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

(DS616)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

April 18, 2024

Mr. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. The United States, like most WTO Members, has a systemic interest in advancing mutually advantageous economic development, including through private, market-oriented investment, that raises living standards and promotes resilience and sustainability. At the same time, we are increasingly concerned about the massive global economic disruptions from non-market-oriented policies and practices that undermine the rights of our workers and companies to fair competition and their ability to pursue sustainable growth. Certain Members are using extensive, trade-distortive government support and other non-market policies and practices to target specific industries for domestic or global market dominance, including in a manner that attempts to neutralize WTO subsidy disciplines.

3. WTO Members maintain a longstanding and well-established right to impose countervailing duties when a Member's domestic industry is harmed by subsidized imports. Article VI:3 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") recognizes a countervailing duty as "a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise." Article VI operates in conjunction with the GATT provisions establishing most-favored nation treatment and non-discrimination to ensure that remedies remain available to respond to unfair trade practices. The Agreement on Subsidies and Countervailing Measure ("SCM Agreement"), which interprets and applies the GATT 1994, does not introduce a geographic limitation on the right to impose a countervailing duty for the purpose of offsetting any subsidy on any merchandise. Rather, the SCM Agreement provides for additional

disciplines on subsidies and, among other things, elaborates on the procedures for determining the existence and amount of subsidization. Central to both the GATT 1994 and the SCM Agreement is the avoidance of harm caused by state economic action in the form of subsidies and ensuring the availability of remedies to redress any resulting injury. It is therefore systemically crucial to ensure that the balance of rights and obligations surrounding subsidy disciplines and trade remedies is maintained and that these tools are not rendered ineffective and irrelevant in acute situations where a WTO Member's domestic industry is harmed by subsidized imports.

4. Today, we will first address the role of state economic action in the context of subsidies. The broad language used in both the GATT 1994 and SCM Agreement and multiple methods of conveying value described in Article 1.1(a)(1) of the SCM Agreement reveal an intention to capture within the meaning of "financial contribution" a *wide array* of transfers of value. This is encapsulated in the proper interpretation of the term "public body" in Article 1.1(a)(1). 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. Control over, and authority to dispose of, the public's economic resources is a core function of government in every WTO Member, whether carried out through government action or through a public body. Thus, whether a Member subsidizes through government action or through a public body, the SCM Agreement is concerned with disciplining the same state economic action – that is, the transfer of public resources in the form of a subsidy that harms another Member. The central issue in this dispute is whether the SCM Agreement *precludes* an injured Member from addressing the harm caused by that state economic action.

5. It is in this context that we will then address the European Union ("EU") Commission's determination to attribute to the Government of Indonesia certain financial contributions from the Government of China in the territory of Indonesia, and to treat these financial contributions as subsidies of the Indonesian government under Article 1.1. If a Member were *not* able to countervail subsidized products simply because the financial contribution was provided by another Member when it would *otherwise* countervail those same products, this would be contrary to the purpose of the WTO disciplines governing state economic action.

6. Finally, we will briefly address the requirement to use market-based benchmarks to determine the amount of benefit under Article 14(d).

I. THE MEANING OF "PUBLIC BODY" UNDER ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

7. We have serious concerns[1] about the interpretation proffered by Indonesia in this dispute for the term "public body" under Article 1.1(a)(1) of the SCM Agreement.[2] Indonesia argues that – based entirely on prior Appellate Body language – the term "public body" refers to "an entity that 'possesses, exercises or is vested with governmental authority,'"[3] and that "mere formal links between an entity and the government (such as through ownership or control over an entity) do not suffice to establish that an entity is a public body."[4] Moreover, based on the prior Appellate Body language, Indonesia appears to suggest that an investigating authority must *always* find that an entity is performing a governmental function before deeming it a public

[1] U.S. Third Party Submission, paras. 30-44.

[2] Indonesia's First Written Submission, paras. 451-455; EU's First Written Submission, paras. 248-253.

[3] Indonesia's First Written Submission, para. 451 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317).

[4] Indonesia's First Written Submission, para. 453.

body.

8. However, nothing in the text of Article 1.1(a)(1) of the SCM Agreement restricts the meaning of "public body" only to an entity possessing, exercising, or otherwise vested with governmental authority, or exercising governmental functions. Indeed, 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."[5] 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.

9. The SCM Agreement does not define the term "public body",[6] but definitions of the words "public" and "body" shed light on the ordinary meaning of this term.[7] The ordinary meaning of the composite term "public body" according to dictionary definitions would be "an artificial person created by legal authority; a corporation; an officially constituted organization" that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." These definitions point towards ownership by the community as one meaning of the term "public body." If an entity "belongs to" or is "of" the community, it also follows that the community can make decisions for, or control, that entity. Nothing in those definitions restricts "public body" to an entity vested with, or exercising, governmental authority, or one exercising governmental functions.[8] Had the drafters intended to convey that meaning,

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[5] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent).

[6] Indonesia's First Written Submission, para. 451; *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

[7] U.S. Third Party Submission, paras. 34-36.

[8] *See* Indonesia's First Written Submission, paras. 451-455.

they might have chosen any number of other terms, for example: "governmental body," "public agency," "governmental agency," or "governmental authority." That they did not do so sheds light on the different concept captured by the term that was chosen, "public body".[9]

10. The ordinary meaning of the terms of a treaty must be understood "in their context."[10] Reading the term "public body" in context supports the conclusion that a "public body" is an entity controlled by the government such that the government can use that entity's resources as its own.

11. In Article 1.1(a)(1), the term "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member." The SCM Agreement thus uses two different terms – "a government" on the one hand and "any public body" on the other hand – to identify the two types of entities that can provide a financial contribution. As a contextual matter, the use of the distinct terms "a government" and "any public body" together this way indicates that the terms have distinct and different meanings.

12. Treaty interpretation should give meaning and effect to all terms of a treaty. The terms "a government" and "any public body" thus need to be interpreted distinctly, so that the latter is not rendered redundant with the former. The ordinary meaning of "government" refers to, *inter alia*, "[t]he regulation, restraint, supervision, or control [. . .] by those invested with authority".[11] The term "public body," therefore, should be interpreted as meaning something *other* than an entity that performs "functions of a 'governmental' character, that is, to 'regulate', 'restrain',

[9] U.S Third Party Submission, paras. 34-35.

[10] Vienna Convention on the Law of Treaties, Article 31.

[11] *Black's Law Dictionary* (West Publishing Co., 1990), p. 695, *cited in Canada – Dairy (AB)*, para. 97.

'supervise' or 'control' the conduct of private citizens."[12] Otherwise, a "public body" *is* "a government," or a part of "a government," and there is no reason for the term "public body" to have been included in Article 1.1(a)(1).

13. More importantly for this dispute, the context supplied by "financial contribution" in Article 1.1(a)(1), in fact, suggests a different and more significant common concept between "government" and "public body." The notion that both are referred to collectively as "government" and are capable of making a "financial contribution" suggests that the core attribute they share is the ability to convey the economic resources of the public.

II. THE EU COMMISSION'S DECISION TO COUNTERVAIL FINANCIAL CONTRIBUTIONS BY THE CHINESE GOVERNMENT TO THE IRNC GROUP, AS SUBSIDIES GRANTED BY THE INDONESIAN GOVERNMENT

14. Turning now to the EU Commission's decision to countervail financial contributions by the Chinese Government, as subsidies granted by the Indonesian Government, the text of the SCM Agreement does not limit the scope of a countervailable subsidy under Article 1.1(a)(1) only to a government's direct financial contribution to recipients within its geographic territory. For example, the phrase "financial contribution by a government" in the chapeau of Article 1.1(a)(1) refers to "a government", as opposed to, for example, "by *the* government *of the subsidizing Member*" or "by a government [. . .] within the territory of *the* Member *granting the subsidy*."

15. The SCM Agreement is interpreting and applying Article VI of the GATT 1994, and that article does not excuse or exempt such subsidies simply because the financial contribution

[12] *See Canada – Dairy (AB)*, para. 97.

involves another Member that is not the exporting Member. Rather, as explained above, Article VI:3 defines "countervailing duty" as a special duty applied to offset "any bounty or subsidy on the manufacture, production or export of any merchandise" – without specifying who provides such bounty or subsidy. In other words, the scope is not limited to offsetting just the direct financial support provided by the government of the country of production or export. Footnote 36 of the SCM Agreement uses almost identical language to define "countervailing duty", referring back to GATT 1994 Article VI:3.

16. Based on these provisions, it is fundamental to the analysis to recall that Members have the right to countervail any subsidies on *any* merchandise. This reflects the practical recognition that a countervailing duty should be able to offset a bounty or subsidy regardless of the geographic source of such bounty or subsidy, on the basis that it benefits the manufacture, production, or export of the product. It would be contrary to the purpose of these provisions 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. Thus, it is unsurprising that the SCM Agreement does not introduce such a limitation in the course of interpreting and applying GATT 1994 Article VI.

17. In sum, the text of the SCM Agreement does not preclude an investigating authority from attributing to the government of the exporting Member a financial contribution provided by another Member if the evidence so warrants. Indonesia's restrictive reading of Article 1.1(a)(1) would create a critical loophole and an obvious circumvention risk if an otherwise actionable subsidy could simply be converted to a non-actionable subsidy by a joint arrangement (for

example, such as the one here) between two Members to subsidize in this manner.[13]

18. Turning to Article 2, the specificity requirement ensures that the agreement disciplines subsidies that are provided to specific recipients or industries, as opposed to generally available subsidies. The cross-reference in Article 2.1 back to Article 1.1 reflects that the specificity analysis presupposes the existence of a subsidy and is limited to the question of determining whether that subsidy is specific (and therefore actionable).[14] Thus, if the investigating authority has established the existence of a subsidy provided to producers in the territory of the exporting Member, the exporting Member may also be the focus of the specificity analysis under Article 2.

19. Here, the Panel's role is to assess whether the EU Commission's particular determination is consistent with the EU's WTO obligations.[15] 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 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.

III. BENCHMARKS

20. Finally, on benchmarks, Article 14(d) of the SCM Agreement permits out-of-country prices to be used as benchmarks, 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,

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

[14] EU's First Written Submission, para. 66 (citing *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 747).

[15] Canada's Third Party Submission, paras. 6-7.

and ensures that any benchmark reflects a market price resulting from arm's-length transactions between independent buyers and sellers. 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 find an absence of market-determined in-country prices (including requiring a quantitative analysis of in-country prices regardless of whether those prices have already been found to be distorted).

IV. CONCLUSION

21. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views and looks forward to responding to the Panel's questions.