reflects that even if the Panel were to conclude that ILC Article 11 meets the criteria of VCLT Article 31.3(c), the VCLT does not prescribe *how* to take into account such information. More importantly, the application of this interpretative approach cannot and must not be used to alter the balance of rights and obligations found in the text.

17. To the extent it is relevant in the sense that the Commission investigating authority refers to ILC Article 11 in the underlying determination, that is an issue of fact for the purposes of this WTO proceeding (in which the issues of law are those related to the WTO Agreement). The EU's reliance on and understanding of ILC Article 11 forms part of its assessment that there was a transfer attributable to Indonesia – and must be treated as part of a finding of fact in this WTO proceeding. Similar to the EU's consideration of the contractual relationship between the two countries through the joint venture arrangement, it formed part of the basis for the EU's conclusion, and is a question of fact for the Panel. Thus, it would be reviewed to assess whether it is a conclusion that an unbiased and objective investigating authority could have reached (and not reviewed for "correctness" or *de novo*). The status of Article 11 does not bear on the legal interpretation of Article 1 of the SCM Agreement for purposes of the Panel's interpretation in this dispute. The Panel can – and should – find that the EU's determination rests on a permissible interpretation of the SCM Agreement – a conclusion which does not require the Panel to perform its own independent assessment of ILC Article 11.

International Trade Law, International Law Commission," http://www.un.org/News/Press/docs//2010/ga11030.doc.htm (6 December 2010) ("Before the Assembly is a report on the responsibility of States for internationally wrongful acts (document A/65/463). It contains one resolution approved on 5 November, by which the Assembly would request Governments to consider the question of future adoption of the draft articles or other appropriate action and submit written comments on such future action to the Secretary-General." (emphasis added)). That these resolutions are all "without prejudice to the question of [the ILC Articles'] future adoption" indicates that the ILC Articles have not been adopted and cannot be considered an "agreement between the parties."

18. Accordingly, it is not necessary for the Panel to address the question of whether Article 11 of the ILC Articles is a relevant rule of international law applicable in the relations between the parties within the meaning of VCLT Article 31.3(c).

6. At paragraph 168 of its first written submission, Indonesia asserts that "Article 11 of the ILC Articles is not concerned with the attribution of actions by one State to another concurrently existing State". Please respond to Indonesia's assertion.

U.S. Response to Question 6:

19. As explained in our responses to questions 4 and 5 above, it is not necessary for the Panel to determine the meaning of Article 11 of the ILC Articles.

7. At recital 650 of its CVD Determination (Exhibit IDN 1), the Commission found that:

> **A demonstrable/explicit link must be established between the GOID and the actions taken by the GOC in order to provide the agreed preferential support to the exporting producers in Indonesia. In that case, the GOID would be accountable for having actively sought, acknowledged and adopted as its own such subsidies for the benefit of the products produced in Indonesia.**

Please provide your views on the analytical framework within which the Panel may evaluate whether the Commission reasonably found "a demonstrable/explicit link" between the GOID's actions and the financial support that GOC allegedly provided to the IRNC Group.

U.S. Response to Question 7:

20. The Panel should evaluate whether an unbiased and objective investigating authority could have reached that conclusion – this is a question of fact – that is, who acted here and what was the nature of that action. That the EU Commission used a particular analytical framework that it understood to be useful is not determinative. The role of the Panel in this dispute is to assess whether the EU Commission's particular determination is consistent with the EU's WTO obligations.[9] The Panel should therefore limit its consideration to the questions of (i) whether the approach the EU Commission took in the underlying investigation relies on a permissible interpretation of the GATT 1994 and the SCM Agreement, and (ii) whether an unbiased and objective investigating authority could properly have reached the same conclusion on the basis of the specific evidence that was available to the Commission.

21. Specifically, with respect to the second question, the Panel should consider **whether an unbiased and objective investigating authority could have properly found that the evidence provided by the EU Commission supports a conclusion that the financial contributions that were made by the GOC to the IRNC Group as part of the specific joint arrangement between the GOC and the GOID constitute subsidies of the GOID**. Rather than relying on "a

[9] *See* EU's First Written Submission, para. 87.

demonstrable/explicit link" test that is not found in the text of the SCM Agreement, the GATT 1994, the DSU, or any other WTO agreements relevant to this dispute, the Panel should take a case-by-case approach to the question, and in making an objective assessment of the facts,[10] consider the totality of the evidence surrounding the joint arrangement and the actions of the GOID and the GOC.

8. At paragraph 99 of its first written submission, the European Union states that:

> **If the Panel agrees with the EU (namely, that *chapeau* of Article 1.1(a)(1) of the SCM Agreement permits the interpretation followed by the EU), then it would not be necessary to examine whether Article 11 of the ILC Articles is relevant to interpret the terms "by a government" in Article 1.1(a)(1) of the SCM Agreement.**

Could the Panel interpret the term "by a government" in the chapeau of Article 1.1(a)(1) of the SCM Agreement independently of Article 11 of the ILC Articles when, as noted in recital 647 of its CVD Determination (Exhibit IDN-1), the Commission interpreted that term "*inter alia* in light of Article 11 of the ILC Articles"?

U.S. Response to Question 8:

22. Yes. The Panel's role in this dispute is to assess whether the EU Commission's determination at issue, including the particular determination to attribute the financial contribution to the GOID, is consistent with the EU's WTO obligations. This requires the Panel to interpret the term "by a government" in the chapeau of Article 1.1(a)(1) of the SCM Agreement as part of assessing the WTO consistency of that particular determination. Therefore, the Panel not only *could*, but also *should*, interpret the term "by a government" in the chapeau of Article 1.1(a)(1) of the SCM Agreement "in accordance with the ordinary meaning to be given to the terms"[11] of the SCM Agreement independently.

23. In doing so, the Panel should look at whether the EU's determination rests on a permissible interpretation of the SCM Agreement – a conclusion which does not require the Panel to perform its own independent assessment of ILC Article 11. Evidently, the EU's understanding of the operation of Article 1 was informed by its understanding of ILC Article 11. The EU drew a conclusion that "by a government" covered the relevant actions once properly attributed. But the attribution determination was a factual determination, based on a legal fact; this is distinct from a VCLT interpretation of SCM Agreement Article 1. The Panel's task is to apply the provisions of the covered agreements to the facts here – in other words, given the ordinary meaning of the terms, "by a government", was the financial contribution provided by a government? The answer is yes. How the EU determined that it was by a government is a factual determination – not an act of interpretation of a WTO agreement provision. The Panel

[10] DSU, Article 11.

[11] Vienna Convention on the Law of Treaties, Article 31.1.

should therefore assess whether the EU reached a conclusion that an unbiased and objective investigating authority could have reached on the basis of the same facts.

9. At paragraph 9 of its third-party statement, Argentina asserts that:

> **Article 1.1(a)(1) is a self-sufficient provision and that should be interpreted without referring to other sources of law. Actually, as mentioned by the Panel in [*US – Origin Marking (Hong Kong, China)*], when the text of a provision does not call for "an interpretation, there is no need to test that reading against the context and the objective and purpose of the treaty. Comporting with the rules of treaty interpretation, neither the context nor the object and purpose of a treaty can validate an interpretation that is not supported by the ordinary meaning of the treaty terms and override another interpretation that does result from those treaty terms". (fn omitted)**

At paragraph 10 of its third-party statement, Argentina further asserts that:

> **In light of the aforementioned, Argentina understands that the introduction of the ILC Articles when interpreting Article 1.1(a)(1) could lead to a far-fetched result, that may be potentially inconsistent with the SCM Agreement.**

In deciding whether to take into account the ILC Articles in interpreting the phrase "by a government" in Article 1.1(a)(1) of the SCM Agreement, to what extent should the Panel be guided by the panel's observation in *US – Origin Marking (Hong Kong China)* to which Argentina refers?[12]

U.S. Response to Question 9:

24. Article 7.1 of the DSU makes clear that a Panel's role in a dispute is to make findings in light of the relevant provisions of the "covered agreements" at issue. The ILC Articles are not covered agreements. Here, the EU relied on ILC Article 11 to draw a factual conclusion. In the same way the EU looked at the joint venture documents, it looked to the ILC Article 11 to support its conclusion regarding attribution. The question for the Panel is whether that legal fact or other relevant facts support the Commission's conclusion.

25. Further, the panel's reasoning in *US – Origin Marking* is not persuasive because it imposes an artificial limitation on the understanding of the ordinary meaning of the terms. While it may be that instances can arise where overinterpretation is used to distort the ordinary meaning of the terms, the panel in *US – Origin Marking* was wrong because ordinary meaning cannot be separated from context *a fortiori* (i.e., by affirmatively declining to acknowledge the context). In doing so, that panel erred and misapplied the VCLT. Similarly, to take into account any relevant rules of international law applicable in the relations between the parties (per VCLT Art. 31.3(c)) may simply be part of the interpretation to ensure that treaty terms are understood by the

[12] The Panel notes that this dispute was appealed to the Appellate Body on 26 January 2023, and that the panel report in this matter has not, to date, been adopted by the DSB.

ordinary meaning to be given to them in context, and is not, as the *US – Origin Marking* panel suggests, necessarily a means of changing the meaning from its ordinary one to something else.

26. Here, as noted in our responses to questions 4-6 above, it is not necessary for the Panel to look outside of the covered agreements in order to interpret the relevant provisions in this dispute, but this does not mean that the context should be ignored when reaching (or confirming) an understanding of the ordinary meaning of the terms.

27. Finally, as a general matter, a prior report may be examined for its persuasive value, but it would be incorrect for the Panel to apply a particular observation in a panel report.

28. The role of a WTO dispute settlement panel established by the DSB[13] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements."[14] That assessment is one of conformity with the covered agreements – not prior reports – whether or not adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[15]

29. Thus, the appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." Those customary rules of interpretation, as reflected in VCLT Articles 31-33, do not assign any interpretive role to dispute settlement reports.

10. At paragraph 19 of its third-party submission, the United States asserts that "[i]t is the Panel's task to discern, in reviewing whether an investigating authority appropriately countervailed a subsidy, whether the EU's interpretation is a permissible interpretation under the GATT 1994 and the SCM Agreement".

At paragraph 5 of its third-party statement, China notes "neither the GATT 1994 nor the SCM Agreement refers to the notion of 'permissible interpretation'. Without any treaty basis, such language shall not be read into the SCM Agreement or the GATT 1994".

At paragraphs 6 and 7 of its third-party submission, Canada asserts that:

> **[T]o assist the Parties in resolving this dispute, as required by Article 3.7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes,**

[13] DSU, Article 7.1.

[14] DSU, Article 11 (second sentence).

[15] DSU, Article 3.2 (second sentence).

> **the Panel need not address whether attribution under Article 1.1(a)(1) of the SCM Agreement is limited to public bodies and private entities. It follows that the Panel need not engage with the parties' arguments regarding the broader context, object and purpose of the SCM Agreement with respect to this question. (emphasis added)**

a. Please comment on these statements. In your comments, please explain whether there are any rules, principles, or guidance relating to treaty interpretation under the WTO Agreement or public international law, other than Articles 31-33 of the Vienna Convention, that should inform the Panel's approach in interpreting Article 1.1(a)(1) of the SCM Agreement for the purpose of this dispute.

U.S. Response to Question 10(a):

30. China's assertion in paragraph 5 of its third-party statement is a straw-man argument. Under the DSU, the panel is charged with making an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements."[16] Assessing whether the EU's interpretation of Article 1.1(a)(1) of the SCM Agreement is a permissible interpretation is a logical part of assessing the challenged EU countervailing measures' "conformity" with those agreements, as the EU relies on that interpretation to support the WTO consistency of the challenged measures. An interpretation that is permissible under the SCM Agreement (and Article VI of the GATT 1994 as necessary context) would indeed be an interpretation that is "in accordance with the ordinary meaning"[17] of the text of the SCM Agreement. Indeed, such an interpretation would serve to "preserve the rights and obligations of Members under the covered agreements", as called for in Article 3.2 of the DSU.

31. With respect to Canada's assertion in paragraphs 6 and 7 of its third-party submission, the United States agrees that the Panel need not address the question of whether attribution under Article 1.1(a)(1) of the SCM Agreement is limited to public bodies and private entities. It is not as clear that the Panel "need not engage with the parties' arguments regarding the broader context, object, and purpose of the SCM Agreement". However, Canada's statement regarding DSU Article 3.7 (i.e., the aim of dispute settlement is to secure a positive solution to a dispute) reflects an important consideration which should act as a guardrail on the temptation for a panel to answer questions that are not before it and not strictly necessary to resolve the dispute. The Panel's role is to assess whether the EU Commission's particular determination is consistent with the EU's WTO obligations.[18] The Panel should therefore limit its consideration to the questions of whether the approach the EU Commission took in the underlying investigation relies on a permissible interpretation of the GATT 1994 and the SCM Agreement, and whether

[16] DSU, Article 11 (second sentence).

[17] Vienna Convention on the Law of Treaties, Article 31.1.

[18] U.S. Third Party Oral Statement, para. 19.

an unbiased and objective investigating authority could properly have reached the same conclusion on the basis of the specific evidence that was available to the Commission.[19]

32. With respect to whether the Panel should look beyond VCLT Articles 31-33, the VCLT itself answers that question insofar as the approach reflected in VCLT Articles 31-33 includes recourse to appropriate sources as described therein.

b. Please comment on whether and to what extent, if any, the principle of *in dubio mitius* should inform the Panel's approach in interpreting Article 1.1(a)(1) of the SCM Agreement.

U.S. Response to Question 10(b):

33. No, the principle of *in dubio mitius* is not relevant because it is non-textual. While certain principles provide useful analytical tools, principles themselves have no legal status or authority in and of themselves. In any case, the principle of *in dubio mitius* has been considered a *supplemental* means of interpretation – in other words, only reached under VCLT Article 32 after finding ambiguity in the terms. To the extent that the Panel considers the principle of *in dubio mitius* in its interpretation of Article 1.1(a)(1) of the SCM Agreement, the United States would again emphasize that WTO Members maintain a longstanding and well-established right to provide a remedy in the form of countervailing duties when a Member's domestic industry is harmed by subsidized imports.[20] As discussed in our response to question 3 above, both the GATT 1994 and the SCM Agreement use non-restrictive language to define "countervailing duty" to cover duties levied for the purpose of offsetting *any* subsidy or bounty bestowed *directly or indirectly* on the manufacture, production, or export of *any* merchandise.[21] If a Member were prevented from countervailing the subsidized products simply because the financial contribution was provided by another Member (*e.g.*, through a scheme such as the one at issue in this dispute) when it would otherwise countervail those same products, this would be contrary to the object and purpose of the SCM Agreement[22] as well as interfering with the WTO Members' right to take action against unfair, injurious subsidies.

11. At paragraph 135 of its first written submission, the European Union asserts that:

> **Indonesia faults the EU for not having carried out the attribution analysis at the level of each financial contribution in question (i.e., loans, credit lines, equity injections, provisions of capital in-kind and shareholder loans), noting that the provisions of capital in-kind and inter-company loans which were provided by the IRNC's group shareholders (as opposed to the GOC). The EU does not see**

[19] U.S. Third Party Oral Statement, para. 19; U.S. Third Party Submission, para. 19.

[20] U.S. Third Party Oral Statement, paras. 3, 16; U.S. Third Party Submission, para. 17.

[21] U.S. Third Party Oral Statement, paras. 3, 15.

[22] U.S. Third Party Submission, para. 17; U.S. Third Party Oral Statement, para. 16.

> **any error in proceeding on the basis of a global analysis in this case. All the transactions had the same features and context. (fn omitted)**

Please comment on whether the Commission was required to have carried out the attribution analysis at issue at the level of each financial contribution in question (i.e. loans, credit lines, equity injections, provisions of capital in-kind and shareholder loans), bearing in mind that the provision of capital in-kind and inter-company loans were provided by the IRNC's group shareholders (as opposed to the GOC).

U.S. Response to Question 11:

34. The United States recalls that for each subsidy for which a countervailing duty is being imposed, an investigating authority must demonstrate a financial contribution. Without opining on the particular facts of this case, there can be situations where an investigating authority may cover more than one financial contribution with a single analysis, *e.g.*, where the analysis is the same for each financial contribution, so long as the investigating authority indicates to which financial contributions its analysis applies. Critically, whether a single analysis covering more than one financial contribution may be appropriate must be considered on a case-by-case basis. Additionally, from a practical perspective, requiring an investigating authority to repeat the same analysis over and over for nearly the same facts could lead to redundancy. Depending on the facts, it may be appropriate and more practical to cover more than one financial contribution with a single attribution analysis if the investigating authority finds that the financial contributions are part of the same scheme.

12. At paragraph 135 of its first written submission, the European Union asserts that:

> **[T]he EU notes that in the absence of any reply from the Chinese parent companies providing the equipment and shareholder loans in question as well as from the GOC, the EU had to rely partially on facts available for its findings concerning these shareholder loans. The EU observes that Indonesia has not raised a claim about the application of facts available as regards the Tsingshan Group or the inferences made that "the provision of the shareholder loans and equipment by the Chinese parent companies to their subsidiaries in Indonesia squarely fits into the GOC's policy objective of promoting BRI projects in the steel industry, and the provision of foreign assets (in this case equipment) is seen as a means by the GOC to beef up collateral to improve the overall financial capabilities of such companies". Therefore, on the basis of the evidence available in the SSCR investigation, the EU could validly conclude that the actions of the Tsingshan Group were implementations of the GOC's policy and commitment to provide financial support to the IRNC Group's activities in Indonesia. (emphasis and fns omitted)**

In light of the European Union's assertion above, please comment on whether the Commission failed to establish, as Indonesia asserts at paragraphs 207 and 216 of its first written submission, how the GOID could have "acknowledged and adopted as its own

financial contributions that were not provided by the GOC or Chinese public bodies but by private operators".

U.S. Response to Question 12:

35. The United States observes that paragraph 135 of the EU's first written submission is responsive to, *inter alia*, paragraphs 207 and 216 of Indonesia's first written submission, in which Indonesia argues that the EU Commission did not establish that the "standard of attribution" of Article 11 of the ILC Articles was met.

36. As explained above in our response to question 7, in assessing whether an unbiased and objective investigating authority could have properly found that the evidence provided by the EU Commission supports a conclusion that the financial contributions at issue constitute subsidies of the GOID, the Panel should not rely on a test that is not found in the text of the SCM Agreement or any other WTO agreements relevant to this dispute. Rather, the Panel should take a case-by-case approach to the question, and in making an objective assessment of the facts,[23] consider the totality of the evidence surrounding the joint arrangement and the actions of the GOID and the GOC.

37. That said, the United States observes that, elsewhere in paragraph 135 of the EU's first written submission, the EU articulates in detail that the Commission resorted to facts available under Article 12.7 of the SCM Agreement in finding that the Tsingshan Group's actions were implementing certain commitments to provide financial support in Indonesia.[24] The United States takes no position on the factual circumstances surrounding the EU Commission's resort to Article 12.7.

1.2 Specificity

13. Please respond to the European Union's assertion, at paragraph 147 of its first written submission, that "[f]or the specificity analysis, it does not matter that the financial contribution is provided and administered by the GOC, since those financial contributions were made in the context of the specific project between the GOC and the GOID in the Indonesian Morowali Park".

U.S. Response to Question 13:

38. We refer the Panel to paragraphs 27-29 of our third-party submission.

[23] DSU, Article 11.

[24] EU's First Written Submission, para. 135; *see also, e.g.*, Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia ("EU CVD Measure"), recitals (786)-(792) (Exhibit IDN-1).

39. In brief, Article 2.1 of the SCM Agreement, on specificity, cross-references Article 1.1, on the definition of a subsidy. This cross-reference reflects that the specificity analysis presupposes the existence of a subsidy and is limited to the question of whether that subsidy is specific (and therefore actionable).[25]

40. Thus, if the investigating authority has established the existence of a subsidy provided to producers in the territory of the exporting Member (or, depending on the facts, if it has appropriately concluded that the relevant financial contribution may be attributed to the government of the exporting Member), it is logical that the exporting Member may also be the focus of the specificity analysis.

14. At recital 575 of its CVD Determination (Exhibit IDN-1), we note that the Commission found that:

> **The Indonesia-China Program shows that both governments identified the key areas of cooperation, which, amongst others, were included mining, metallurgical industry and Industrial parks (including special economic zones).**

We also note that recital 716 of the Commission's CVD Determination (Exhibit IDN-1) suggests that the GOID asserted that "the cooperation with the GOC did not cover just industrial parks, but a number of areas".

In view of the above, please comment on whether and why the provision of preferential financing by the GOC to companies outside the Morowali Park could be considered to be "irrelevant" to determine whether the subsidies that the GOID provided to the IRNC Group are specific when the Commission's findings, at recital 575 of its CVD Determination above, suggest that the GOC's preferential financing to companies outside the Morowali Park was also provided in the context of GOID-GOC bilateral cooperation.

U.S. Response to Question 14:

41. Article 2.2 of the SCM Agreement states that a subsidy is specific when it "is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority."

42. Depending on the facts of a particular case, there may be instances in which a subsidy is available to recipients in several, but not all, geographic regions within the jurisdiction of the granting authority. In such an instance, if the granting authority provides a financial contribution to enterprises in only some of the regions in which the subsidy is available, the subsidy may still be deemed to be regionally specific because it is not available to enterprises within all geographical regions within the jurisdiction of the granting authority.

43. However, the United States does not opine on the specific facts at issue in this dispute.

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[25] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 747.

1.3 Benefit

15. Please respond to the European Union's assertion at paragraph 185 of its first written submission that "when the supplier of the subsidised input is related to the producer of the processed product, such a pass-through analysis is not required". (emphasis omitted)

U.S. Response to Question 15:

44. Without opining on the specific facts before the Panel in this dispute, there may be circumstances where benefits received by companies with common control can be countervailed and attributed to sales of downstream products (including the merchandise under consideration) produced by a related company without conducting a pass-through analysis.

16. Indonesia asserts, at paragraph 341 of its first written submission, that "[w]hile an investigating authority may use a benchmark other than private prices in the country of provision under Article 14(d) of the SCM Agreement, they can only do so '*if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods*'." (fn omitted; emphasis original) Please respond to Indonesia's assertion.

U.S. Response to Question 16:

45. Indonesia's assertion reads into Article 14 obligations that are not found in the text. Article 14 of the SCM Agreement concerns the calculation of a subsidy "in terms of the benefit to the recipient", and provides "guidelines" in subparagraphs (a)-(d) for calculating benefit in various circumstances. Relevant here, Article 14(d) states that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

46. Accordingly, "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision."[26]

47. However, the ability to use out-of-country benchmarks when prices are distorted in the country where the subsidy is provided is critical to the proper functioning of the agreed disciplines on subsidies. This is because Article 14 contemplates market-determined prices as the appropriate benchmark for measuring the adequacy of remuneration.

48. Prior reports have consistently reached the same conclusion that, properly interpreted, Article 14(d) refers to market-determined prices and permits out-of-country prices to be used as a benchmark where market-determined prices are not found in the country of provision.

[26] *US – Carbon Steel (India) (AB)*, para. 4.154 (italics in original); *see also US – Softwood Lumber IV (AB)*, para. 90.

49. This approach comports with the references to a "market" in the text of Article 14 and ensures that any benchmark used to measure the adequacy of remuneration reflects a market price resulting from arm's-length transactions between independent buyers and sellers.

50. But it would be an erroneous approach to Article 14 – and would undermine the Members' ability to respond to unfair subsidies – to impose an overly demanding or extraneous obligation on investigating authorities to be able to find an absence of market-determined in-country prices before they may apply out-of-country benchmarks (including requiring a quantitative analysis of in-country prices regardless of whether those prices have already been found to be distorted).

51. Although an investigating authority may first consider proposed in-country prices for the good in question, Indonesia presupposes that the "*only*" reason an investigating authority may resort to out-of-country benchmarks under Article 14(d) is if "private prices in that country are distorted because of the government's predominant role in providing those goods". We disagree with Indonesia.

52. While it could be that in-country prices are not market-determined as a result of governmental intervention in the market,[27] there may be other valid bases for resorting to an out-of-country benchmark. For example, it could be impossible to use an in-country price is if such a price is simply unavailable.

53. Here, for example, we understand that an equipment price in Indonesia may not have been available.[28] In that scenario, an investigating authority would not be required to first determine whether the market is distorted before considering an out-of-country benchmark.

2. CLAIMS CONCERNING THE ALLEGED PROVISION OF NICKEL ORE

2.1 Public body

17. Please respond to the European Union's assertion, in paragraph 368 of its first written submission, that "It is a very different analysis to examine whether a single company is a public body in a regulatory framework where market forces in principle prevail, as opposed to examining whether companies in an entire sector are public bodies in light of the stringent regulatory constraints imposed by the government in question. In the first scenario, the

[27] *US – Carbon Steel (India) (AB)*, para. 4.155; Indonesia's First Written Submission, paras. 341-342. Government intervention may distort in-country prices in a variety of ways – for example, administratively setting the price, or through its participation as a buyer or seller. Likewise, where the government is the predominant supplier of a good, the government "may distort in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align." *US – Carbon Steel (India) (AB)*, para. 4.155 (referring to *US – Softwood Lumber IV (AB)*, para. 90). In such circumstances, "the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular." *US – Softwood Lumber IV (AB)*, para. 93.

[28] *See* EU's First Written Submission, para. 209.

analysis is likely to concentrate more on elements such as ownership and other indicia of control regarding the particular company or the specific (governmental) function conferred to that individual company. In the second scenario, the focus of the analysis is likely to be on the regulatory framework applying to *all* companies in the sector concerned equally, as in the present case." As part of your response, please address the relevance, if any, of prior WTO disputes concerning this issue.

U.S. Response to Question 17:

54. Article 1.1(a)(1) of the SCM Agreement does not prescribe a specific way to examine whether entities are public bodies. The United States agrees in principle with the EU that "each case must be judged on its own merits,"[29] and that an investigating authority's public body analysis "does not have to meet a given legal standard that would have been set by a specific prior WTO report".[30]

55. However, for the reasons stated in the U.S. third party submission and oral statement during the third party session, the United States disagrees with the premise that an entity must necessarily possess, exercise, or be vested with governmental authority or exercise governmental functions to be a public body.[31] Indeed, properly interpreted, an entity may be a "public body" where "the government has the ability to control that entity and/or its conduct to convey financial value," or, put another way, any entity that a government is able to control, such that when the entity conveys economic resources, it is transferring the public's resources.[32]

56. That said, depending on the facts and circumstances before the investigating authority, the authority could choose to proceed with analyzing whether particular entities constitute public bodies on an entity-by-entity basis, or analyzing entities on a sector-by-sector basis. Neither approach would necessarily be inconsistent with Article 1.1(a)(1) of the SCM Agreement, provided that the facts and circumstances otherwise support its determination.

18. Can a finding that an entity is a "public body" be based solely on the domestic regulatory framework of a Member, even if such an entity is wholly privately-owned?

U.S. Response to Question 18:

57. The phrase "the domestic regulatory framework of a Member" could be understood to cover a range of factual circumstances which would require important assumptions to be made in order to answer the question – for example, in market economy countries where private property rights are recognized and where market-oriented conditions prevail, the "domestic regulatory

[29] EU's First Written Submission, paras. 367, 369.

[30] EU's First Written Submission, para. 367.

[31] U.S. Third Party Submission, paras. 32-43; U.S. Third Party Statement, paras. 7-13; EU's First Written Submission, para. 368 (referencing "the specific (governmental) function conferred to that individual company").

[32] U.S. Third Party Submission, para. 33 (quoting *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent)); U.S. Third Party Oral Statement, para. 8.

framework" is likely to be understood differently than in non-market economy countries where even so-called "private" ownership is subject to non-market policies and practices. It may be possible – depending on a given set of facts – for a privately-owned entity to be found to be a "public body" based on a domestic regulatory framework if, importantly, the facts under examination support a finding that the regulatory framework renders the privately-owned entity to be a public body.

58. However, it is not necessary for the Panel in this dispute to address the question of whether a finding that an entity is a public body can be based solely on the domestic regulatory framework of a Member. Here, the United States understands that the EU Commission found that Indonesian nickel ore mining companies were public bodies under Article 1.1(a)(1) of the SCM Agreement on the basis of, *inter alia*, its resort to facts available under Article 12.7. According to the EU Commission, the facts available suggested that "mining companies representing a substantial production of nickel ore are fully or partially State-owned, and also managed and/or controlled by the State in a close relationship with the GOID."[33]

19. Please comment on

a. Japan's assertion, in paragraph 9 of its third party submission, that "a public body can be differentiated from private bodies by its ability to continue to exist for the sake of achieving its policy goals even if it records losses for a sustained period of time";

U.S. Response to Question 19(a):

59. Requiring an investigating authority to consider an entity's profit-orientation or "ability to continue to exist [. . .] even if it records losses for a sustained period of time"[34] would unduly impose a limitation on the definition of public body that is not based on the text of Article 1.1(a)(1) or any other part of the SCM Agreement, thereby potentially narrowing the scope of the term "public body".

60. An entity may constitute a public body where evidence before an investigating authority supports that "'the government has the ability to control that entity and/or its conduct to convey financial value.'"[35] Put another way, a public body may be any entity that a government is able to control, such that when the entity conveys economic resources, it is transferring the public's resources.[36]

61. However, in suggesting that an entity's profit orientation is relevant, Japan's assertion usefully illustrates a key attribute of a public body, which is that the entity is capable of conveying

[33] EU CVD Measure, recital (393) (Exhibit IDN-1).

[34] Japan's Third Party Submission, para. 9.

[35] U.S. Third Party Submission, para. 33 (quoting *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent)); *see also* U.S. Third Party Oral Statement, para. 8.

[36] U.S. Third Party Submission, para. 33; U.S. Third Party Oral Statement, para. 8.

the public's economic resources. That is why it may be able to sustain losses over periods beyond what a private entity (and its creditors) could.

b. the United States' assertion, in paragraph 8 of its third-party statement, that a "public body" is "any entity that a government is able to control, such that when the entity conveys economic resources, it is transferring the public's resources".

U.S. Response to Question 19(b):

62. The United States refers the Panel to the U.S. third party submission and third party oral statement,[37] in which we demonstrate that an entity may be a "public body" under Article 1.1(a)(1) of the SCM Agreement where evidence before an investigating authority supports that "'the government has the ability to control that entity and/or its conduct to convey financial value.'"[38] Put another way, a public body is any entity that a government is able to control, such that when the entity conveys economic resources, it is transferring the public's resources. [39]

20. Please respond to Indonesia's assertions, in paragraph 571 of its first written submission, that: (1) the "detailed regulation of the natural resources use is not something unique for Indonesia", (2) following the Commission's approach means that, "a vast number companies in Indonesia and all around the world potentially '*possess*, *exercise or are vested*' with governmental functions, i.e., are '*public bodies*'; and all transactions with such companies are potentially actionable subsidies", (emphasis original) and (3) "[s]uch an expansive and patently illogical interpretation will lead to the abusive use of the countervailing measures and cannot be preferred by this Panel."

U.S. Response to Question 20:

63. The United States disagrees with the premise of Indonesia's argument that an entity can only be a "public body" if that entity possesses, exercises, or is vested with governmental authority or exercises governmental functions. Nothing in Article 1.1(a)(1) of the SCM Agreement restricts the meaning of "public body" only to an entity having these particular characteristics.[40]

64. The United States refers to its prior arguments, which support that an entity may constitute a public body where evidence before an investigating authority supports that "'the government has the ability to control that entity and/or its conduct to convey financial value,'" or put another way, a public body may be any entity that a government is able to control, such that

[37] U.S. Third Party Submission, paras. 33-44; U.S. Third Party Oral Statement, paras. 8-13.

[38] U.S. Third Party Submission, para. 33 (quoting *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent)); *see also* U.S. Third Party Oral Statement, para. 8.

[39] U.S. Third Party Submission, para. 33; U.S. Third Party Oral Statement, para. 8.

[40] U.S. Third Party Submission, para. 33; U.S. Third Party Oral Statement, para. 8.

when the entity conveys economic resources, it is transferring the public's resources.[41] An analysis of whether an entity is a public body entails a case-by-case approach, and not the one-size-fits-all approach suggested by Indonesia.[42]

65. With that perspective in mind, the United States understands that the EU Commission found that the regulatory regime in Indonesia included not just the issuance of permits but evidenced government control over the mining companies at issue until the sale of nickel ore, including the transaction price. The EU explained that the regime "prescribes production quantities, prices, domestic processing obligations, export restrictions etc. for mining companies," and "[a] substantial part of mining companies is also State-owned and/or managed."[43]

66. Accordingly, this appears to be a highly specific fact pattern that the EU Commission relied on in demonstrating that the mining companies constituted public bodies. The Panel should examine whether an unbiased and objective investigating authority could properly have reached a "public body" determination on the basis of that evidence and the additional evidence examined by the EU Commission.[44]

21. Please comment on Japan's assertion, in paragraph 12 of its third party submission, that while "[i]t is true that, even in other countries, the mining industry is often subject to regulations relating to the protection of the environment, safety, or the conservation of natural resources", Indonesia's regulatory regime governing the mining industry "goes significantly beyond such scope and imposes strict and detailed controls over each of the core activities of the relevant mining companies - i.e., production, processing, exporting, and pricing".

U.S. Response to Question 21:

67. The United States takes no position on the facts surrounding the EU Commission's determination that companies operating in Indonesia's nickel ore mining sector constituted public bodies under Article 1.1(a)(1) of the SCM Agreement.[45] However, as a general matter, the extent of regulatory authority the government has over an entity could be relevant to whether the relationship between the government and the entity is sufficiently close to warrant a finding

[41] U.S. Third Party Submission, para. 33 (quoting *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent)); *see also* U.S. Third Party Oral Statement, para. 8.

[42] U.S. Third Party Submission, para. 44.

[43] EU's First Written Submission, para. 364.

[44] U.S. Third Party Submission, para. 19.

[45] U.S. Third Party Submission, para. 32.

that the former can control the latter, which in turn is germane to a determination of whether that entity is a public body.[46]

2.2 Benefit

22. Please respond to the European Union's assertion, in paragraph 449 of its first written submission, that the Commission's use of Philippine prices as an external benchmark – even though they are influenced by the Indonesian export restrictions – is proper because, "[o]therwise, in cases where for example a country having most of the natural resources subject to export restrictions, it would not be possible to use any price at all, since arguably all international prices would be affected by such an export restriction."

U.S. Response to Question 22:

68. As an initial matter, the United States refers to its response to question 16 above. To briefly reiterate, Article 14(d) of the SCM Agreement contemplates market-determined prices as the appropriate benchmark for measuring the adequacy of remuneration. The ability to use out-of-country benchmarks when prices are distorted in the country where the subsidy is provided is critical to the proper functioning the of the agreed disciplines on subsidies.

23. In paragraph 80 of its opening statement at the first substantive meeting, Indonesia asserts that "Indonesia's regulatory measures pushed up the prices of the exports from the Philippines. The Philippine export prices included effects of the very measures the EU seeks to countervail against" (underlining original). Please respond to Indonesia's assertion in paragraph 81 of its opening statement at the first substantive meeting that, under Article 14(d) of the SCM Agreement, an "authority must also ensure that the benchmark selected reflects the market conditions absent the alleged financial contribution. *If an authority is allowed to use benchmarks that reflect the effect of the alleged financial contribution, then the result would be that the extent of the subsidy in terms of benefit would be exaggerated*" (underlining original; italics added).

U.S. Response to Question 23:

69. The United States does not have access to Indonesia's opening statement to understand the full context surrounding its statements at paragraphs 80-81. However, it appears that the excerpted quotes are similar to the arguments Indonesia makes in paragraphs 704-718 of its first written submission.[47] For example, in paragraph 713 of its first written submission, Indonesia argues that "[w]here an investigating authority uses an external benchmark that has been affected by the government measures at issue, such that the prices in that market have been *pushed up* as a direct result of such measures, the resulting benefit would be *artificially high*, such that it

[46] *See* U.S. Third Party Submission, para. 43 ("the ordinary meaning of 'public body' in Article 1.1(a)(1) suggests that the key question is whether a government is able to control the entity such that when the entity conveys economic resources, it is transferring the public's resources.").

[47] *See* Indonesia's First Written Submission, paras. 704-718.

would reflect not only the full extent of the subsidy, but would exaggerate the extent of such subsidy."[48]

70. Properly interpreted, Article 14(d) of the SCM Agreement refers to market-determined prices and permits out-of-country prices to be used as a benchmark where market-determined prices are not found in the country of provision. This approach comports with the references to a "market" in the text of Article 14 and ensures that any benchmark used to measure the adequacy of remuneration reflects a market price resulting from arm's-length transactions between independent buyers and sellers. A variety of facts and circumstances are relevant when an investigating authority is examining whether the benchmark prices available are suitable for use in the benefit analysis.

3. CLAIMS IN CONNECTION WITH GOVERNMENTAL REVENUE FOREGONE

24. Taking note of the statement at paragraph 776 of Indonesia's first written submission that the panel report in *India – Export Related Measures* is not adopted and "cannot create legitimate expectations between WTO Members" and the references by the European Union to this report at paragraphs 520 (footnote 690) and 524 (footnote 692) of its first written submission:

a. Please comment on the persuasiveness of the analytical approach of that panel to the applicable legal standard under footnote 1 as set forth at paragraphs 7.167-7.187 of that report.

U.S. Response to Question 24(a):

71. The analytical approach of a prior report may inform a panel's understanding of the operation of the relevant provisions in a highly technical areas such as this, but care must be taken not to treat a prior approach as if it has legal authority. While a prior report may be examined for its persuasive value, the adoption status does not confer any authority on the legal or analytical approaches used in such a report, nor does it make a report any more or less persuasive. As Indonesia properly observes, the DSB did not adopt the panel report in *India – Export Related Measures* because the United States and India agreed that the panel report would not be adopted.[49] Indeed, the United States and India reached a mutually agreed solution, in which they, as the parties to that dispute, agreed that the panel report "may not be adopted by the DSB."[50]

72. Putting that point aside, Indonesia's statement raises an important systemic issue by implying that panel reports can essentially constitute precedent as long as they are adopted by the

[48] Indonesia's First Written Submission, para. 713 (emphasis in original).

[49] Indonesia's First Written Submission, para. 776.

[50] *India – Export Related Measures*, Notification of a Mutually Agreed Solution, WT/DS541/8, G/SCM/D119/1/Add.1, circulated July 18, 2023.

DSB.[51] This concept of precedent or reliance on prior reports is directly contrary to the function of a panel as set out in the DSU.

73. The role of a WTO dispute settlement panel established by the DSB[52] is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements."[53] That assessment is one of conformity with the covered agreements – not prior reports – whether or not adopted by the DSB. The DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[54]

74. Under the DSU, the DSB has no authority to adopt an authoritative interpretation of the covered agreements that is binding on WTO Members – and, therefore, neither the Appellate Body nor any panel can issue such an authoritative interpretation that amounts to case law or precedent, regardless of whether a report is adopted by the DSB or not. In fact, Article 3.9 of the DSU explicitly states that "the provisions of [the DSU] are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement." Per Article IX:2 of the WTO Agreement, that "exclusive authority" is reserved to the Ministerial Conference or the General Council acting under a special procedure. Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to follow or apply a panel or Appellate Body interpretation from a prior dispute.

75. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." Those customary rules of interpretation, as reflected in VCLT Articles 31-33, do not assign any interpretive role to dispute settlement reports. VCLT Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. Thus, relying

[51] Indeed, immediately following the quote from paragraph 776 of Indonesia's first written submission in the Panel's question, Indonesia asserts that, "in this claim, Indonesia will predominantly focus on the *legal standard* expressed in the highly relevant Panel Report in *EU – PET (Pakistan) (DS486)*." Indonesia's First Written Submission, para. 776 (emphasis added).

[52] DSU, Article 7.1.

[53] DSU, Article 11 (second sentence).

[54] DSU, Article 3.2 (second sentence).

on prior reports as "case law" or treating so-called DSB "adopted" interpretations as substantive rules would constitute serious legal error.

b. Please comment on the analytical approach taken by that panel at paragraphs 7.196-7.216 concerning whether a duty exemption scheme meets the conditions of footnote 1 with respect to the nature of goods covered by the exemptions.

U.S. Response to Question 24(b):

76. The framework used by the panel in *India – Export Related Measures* appears to provide a reasonable analytical approach for that particular dispute given the specific facts. Nevertheless, the Panel should determine the proper analytical approach to apply on a case-by-case basis base in consideration of the facts.

25. With respect to the import duty exemption scheme and in reference to the parties' submissions (Indonesia's first written submission at paragraph 838; European Union's first written submission at paragraph 547), please take note of Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 5.306:

> **As we see it, the explicit requirement that taxpayers be located in an MCIP in order to receive the additional corporate income tax credits is a limitation on access to the MCIP subsidy. This limitation is not made void by the fact that enterprises not located in an MCIP may become part of an MCIP in the future and then qualify for the subsidy. We understand that the size and configuration of MCIPs in South Carolina may change over time. The territory of existing MCIPs may be reduced or expanded, and new MCIPs may be established. However, this does not change the fact that only enterprises located in an MCIP are eligible to receive the MCIP subsidy. We therefore disagree with the Panel that the requirement of Section 12-6-3360 of the South Carolina Income Tax Act that taxpayers be located in an MCIP in order to receive the additional corporate income tax credits cannot be "meaningfully" considered as a "limitation" under Article 2.2 of the SCM Agreement.**

In light of the above analysis, please comment on the extent to which locations which are able to access a subsidy at one point in time may differ (e.g. by expansion, contraction, addition, subtraction) as compared to another point in time, changes the character of the places that are eligible at one point in time from being a designated geographical region within the meaning of Article 2.2 of the SCM Agreement.

U.S. Response to Question 25:

77. Article 2.2 of the SCM Agreement provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region [. . .] shall be specific." Thus, the text of the article focuses on limitation within a "designated geographical region" – and location may be evidence of such limitation – and does not address the temporal element of the

designation. Depending on the facts, a change in the designation of such geographic region may potentially be considered, where appropriate, in the analysis of a given investigating authority.

26. With respect to the import duty exemption scheme, the parties refer (Indonesia's first written submission at paragraph 840; European Union's first written submission at paragraph 549) to the Regulation of the Minister of Finance on Bonded Zones (Exhibit IDN-118). Articles 1 and 4 of the Regulation contain the following provisions:

Article 1

…

3. Bonded Storage Area is a building, place, or area that meets certain requirements and is used to store goods with specific purposes by obtaining Import Duty suspension.

4. Bonded Zone is a Bonded Storage Area for storing imported goods and/or goods originating from other places in customs territory to be processed or assembled before being exported or imported for use.

…

Article 4

(1) Bonded zones must be located in:

a. industrial zones; or

b. cultivation zones, in accordance with the stipulated spatial layout plan.

(2) The location are for Bonded Zones located in a cultivation area, as referred to in paragraph (1) letter b, shall at least be 10,000 m2 (ten thousand square meters) in one stretch.

Please comment on whether these provisions, read together, limit access to enterprises located within a "designated geographical region" within the meaning of Article 2.2 of the SCM Agreement.

U.S. Response to Question 26:

78. The type of analysis requested in this question is the type of analysis that an investigating authority might conduct in the context of a countervailing duty investigation, potentially with the benefit of additional information, context, and parties' arguments.

4. CLAIMS CONCERNING ACTIONS AND OMISSIONS DURING THE INVESTIGATION

27. Please provide your views in light of Article 12.9 of the SCM Agreement as to:

a. Whether – in view of the Commission's finding that they were involved in the provision of the subsidies at issue to the SSCRFP producers – the nickel ore companies had a sufficient "interest" in the underlying CVD investigation to require the Commission to consider the nickel ore companies to be "interested parties" for the purposes of the investigation. (Please see Indonesia's assertions at paragraphs 887 and 888 of its first written submission).

b. Whether the fact that the Commission sought to obtain certain detailed information from the nickel ore companies in order to conduct its subsidy determination was sufficient to "confer[] an 'interest' on these companies" to require the Commission to consider to them be "interested parties" for the purposes of the investigation. (Please see Indonesia's assertions at paragraph 892 of its first written submission).

c. Whether the nickel ore mining companies' 'interest' in the outcome of the SSCRFP CVD investigation as upstream suppliers of inputs was too "remote" to require the Commission to consider these companies to be "interested parties". (Please see the European Union's assertions at paragraph 588 of its first written submission).

U.S. Response to Question 27:

79. The United States responds to subsections (a)-(c) of this question together.

80. Article 12.9 of the SCM Agreement defines "interested parties" as "an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product" and "a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member." Article 12.9 further provides Members the discretion to include as interested parties other parties that are not specifically listed in the provision.

81. The EU Commission determined that the nickel ore mining companies are input suppliers, and thus not "interested parties" pursuant to Article 12. The United States takes no position on the facts surrounding the EU Commission's determination that the nickel ore mining companies are input suppliers.

28. The European Union asserts, at paragraph 601 of its first written submission, that Article 12.1 neither defines the "means of communication" by which an investigating authority must transmit a questionnaire to an interested party, nor precludes an investigating authority from "using more effective ways than direct delivery of the questionnaires to interested parties and other parties with specific knowledge of the matter". Please respond to the European Union's assertion.

U.S. Response to Question 28:

82. The EU Commission's assertions in paragraph 601 are in response to Indonesia's argument that the nickel ore mining companies are "interested parties" within the meaning of Article 12. The United States takes no position on the facts surrounding the EU Commission's determination that the nickel ore mining companies are input suppliers, and thus not "interested parties" pursuant to Article 12.

83. That aside, the United States agrees that Article 12.1 does not prescribe any specific manner through which an investigating authority must transmit requests for information.

5. CLAIMS CONCERNING THE ALLEGED USE OF FACTS AVAILABLE

5.1 General

29. Please comment on the Canada's assertions in paragraphs 40 and 41 of its third-party submission that:

> **[F]acts available are not used against any interested party/Member. Rather, as per the language of Article 12.7, they are used "[i]n cases in which" any interested party/Member fails to cooperate. In other words, failure to cooperate serves, in this instance, as a condition for the resort to facts available. That failure does not, however, alter the purpose of using facts available which, as stated above, is to enable the proper completion of an investigation. Conversely, should facts available be used against any interested party/Member, it would likely trigger the scenario, inconsistent with Article 12.7, where an investigating authority resorts to facts available in order to punish non-cooperation.**
>
> **…**
>
> **[F]acts available are not applied against any specific entity; rather, they are applied in respect of necessary information missing from the record…. (fn omitted)**

U.S. Response to Question 29:

84. Indonesia argues that "the party/Member against whom facts available is used must be the same as the party/Member with respect to whom non-cooperation has been established."[55] However, Article 12.7 does not contain language regarding using facts available "against" any Member or party, where the conditions for resorting to facts available are present. Instead, Article 12.7 simply states that "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available", but conditions the resort to facts available on to instances in which a party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Article 12.7

[55] Indonesia's First Written Submission, para. 1002.

generally is intended to ensure that the failure of a party "to provide necessary information does not hinder an agency's investigation."[56]

85. Thus, there could be cases in which an investigating authority applies facts available that only have an effect on the party or Member whose conduct gave rise to the need to apply facts available. However, there could also be cases in which an investigating authority applies facts available based on the conduct by a particular party or Member, but the *effect* of the facts available may implicate other parties. Nothing in the text of Article 12.7 obligates the investigating authority to ensure that the effect of the application of facts available is limited to only the Member or party whose conduct gave rise to the need to resort to facts available in the first place.

86. Article 12.7 is practical and logical in the context of a CVD investigation and does not include the requirement Indonesia seeks to impose here. An investigating authority is typically gathering different information from different parties for different elements of its countervailable subsidy determination. For example, an authority would typically ask an interested Member for information pertaining to the operation of the subsidy and whether it is specific, and would typically ask an interested party producer or exporter for information on whether and to what extent it benefitted from the subsidy in question.

87. If either a Member or party does not provide necessary information, this could impact the investigating authority's analysis of one or more elements of its CVD determination, which could, in turn, potentially have an effect on Members and parties that are not the Member or party that did not provide that information – for example where a producer has provided necessary information, but the subsidizing Member has decided to withhold necessary information that may impact the producer's countervailing duty rate.

88. We note that the terms of Article 12.7 are largely the same as Article 6.8 of the Anti-Dumping Agreement, and panels have considered that it would be anomalous to treat the terms in a different manner.[57] Notably, the Anti-Dumping Agreement also contains Annex II, and the Appellate Body has cited to Annex II, paragraph 7 of the Anti-Dumping Agreement as "relevant," "[a]dditional context" for interpreting Article 12.7 of the SCM Agreement, even though Annex II "does not form part of the SCM Agreement."[58]

89. Annex II(7) of the Anti-Dumping Agreement states, in relevant part, that "[i]It is clear, however, that if an interested party does not cooperate and thus relevant information

[56] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (Article 12.7 ensures that "the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties").

[57] *See China – Autos (US)*, para. 7.172.

[58] *US – Carbon Steel (India) (AB)*, paras. 4.423, 4.425; *see also id.* at para. 4.432 (quoting *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291).

is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."[59]

90. In other words, a selection of facts available that leads to a less favorable result for a non-cooperating party is permissible under Article 12.7 of the SCM Agreement.[60]

30. Please comment on Indonesia's assertion in paragraph 1002 of its first written submission that "the party/Member against whom facts available is used must be the same as the party/Member with respect to whom non-cooperation has been established". (emphasis original)

U.S. Response to Question 30:

91. The United States disagrees with Indonesia's assertion. We refer the Panel to our response to the question 29 above.

92. In short, Article 12.7 states that "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available" and provides the conditions to resort to facts available. Nothing in the text of Article 12.7 obligates the investigating authority to ensure that the effect of the application of facts available is limited to only the Member or party whose conduct gave rise to the need to resort to facts available in the first place.

31. Please comment on the European Union's assertion in paragraph 637 of its first written submission that Article 12.7 "does not require perfect symmetry between the facts available applied and the entity against whom the non-cooperation was established" and that, "[i]nsofar as the investigating authority has sought the necessary information from interested parties or other sources (such as parties to an investigation or persons capable of supplying the necessary information to make a proper determination), Article 12.7 of the SCM Agreement does not preclude the use of best information available for such investigating authority to make its determination."

U.S. Response to Question 31:

[59] Anti-Dumping Agreement, Annex II(7).

[60] *See US – Carbon Steel (India) (AB)*, para. 4.426 (Annex II(7) "acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party. It describes what could occur as a result of a non-cooperating party's failure to supply or otherwise withhold relevant information and the investigating authority's use of the "facts available" on the record. The juxtaposition between the "result" and the "situation" of non-cooperation in this clause confirms our understanding that the non-cooperation of a party is not itself the "basis" for replacing the necessary information". Rather, non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact. Annex II to the Anti-Dumping Agreement thus provides contextual support for our understanding that the procedural circumstances in which information is missing are relevant to an investigating authority's use of "facts available" under Article 12.7 of the SCM Agreement.")

93. As context for the assertions being quoted in the question, the European Union stated in the same paragraph that "the party that 'does not cooperate' and the party who must be wary of a 'less favourable outcome' do not have to be the same, but may very well be the same."[61]

94. Article 12.7 states that "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available" and provides the conditions to resort to facts available. As explained in our responses to questions 29 and 30 above, nothing in the text of Article 12.7 obligates the investigating authority to ensure that the effect of the application of facts available is limited to only the Member or party whose conduct gave rise to the need to resort to facts available in the first place.

95. Indeed, if either a Member or a party does not provide necessary information, this could impact the investigating authority's analysis of one or more elements of its CVD determination, which could, in turn, potentially have an effect on Members and parties that are not the Member or party that did not provide that information – for example where a producer has provided necessary information, but the subsidizing Member has decided to withhold necessary information that may impact the producer's countervailing duty rate.

32. Please comment on the European Union's assertion in paragraph 646 of its first written submission that, "[w]hereas the information necessary for [a] determination is normally under the possession of interested parties (e.g. exporters) or the interested Member (i.e. the GOID in this case), it cannot be ruled out that for a determination on subsidisation the investigating authority needs to collect data from public or private bodies as well."

U.S. Response to Question 32:

96. Without opining on the specific facts of this dispute, the United States agrees that there may be circumstances in which it is appropriate for an investigating authority to collect information that is in the possession of non-interested parties.

33. Please comment on Indonesia's assertion in paragraphs 1006-1010 of its first written submission that "'*necessary information*' in the context of Article 12.7 … must be interpreted to be limited to information *actually held/possessed* by the party that is being requested (by the authority) to provide it." (emphasis original) In doing so, please comment on what significance, if any, the Panel – when interpreting the meaning of the term "necessary information" in the SCM Agreement – should draw from the fact that Article 12.7 of the SCM Agreement (unlike Article 6.8 of the Anti-Dumping Agreement) uses the term "interested Member" in addition to the term "interested party" (which does appear in Article 6.8 of the Anti-Dumping Agreement).

U.S. Response to Question 33:

[61] EU's First Written Submission, para. 637.

97. Indonesia's reading of Article 12.7 is overly restrictive. The text of Article 12.7 does not support that the "necessary information" must be in the possession of the responding party. Article 12.7 permits an investigating authority to resort to facts available if a party refuses access to, or otherwise does not provide, necessary information. The phrase "refuses access" in Article 12.7 might imply possession of the necessary information by the party or Member, but "otherwise does not provide" does not necessarily imply possession. The phrase "otherwise does not provide" suggests that the party might be asked for information it does *not* possess, but could reasonably be expected to find or obtain access to. The question then becomes whether the party engaged in that effort.

98. Accordingly, while "necessary information" could be – to use Indonesia's words – "actually held" or "possessed" by the party from whom it is being requested, and that may sometimes be the case, it could also be more generally within the party's ability to obtain it to the best of its ability. For example, the information might be "actually held" or "possessed" by a subsidiary of a party but not by the party itself, but nonetheless be within that party's ability to obtain because of its ownership interest.

99. Furthermore, the additional reference to "interested Member" in Article 12.7 does not change this reading. Other provisions of the SCM Agreement and of the Anti-Dumping Agreement use different definitions of an "interested party." Article 6.11 of the Anti-Dumping Agreement includes "the government of the exporting Member" as an "interested party", while Article 12.9 of the SCM Agreement does not. Given this difference, it makes sense that Article 12.7 of the SCM Agreement includes an additional, explicit reference to "interested Members."

100. Finally, while Indonesia's assertion at issue relies on several prior panel reports,[62] the quoted statements from *Korea – Stainless Steel Bars* (DS533), *EC – Salmon (Norway)* (DS337), and *US – Coated Paper (Indonesia)* (DS491) of "possessed by",[63] "held by",[64] or "in control of"[65] the relevant interested party, are merely assertions by those panels. Those panels did not analyze the text of the covered agreements or employ the interpretative analysis required by the customary rules of interpretation in making those statements.

101. Regardless, the statements do not undermine our reading of "necessary information". For example, "in control of" does not necessarily equivalate to "actually held" or "possessed".

102. Indonesia also relies on the Appellate Body report in *US – Hot-Rolled Steel* (DS184) in its reading of "necessary information", but the relevant finding in that report merely illustrates the extent of the burden an investigating authority may place on an interested party to provide necessary information. As Indonesia recognizes, the issue in that case was whether the

[62] Indonesia's First Written Submission, para. 1007 (citing *Korea – Stainless Steel Bars*, para. 7.185; *EC – Salmon (Norway)*, para. 7.343; *US – Coated Paper (Indonesia)*, para. 7.125).

[63] *Korea – Stainless Steel Bars*, para. 7.185.

[64] *EC – Salmon (Norway)*, para. 7.343.

[65] *US – Coated Paper (Indonesia)*, para. 7.125.

investigating authority placed too much of a burden on a company respondent in an anti-dumping case in providing "necessary information" that was in the possession of its overseas affiliate, before finding the respondent non-cooperative and resorting to facts available under Article 6.8 of the Anti-Dumping Agreement.[66]

103. A similar rationale underpins Article 12.7 of the SCM Agreement, particularly given that Article 12.7 uses language that is similar to Article 6.8 of the Anti-Dumping Agreement.[67] To clarify, an investigating authority may obtain a wide array of information from a Member or party in a CVD investigation, provided that it does not impose an unreasonable burden on them before resorting to facts available.

5.2 Resort to facts available

34. Please comment on Indonesia's assertion in paragraph 1022 of its first written submission that "[a]uthorities are therefore not entitled to reject information from interested parties for the '*sole reason*' that it was submitted beyond an authority-established deadline" (emphasis original; fn omitted).

U.S. Response to Question 34:

104. Article 12.7 of the SCM Agreement permits an investigating authority to make a determination on the basis of facts available if an interested Member or an interested party does not provide necessary information "within a reasonable period." At the same time, the agreement does not define a "reasonable" period of time or otherwise restrict the ability of an investigating authority to establish deadlines. Thus, Article 12.7 does not preclude an investigating authority from rejecting information submitted after a deadline established by the authority.

35. Please respond to the European Union's assertion in paragraph 658 of its first written submission that "the reasonable period to submit information to the investigating authority cannot be assessed based on the time remaining before the deadline for the imposition of measures. The reasonable period must be assessed in respect of the original deadline for providing the relevant information."

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[66] Indonesia's First Written Submission, paras. 1008-1009 (citing *US – Hot-Rolled Steel (AB)*, paras. 105-110).

[67] While there is no accompanying annex to Article 12.7 of the SCM Agreement, past panels have observed that the SCM Agreement does not contain an Annex with detailed rights and obligations regarding the use of facts available. In these circumstances, the detailed rules in the Anti-Dumping Agreement may be considered as context in interpreting Article 12.7 of the SCM Agreement. As the Appellate Body has noted, "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations." *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295. At the same time, the specific rules in Annex II of the Anti-Dumping Agreement cannot be imported directly into the SCM Agreement; if this were the intent of the drafters, the SCM Agreement would have repeated those same rules in the text of the SCM Agreement.

U.S. Response to Question 35:

105. Article 12.1.1 of the SCM Agreement provides that "[e]xporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply." In other words, while it does not explicitly use the word "deadlines," the article contemplates that investigating authorities are permitted to establish appropriate time limits for questionnaire responses. As noted, Article 12.7 of the SCM Agreement permits an investigating authority to make a determination on the basis of facts available if an interested Member or an interested party does not provide necessary information "within a reasonable period." At the same time, the agreement does not define a "reasonable" period of time or otherwise restrict the ability of an investigating authority to establish deadlines. Thus, the reasonable period to submit information depends on the facts of the case.

106. In considering the term "reasonable period," prior reports have reached the same conclusion, based on similar reasoning:

> "reasonable" implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is "reasonable" in one set of circumstances may prove to be less than "reasonable" in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.[68]

107. Article 12.1.1 of the SCM Agreement reads almost verbatim to 6.1.1 of the Anti-Dumping Agreement and it is fully consistent with the Anti-Dumping Agreement for investigating authorities to impose time-limits for the submission of questionnaire responses. The report in *US – Hot-Rolled Steel* reasoned that:

> Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the Anti-Dumping Agreement . . . "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines."[69]

This reasoning reflects a correct understanding of the text, and the same logic applies to Article 12.7 of the SCM Agreement, read in light of Article 12.1.1.

108. In both anti-dumping and CVD investigations, in determining what constitutes a reasonable period of time, an investigating authority may be balancing a variety of

[68] *US – Hot-Rolled Steel (AB)*, para. 84.

[69] *US – Hot-Rolled Steel (AB)*, para. 73 (quoting *US – Hot Rolled Steel (Panel)*, para. 7.54).

considerations, including Members' potentially differing investigative steps and processes. Thus, it is logical that there is no one rule dictating how to determine a "reasonable period".

36. Where an investigating authority requests "necessary information" from an interested party or interested Member, does a response that such information either does not exist or is not in the possession of the interested party or interested Member necessarily preclude an authority from applying facts available to fill any informational gap associated with the absence of any such necessary information?

U.S. Response to Question 36:

109. Article 12.7 provides the conditions to resort to facts available – "cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." The text does not support that the "necessary information" must be in the possession of the responding party. The phrase "otherwise does not provide" suggests that the party might be asked for information it does not possess, but could be expected to find or obtain access to.

110. Therefore, a response that such information either does not exist or is not in the possession of the interested party or interested Member does not necessarily preclude an investigating authority from applying facts available to fill any informational gap associated with the absence of any such necessary information.

6. CLAIMS CONCERNING DISCLOSURE OF ESSENTIAL FACTS

37. Please comment on Indonesia's submission that "in order to determine 'sufficient time', it is working days that are relevant. … This makes sense since most companies (i.e., employees thereof), do not work on weekends and public holidays." (Indonesia's first written submission, fn 1814 (referring to Panel Report, *EU – Footwear (China)*, para. 7.833; Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.134). (emphasis original))

U.S. Response to Question 37:

111. Making a determination regarding sufficient time is dependent on the facts and the totality of the circumstances. Without opining on the specific facts in this dispute, there may be circumstances in which weekends and public holidays are relevant.