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

(DS616)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY

OF THE UNITED STATES

May 21, 2024

EXECUTIVE SUMMARY OF THE U.S. THIRD PARTY SUBMISSION

1. In this dispute, Indonesia challenges, *inter alia*, the definitive countervailing duties ("CVDs") imposed by the European Union ("EU"), resulting from an anti-subsidy investigation on imports of stainless steel cold-rolled flat products ("stainless steel") from Indonesia. Indonesia's claims include challenges to the EU Commission's decision to countervail financial contributions provided to stainless steel producers in Indonesia by the Government of China ("GOC"), as subsidies granted by the Government of Indonesia ("GOID"). Indonesia alleges the EU Commission's decision is inconsistent with Articles 1.1(a)(1), 1.2, 2.1, 2.2, and 2.4 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. The EU argues that, based on specific evidence in this case, the GOC's financial support is properly attributed to the GOID because the GOID consciously sought, acknowledged, and adopted the GOC's conduct as its own, such that the financial contributions constitute (indirect) subsidies granted by the GOID that are countervailable under the SCM Agreement. The United States understands that, according to the underlying EU Commission determination, the GOID and the GOC entered into essentially a joint venture or joint initiative to provide government support to stainless steel producers in a specific industrial zone in Indonesia via targeted, close cooperation between the two governments and subject to their joint administration of the area. Both governments granted special status to the Morowali Industrial Park – the GOID recognizing it as an industrial estate and a "National Strategic Project," benefitting from certain preferential domestic rules, and the GOC designating the same area as a China Overseas Economic and Trade Cooperation Zone, benefitting from the GOC's preferential support including under the Belt and Road Initiative.

3. According to the EU, the GOID's role in this joint initiative is to provide a conducive legislative, policy, and political framework to ensure success of the industrial project, which would serve Indonesia's industrial policy objective of developing its entire nickel value chain, from mining nickel ore to producing stainless steel. The GOC's role, according to the EU, is to provide preferential financing for investments in the industrial park, which would serve the interests of the Chinese parent companies of the Indonesian producers in the industrial park (including the IRNC Group), such as Tsingshan Steel Group, the ultimate parent company and the main investor in the IRNC Group; the Chinese steel industry at large, which relied on Indonesia's large nickel ore reserves; and China's industrial policy objective under the Belt and Road Initiative. As a result, the stainless steel producers in the Morowali Industrial Park have benefited from systematic support from both governments operating in concert.

4. In turn, the EU found that exports from these state-backed producers caused material injury to the EU domestic industry. As described by the EU Commission in the CVD determination, the subsidized imports caused price suppression on the EU market, and the domestic industry experienced significant drops in profitability, investments, return on investments, and cash flow.

5. Indonesia challenges the imposition of the CVDs on the subsidized imports and argues, *inter alia*, that under Article 1.1(a)(1) of the SCM Agreement, financial contributions provided by one Member to recipients in the territory of another Member may not be treated as countervailable subsidies. Indonesia further argues that the "granting authority" for the purpose

of the Article 2 specificity analysis is the body issuing and administering the subsidy, which, in Indonesia's view, is the GOC.

6. The EU argues that Article 1.1(a)(1) of the SCM Agreement 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. Specifically, the EU argues, *inter alia*, that the phrase "by a government" in the chapeau of Article 1.1(a)(1) allows for this kind of attribution.

7. Here, the EU's interpretation is supported by the text of the SCM Agreement and is consistent with the object and purpose of the SCM Agreement. As the EU points out in its first written submission, the use of the indefinite article "a" in the phrase "financial contribution by a government" in the chapeau of Article 1.1(a)(1) does not explicitly limit the scope of the financial contribution to the territory of the government providing the financial contribution. For example, the chapeau does not state, "by *the* government *of the subsidizing Member*" or "by a government [. . .] within the territory of *the* Member *granting the subsidy*." The remainder of Article 1.1(a)(1), which details various types of financial contributions that could constitute subsidies, also does not contain language prescribing territoriality.

8. Moreover, the SCM Agreement is interpreting and applying Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and this important context cannot be overlooked. Article VI of the GATT 1994 does not excuse or exempt such subsidies simply because the financial contribution involves another Member that is not the exporting Member. Rather, 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. 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. Based on these GATT 1994 and SCM Agreement provisions, it is central to the analysis to recall that Members have the clear right to countervail subsidies on the manufacture, production, or export. This 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, on the basis that it benefits the manufacture, production, or export of the product. If a Member were not able to countervail the subsidized products simply because the financial contribution was provided by another Member (*e.g.*, through a scheme such as the one at issue here) when it would otherwise countervail those same products, this would be contrary to the purpose of these provisions. 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.

9. A restrictive approach to Article 1.1(a)(1) as proposed by Indonesia would frustrate the object and purpose of the SCM Agreement and would create an obvious circumvention risk if an otherwise actionable subsidy could simply be converted to a non-actionable subsidy by a joint agreement (*e.g.*, such as the one here) between two Members to subsidize in this manner. Indonesia's approach would evidently allow a critical loophole for any Member that wishes to shield unfair subsidies, including through a cross-subsidization scheme or some other joint operation with another Member.

10. The text of Article 1.1(a)(1) permits a finding of a subsidy under circumstances such as those at issue here, and 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 warrant such a finding. While such an approach may not be necessary to determine the existence of a subsidy, such attribution may be understood to mean that the financial contribution is appropriately treated as a financial contribution by the exporting Member. It 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 and whether an unbiased and objective investigating authority could properly have reached the same conclusion on the basis of that evidence.

11. In light of the evidence provided by the EU Commission, the United States considers that an unbiased and objective investigating authority could properly find such evidence to support a conclusion that the financial contributions made by the GOC to the IRNC Group as part of the specific joint initiative between the GOC and the GOID constitute subsidies of the GOID.

12. Article 2 of the SCM Agreement functions to distinguish between generally available subsidies and those that are provided to specific recipients or industries. The purpose of this distinction is to ensure that generally available subsidies are not countervailed or treated as actionable under the SCM Agreement.

13. Here, the EU Commission considered the GOID the "granting authority" for the purpose of the specificity analysis under Article 2 of the SCM Agreement, having properly found the existence of a subsidy of the GOID. Article 2.1 states that: "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries . . . within the jurisdiction of the granting authority, the following principles shall apply". This 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). Thus, if the investigating authority has established the existence of a subsidy provided to producers in the territory of the exporting Member, it is logical that the exporting Member would also be the focus of the specificity analysis under Article 2.

14. This interpretation is consistent with the object and purpose of the SCM Agreement. As noted by both Indonesia and the EU, the Article 2 specificity requirement is intended to ensure that the SCM Agreement disciplines specific subsidies, as opposed to generally available subsidies, since specific subsidies are more likely to distort trade by distorting the allocation of resources within an economy and are thus more likely to lead to injury to others. Where a subsidy is found to exist under Article 1, that subsidy would be countervailable or actionable under the SCM Agreement so long as it is limited to certain enterprises or industries, as is the case here.

15. With respect to the meaning of "public body" under Article 1.1(a)(1) of the SCM Agreement, Indonesia argues that the EU acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in determining that Indonesian nickel ore mining companies constituted "public

bodies", in its assessment of whether such companies provided nickel ore to stainless steel producers in Indonesia for less than adequate remuneration.

16. The United States, while taking no position on the merits of the factual allegations made by either party, has serious concerns about the applicable evidentiary standard for "public body" proffered by the main parties in this dispute. Indonesia, relying *entirely* on prior Appellate Body and panel reports, argues that the term "public body" refers to "an entity that 'possesses, exercises or is vested with governmental authority,'" 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." The EU appears to agree with Indonesia that such "governmental authority" is required for an entity to be a public body, and the Commission appears to have made its public bodies finding in light of this purported requirement. Moreover, the United States understands Indonesia to be arguing that an investigating authority must always find that an entity is performing a governmental function before it may determine that such entity is a public body.

17. *Nothing* in 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." 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.

18. The SCM Agreement does not define the term "public body", but definitions of the words "public" and "body" shed light on the ordinary meaning of this term. 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.

19. Nothing in these dictionary definitions restricts the meaning of the term "public body" to an entity vested with, or exercising, governmental authority, or one exercising governmental functions. Had the drafters of the SCM Agreement intended to convey that meaning, they might have chosen any number of other terms. For example, the drafters might have used "governmental body," "public agency," "governmental agency," or "governmental authority." That they were not chosen sheds light on the different concept captured by the term that was chosen, "public body."

20. The ordinary meaning of the terms of a treaty must be understood "in their context." 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.

21. 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. Treaty interpretation should give meaning and effect to all terms of a treaty. The term "public body" should not be interpreted in a manner that would render it redundant with the word "government."

22. The essence of "government" is that "it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority." Further, a "government agency" is "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." 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', 'supervise' or 'control' the conduct of private citizens." 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) of the SCM Agreement.

23. The context supplied by "financial contribution" further suggests a different common concept between "government" and "public body." The notion that both entities 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.

24. Thus, to the extent Indonesia argues that the EU failed to properly find that the entities possess, exercise, or are vested with governmental authority, its arguments must fail because Indonesia has incorrectly relied on a legal approach that is too narrow.

EXECUTIVE SUMMARY OF THE U.S. ORAL STATEMENT

25. 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 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 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.

26. 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.

27. 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.

28. It is in this context that we address the EU Commission's determination to attribute to the GOID certain financial contributions from the GOC 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.

29. 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, and thus 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.

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

31. With respect to 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, 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).