European Union – Countervailing Duties on Imports of Biodiesel from Indonesia

(WT/DS618)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

November 4, 2024

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS REGARDING ARTICLE 1.1(A)(1)(I) OF THE SCM AGREEMENT

1. In brief, *nothing* in Article 1.1(a)(1)(i) precludes a transfer of funds by a government or public body from constituting a financial contribution on the basis of the origin of the funds. As a matter of logic, levies and taxes owed to the government cease to be privately held once paid.

2. Furthermore, most if not nearly all, funding for government and public programs derives from sources outside the government, including revenues generated by the collection of levies and taxes. Nevertheless, the origin of funds from a source outside the government is not dispositive to the question of whether a government disbursement of funds constitutes a "financial contribution." Rather, an investigating authority may find the existence of a "financial contribution" under Article 1.1(a)(1)(i), so long as the evidence before it supports that there is a government practice which involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion) that is attributable to a government or public body.

3. The broad language used and multiple methods of conveying value described in Article 1.1(a)(1) reveal an intention to capture within the meaning of "financial contribution" a wide array of transfers of value. The examples listed in Article 1.1(a)(1)(i) indicate that a direct transfer of funds typically involves financing by the government to the recipient through transactions like *e.g.*, grants, loans, and equity infusions. There is no language indicating that the provision contemplates the origin of the funds transferred such that the origin of the funds would preclude consideration as a "financial contribution" under Article 1.1(a)(1)(i). Accordingly, based on the text of Article 1.1(a)(1)(i), the relevant inquiry is whether there is a government practice which involves a direct transfer of funds that is attributable to a government or public body.

4. Previous disputes also support this interpretation of Article 1.1(a)(1)(i). The report in *US – Large Civil Aircraft (Second Complaint) (AB)* agreed that the focus of Article 1.1(a)(1) is the government conduct which constitutes a financial contribution. Recognizing that the term "funds" is not limited to money, but encompasses "financial resources and other financial claims more generally," that report concluded that "direct transfer of funds" "captures conduct on the part of the government by which money, financial resources, and/or financial claims are made available to a recipient." Likewise, in *US – Carbon Steel (India) (AB*), the report similarly rejected that a "transfer of funds" under Article 1.1(a)(1)(i) refers only to situations where funds are drawn from government resources or a charge on a public account.

5. This reasoning reflects a correct understanding and reasonable interpretation of the terms of Article 1.1(a)(1)(i). Indeed, a restrictive interpretation of Article 1.1(a)(1)(i), as proposed by Indonesia would frustrate the object and purpose of the SCM Agreement by creating an obvious circumvention risk where an otherwise actionable subsidy could be converted to a non-actionable subsidy simply because the government used revenues generated by private funds, *e.g.,* the collection of taxes and levies. This approach to Article 1.1(a)(1)(i) would create a loophole for tax- or levy-paying recipients to shield unfair subsidization.

II. CLAIMS REGARDING ARTICLE 1.1(B) OF THE SCM AGREEMENT

6. Article 1.1 of the SCM Agreement provides that a subsidy shall be deemed to exist if there is a "financial contribution by a government" and "a benefit is thereby conferred." In its entirety, Article 1.1(b) provides only that "a benefit is thereby conferred." Notably, Article 1.1(b) says nothing about how to determine whether a benefit has been conferred, or how to measure the benefit.

7. The term "benefit" is not defined by the SCM Agreement. Therefore, Article 14 of the SCM Agreement "constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b)." With regard to the ordinary meaning, "benefit" is defined as "do good to, be of advantage to; improve" and "receive benefit; profit". The title of Article 14 – " Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" – similarly reflects the advantage provided to the recipient of a financial contribution. As such, the concept of "benefit" relates to situations in which a firm receives "an improvement" or "an advantage," rather than a detriment or disadvantage.

8. Therefore, based on the ordinary meaning of the term and the context provided by Article 14, outlined above, a "benefit" arises when the recipient has received something that makes the recipient better off than it otherwise would have been absent that financial contribution. Thus, the focus of the benefit analysis centers on "benefit to the recipient."

9. Although the guidelines in Article 14 enumerate instances which shall not be considered as conferring a benefit, Article 14 lacks any "guideline" for the financial contribution in the present dispute, *i.e.*, a "direct transfer of funds" in the form of a grant. In the absence of any such text, a grant simply bestows a benefit to the recipient.

10. Therefore, nothing in the text of Article 1.1(b) or Article 14 of the SCM Agreement requires an investigating authority to offset a portion of the benefit received from a subsidy grant program.

III. CLAIMS REGARDING ENTRUSTMENT OR DIRECTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

11. A proper interpretation of Article 1.1(a)(1)(iv) supports the conclusion that Article 1.1(a)(1)(iv) encompasses a range of government action that would normally be vested in government, and does not require an explicit and affirmative action of delegation or command for an investigating authority to make a finding of entrustment or direction.

12. Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government." Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The term "would" as it is used in Article

1.1(a)(1)(iv) is a modal verb in the present unreal conditional form. The present unreal conditional form "is used to talk about what you would generally do [or what would generally be the case] in imaginary situations." The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs the precise function carried out by the private body, but that the government normally would perform that type of function, and also "the practice, in no real sense, differs from the practices normally followed by governments."

13. The phrase "in no real sense" also suggests that Members were seeking to avoid circumvention. The practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments, but rather must be determined to, "in no real sense," differ from such practices – *i.e.*, not differ in any real sense. Entrustment or direction in Article 1.1(a)(1)(iv) captures subsidies that differ "in no real sense" from those provided by a government itself, except for the fact that they are provided through private bodies.

14. Therefore, a determination of entrustment or direction involves consideration of both the types of functions that "*would* normally be vested in the government" alleged to have entrusted or directed a private body and also the "practices normally followed by governments" other than that government. Such determinations of entrustment or direction will hinge on the particular facts of the case, but the relevant provisions also allow for a broad degree of generality.

15. Further, there is no requirement on WTO Members to demonstrate both control and command under Article 1.1(a)(1)(iv) of the SCM Agreement. An examination of the ordinary meaning of "entrusts" or "directs" establishes that explicit and affirmative action is not required. "Entrust" is defined, in relevant part, as "[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person." This definition encompasses a range of actions. The word "entrust" implies that a degree of discretion is given to the person being entrusted.

16. Definitions of the word "direct" include "Cause to move in or take a specified direction; turn towards a specified destination or target;" "Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of" or "Regulate the course of; guide with advice." Additional definitions of "direct" include "Inform or guide (a person) as to the way; show or tell (a person) the way (to);" and "govern the actions ... of." Thus, the ordinary meaning of "direct" also encompasses a wide range of actions. These actions are not limited to commanding a person or entity to do something in particular.

17. The proper interpretation of "entrusts or directs" is one that takes account of the full range of government actions that fall within the ordinary meaning of this term, including: a government investing trust in a private body to carry out a task, a government giving responsibility to a private body to carry out a task, a government informing or guiding a private

body as to how to carry out a task, a government regulating the course of a private body's conduct, as well as a government delegating or commanding a private body to carry out a task.

18. Lastly, the United States observes that Indonesia's interpretation, which would preclude an investigating authority from finding entrustment or direction based on the presence of free choice by market actors, is inconsistent with the ordinary meaning of the terms under Article 1.1(a)(1)(iv) of the SCM Agreement as discussed above. That is, adopting an interpretation of "entrusts" or "directs" which requires the elimination of the possibility of free choice by private entities would be contrary to the element of discretion in the meaning of "entrust" and the element of inform or guide in "direct". This would narrow the terms' scope to a very limited range of government actions, inconsistent with the ordinary meaning of "entrusts or directs".

IV. CLAIMS REGARDING ARTICLE 12.7 OF THE SCM AGREEMENT

19. One scenario which may trigger resort to Article 12.7 of the SCM Agreement is where information is not provided within "a reasonable period." Definitions of "reasonable" include "Proportionate" and "Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate". Therefore, the use of the term "reasonable" implies a degree of flexibility that is determined on a case-by-case basis. What will constitute a "reasonable period" will be based on the circumstances of a particular case.

20. Simultaneously, the SCM Agreement permits investigating authorities to establish deadlines for questionnaire responses to foreign producers or interested Members. Although it does not explicitly use the word "deadlines," the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits. Indeed, investigating authorities must be able to control the conduct of their investigation to effectively reach a final determination.

21. The "facts available" refer to those facts that are in the possession of the investigating authority and on its written record. Thus, an Article 12.7 determination "'cannot be made on the basis of non-factual assumptions or speculation.'" The extent to which the investigating authority must evaluate the possible "facts available," and the form that evaluation may take, "depend[s] on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record, and the particular determinations to be made in the course of an investigation."

22. In addition, the fact of an interested party's non-cooperation may be relevant to the investigating authority's selection of "facts available" under Article 12.7. Indeed, a non-cooperating party's knowledge of the consequences of failing to provide information can be taken into account by the investigating authority when relying on "facts available" to reach a determination.

23. Therefore, a proper interpretation of Article 12.7 of the SCM Agreement preserves the requisite flexibility of investigating authorities to effectively conclude investigations.

IV. CLAIMS REGARDING ARTICLE 15.5 OF THE SCM AGREEMENT

24. Article 15.5 of the SCM Agreement defines the investigating authority's obligation to conduct an examination of known factors other than dumped imports. The purpose of the examination of other known factors is to ensure the existence of a causal link between the subsidized imports and the injury to the domestic industry.

25. The premise of Article 15.5 is that other known factors may "at the same time [be] injuring the domestic industry" – that is, there can be multiple causes of injury. The provision is to ensure the imports remain "a" cause of injury despite consideration of the contributions from other sources – not to ensure imports are the sole or primary cause of injury. "Separate and distinguish", however, is not text found in Article 15.5 of the SCM Agreement. In fact, Article 15.5 does not dictate the methodology that an investigating authority must employ for its examination of other known factors. An investigating authority has the flexibility to base its conclusions on a qualitative assessment, a quantitative assessment, or another type of assessment that it considers appropriate so long as the assessment results in a demonstration of the causal link between subsidized imports and material injury that does not attribute to subsidized imports the injury caused by other factors.

26. In some cases, factors cited by a party are found by the investigating authority to either not be causing injury at all to the domestic industry, or not to be causing injury "at the same time" as the dumped or subsidized imports. In such cases, the investigating authorities are not obligated under Article 15.5 of the SCM Agreement to undertake an additional analysis of those factors since there would be no injury to attribute to them.

27. Based on the above discussion, the United States observes that the Panel must determine if the investigating authority demonstrated in its investigation that it examined other "known factors" within the meaning of Article 15.5 of the SCM Agreement, *i.e.*, factors that were also causing injury to the domestic industry "at the same time" as were the subject imports, and based its causation analysis on an examination of all relevant evidence.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS

U.S. Response to Question 12

28. In some cases, the application of facts available by an investigating authority may 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 of a party or a Member, or even a non-party, but the *effect* of the

facts available may implicate the other party or Member. Indeed, 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.

29. Article 12.7 is practical and logical in the context of a CVD investigation where an investigating authority is typically gathering different information from different parties for different elements of its countervailable subsidy determination. 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.

30. Notably, the application of facts available as a result of a party or Member's inability to obtain information from a non-party is not inconsistent with Article 12.7, which provides for the application of facts available when a Member or interested party fails to provide the necessary information. That is, Article 12.7 does not limit the application of facts available to circumstances where the necessary information is within the possession of the Member or party from which the information is requested. Rather, Article 12.7 plainly states that facts available may be used when a Member or interested party "otherwise does not provide, necessary information." Although the earlier phrase "refuses access" in Article 12.7 might imply possession of the necessary information by the party or Member, "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.