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

(DS616)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted Mar. 25, 2011
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TABLE OF ABBREVIATIONS

Abbreviation	Definition
CVD	Countervailing Duty
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
GOC	Government of China
GOID	Government of Indonesia
PSN	National Strategic Project
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit No.	Description
USA-1	*The New Shorter Oxford English Dictionary* (1993) (excerpts)

I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") as relevant to certain issues in this dispute. First, we address Indonesia's arguments surrounding the European Union ("EU") Commission's determination to attribute to the Government of Indonesia ("GOID") certain financial contributions from the Government of China ("GOC"), and to treat these GOC financial contributions as subsidies provided by the GOID. Second, we address the proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

2. This dispute raises several issues of systemic importance under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the SCM Agreement, and for the WTO more broadly. Importantly, like most WTO Members, the United States has a systemic interest in advancing economic growth, including through private, market-oriented investment (including foreign direct investment), that promotes resilience and sustainability and benefits workers. However, we are increasingly concerned about another kind of activity, namely the strategic attempts to target specific industries for domestic or global market dominance by companies and countries using extensive government support and other wide-ranging non-market policies and practices, including in a manner that attempts to neutralize WTO subsidy disciplines. Such policies and practices pursued by certain Members distort trade, investment, and competition, and have created critical dependencies and systemic vulnerabilities globally. The United States and others are taking steps at the WTO and elsewhere to address a range of non-market policies and practices.

3. To the extent these harmful policies and practices include the use of subsidies, the GATT 1994 and the SCM Agreement provide a remedy when a Member's domestic industry is harmed by subsidized imports. The United States thus has a systemic interest in ensuring that the rules disciplining subsidies are not rendered ineffective and irrelevant in acute situations where a WTO Member's domestic industry is harmed by subsidized imports, which would severely undermine the object and purpose of the SCM Agreement.

II. CLAIMS CONCERNING THE PROVISION OF PREFERENTIAL FINANCING AND SUPPORT BY THE GOC TO THE IRNC GROUP

4. In this section, we address Indonesia's arguments regarding the EU Commission's determination to treat financial contributions from the GOC as subsidies of the GOID under Article 1.1 of the SCM Agreement and to treat those subsidies as actionable in its anti-subsidy investigation, consistent with Article 1.2 and Article 2 of the SCM Agreement. First, we will briefly summarize the arguments made by Indonesia and the EU in their first written submissions. Next, we recall the relevant legal provisions of the SCM Agreement and explain our view that the text of Article 1.1(a)(1) does not preclude an investigating authority from finding that a financial contribution provided by a WTO Member may be considered a subsidy of another WTO Member, in light of the specific evidence available, for the purpose of determining the existence of a subsidy under Article 1. We will then discuss the evidence used by the EU Commission to find the existence of a GOID subsidy and explain why the evidence at issue

appears to support the EU's conclusion. Finally, we address the EU Commission's determination to treat those subsidies as actionable, which is consistent with Article 1.2 and Article 2 of the SCM Agreement.

A. *Introduction*

5. In this dispute, Indonesia challenges, *inter alia*, the definitive countervailing duties ("CVDs") imposed by the EU, resulting from an anti-subsidy investigation on imports of stainless steel cold-rolled flat products ("stainless steel") from Indonesia.[1] Indonesia's claims include challenges to the EU Commission's decision to countervail financial contributions provided to stainless steel producers in Indonesia by the GOC, as subsidies granted by the GOID.[2] 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 SCM Agreement.[3]

6. 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.[4] The United States understands that, according to the underlying EU Commission determination,[5] 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.[6] 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.[7]

7. 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,

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[1] *See* Indonesia's First Written Submission, paras. 12-13.

[2] *See* Indonesia's First Written Submission, paras. 52-53.

[3] *See* Indonesia's First Written Submission, para. 64.

[4] *See* EU's First Written Submission, para. 14.

[5] 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") (Exhibit IDN-1).

[6] *See* EU CVD Measure, section 4.5 (Exhibit IDN-1).

[7] *See* EU CVD Measure, recitals (615)-(619) (Exhibit IDN-1).

from mining nickel ore to producing stainless steel.[8] 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.[9]

As a result, the stainless steel producers in the Morowali Industrial Park have benefited from systematic support from both governments operating in concert.[10]

8. In turn, the EU found that exports from these state-backed producers caused material injury to the EU domestic industry.[11] 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.[12]

9. 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.[13] 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.[14]

B. *Legal provisions*

10. Article 1.1 of the SCM Agreement, titled "Definition of a Subsidy", provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

[8] *See* EU's First Written Submission, paras. 10, 31, 42.

[9] *See* EU's First Written Submission, paras. 11, 41, 42.

[10] *See* EU's First Written Submission, paras. 9-12.

[11] *See* EU's First Written Submission, para. 47; EU CVD Measure, recitals (945)-(1011) (Exhibit IDN-1).

[12] *See* EU CVD Measure, recitals (1005)-(1008) (Exhibit IDN-1).

[13] *See* Indonesia's First Written Submission, paras. 53, 93, 137.

[14] *See* Indonesia's First Written Submission, paras. 233-234.

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> > (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> >
> > (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
> >
> > (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> >
> > (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
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> and
>
> (b) a benefit is thereby conferred.
>
> 1.2 A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.

11. Article 2, titled "Specificity", provides, in relevant part:

> 2.1 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 (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply: [. . .]
>
> 2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. [. . .]

C. *Arguments Regarding Article 1 of the SCM Agreement*

12. The United States understands that the central issue is – as the EU frames it – whether the SCM Agreement permits a financial contribution provided by one WTO Member to products manufactured in the territory of another WTO Member to be treated as a subsidy granted by the latter.[15] Put another way, the question is whether the SCM Agreement prohibits a Member from countervailing injurious subsidies under the circumstances at issue.

13. 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.[16] Specifically, the EU argues that the phrase "by a government" in the chapeau of Article 1.1(a)(1) allows for this kind of attribution.[17] Indonesia, on the other hand, argues that only actions of a government or of a public body (pursuant to Article 1.1(a)(1) of the SCM Agreement), or actions of a private body entrusted or directed by a government (pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement) of a WTO Member can be attributed to the government, while actions of another State may not.[18]

14. 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 in contrast to the interpretation advocated by Indonesia. As the EU points out in its first written submission,[19] 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.

15. The EU further emphasizes that Article 1.1(a)(2), which addresses "*any* form of income or price support in the sense of Article XVI of GATT 1994" as another possible form of a subsidy for the purpose of the SCM Agreement, includes no qualification with respect to who

[15] *See* EU's First Written Submission, para. 21 n.22.

[16] *See* EU's First Written Submission, paras. 30, 54-62.

[17] *See* EU's First Written Submission, para. 55.

[18] *See* Indonesia's First Written Submission, paras. 84-95.

[19] *See* EU's First Written Submission, para. 55.

provides such income or price support.[20] The EU also points to the absence of qualifiers in GATT 1994 Article XVI itself as well as the repeated use of the term "any."[21]

16. The EU reasonably concludes that both the GATT 1994 and the SCM Agreement therefore contemplate a degree of flexibility in addressing the harms caused by "any" such activity.

17. As stated above, the United States agrees that 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.[22] Moreover, the SCM Agreement is interpreting and applying Article VI of the 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.

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[20] *See* EU's First Written Submission, para. 60.

[21] *See* GATT 1994 Article XVI:1 ("If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any products from, or to reduce imports of any product into, its territory, [. . .]").

[22] The United States notes that Indonesia in its First Written Submission argues that the United States "has historically excluded cross-border subsidies from the scope of its countervailing [duty] rules, even prior to the entry into force of the SCM Agreement". Indonesia's First Written Submission, paras. 133, 186. In support of its argument, Indonesia cites a U.S. CVD regulation, Section 351.527 of Title 19 of the U.S. Code of Federal Regulations ("19 C.F.R. 351.527"). *See id.* While U.S. CVD law is not at issue in this dispute, Indonesia's observation is of limited relevance as it is incomplete and does not reflect the more recent experience of the United States. In fact, the U.S. Department of Commerce ("USDOC") has observed through its administrative experiences that instances in which a government provides a subsidy that benefits foreign production are far more prevalent than it previously had assumed. *See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws*, 88 Federal Register 29850, 29870 (May 9, 2023). Moreover, the USDOC published a proposal in May 2023 to repeal 19 C.F.R. 351.527; a final decision on the proposed repeal remains pending at the time of this submission. *See id.*

18. For example, while the more common occurrence may be for a government to provide financial support to producers within its own territory, there is no basis in the text of the GATT 1994 or the SCM Agreement to assume that this is the only scenario subject to subsidy disciplines.

19. Further, the text of Article 1.1(a)(1) permits a finding of a subsidy under circumstances such as the one 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 before the investigating authority 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. Whether an investigating authority may reach such a conclusion is dependent on the specific evidence available to the investigating authority. 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.

1. Additional Considerations Support the EU's Interpretation of Article 1 of the SCM Agreement

20. 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.[23] 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.

21. In this dispute, the United States recalls that the EU has painted a detailed picture of a joint arrangement between the GOID and the GOC. According to the evidence collected by the EU's investigating authority, the GOID and the GOC jointly set up the Morowali Industrial Park in the Sulawesi area of Indonesia to develop the stainless steel industry in Indonesia.[24] The GOID has promoted Sulawesi as one of the six economic corridors that are to serve as axes of the country's economic development plans.[25] The EU Commission found that the GOID initiated and successfully obtained a bilateral commitment with the GOC to invest their resources (including financial support to stainless steel producers) in industrial parks including the Morowali Industrial Park,[26] which has the formal status of a National Strategic Project ("PSN")

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

[24] *See* EU CVD Measure, recitals (323), (581) (Exhibit IDN-1).

[25] *See* EU CVD Measure, recital (614) (Exhibit IDN-1).

[26] *See* EU CVD Measure, recital (668) (Exhibit IDN-1).

in Indonesia.[27] According to the EU, PSNs are selected in line with Indonesia's development policies, are closely monitored by the GOID, and are eligible to be provided with certain privileges.[28] The PSN status also allowed the construction and development of the industrial complex to begin while the building construction permit was still pending.[29] The GOC likewise designated the Morowali Industrial Park as a China Overseas Economic and Trade Cooperation Zone, which benefits from the GOC's preferential support.[30]

22. The EU Commission found that the joint development of the Morowali Industrial Park is part of the implementation of the bilateral industrial support program that the GOID and the GOC established through various agreements, joint statements, and other documents,[31] including that:

- Both governments would facilitate and provide policy support in the development of industrial parks, which is a key area of bilateral economic and trade cooperation;[32]
- Both governments would encourage their financial and insurance institutions to give priority to supporting bilateral projects including industrial parks and development of mineral resources;[33]
- Both governments would establish an inter-governmental coordinating committee for China-Indonesia integrated industrial parks;[34]
- Both governments would encourage or instruct Chinese companies to invest in these industrial parks;[35]

[27] *See* EU CVD Measure, recital (616) (Exhibit IDN-1).

[28] *See* EU CVD Measure, recital (616) (Exhibit IDN-1).

[29] *See* EU CVD Measure, recital (616) (Exhibit IDN-1).

[30] *See* EU CVD Measure, recitals (617)-(619), (656) (Exhibit IDN-1).

[31] *See* EU CVD Measure, recitals (560)-(581), (595), (598) (Exhibit IDN-1).

[32] *See* Agreement between the GOID and the GOC on Indonesia-China Integrated Industrial Parks signed in Jakarta on 2 October 2013, Article V (Exhibit EU-47); Indonesia-China Five Year Development Program for Economic and Trade Cooperation signed in Jakarta on 2 October 2013, Points 2.9.1 and 2.9.2 (Exhibit EU-46).

[33] *See* Agreement between the GOID and the GOC on Expanding and Deepening bilateral Economic and Trade Cooperation signed in Jakarta on 29 April 2011, Article VI (Exhibit EU-42).

[34] *See* Joint Statement of Strengthening Comprehensive Strategic Partnership between the PRC and Indonesia delivered in Beijing on 26 March 2015, para. 16 (Exhibit EU-48).

[35] *See* Indonesia-China Five Year Development Program for Economic and Trade Cooperation signed in Jakarta on 2 October 2013, Point 2.9.2 (Exhibit EU-46).

- Chinese financial institutions are encouraged to support financing for investment and project construction by Chinese-funded enterprises in Indonesia;[36] and

- The GOID would introduce preferential policies for the industrial parks to provide safeguard and facilitation for more Chinese enterprises to enter the industrial parks to accelerate their development.[37]

23. According to the EU, several bilateral administrative bodies were created in the Morowali Industrial Park to monitor and coordinate the implementation of the joint program.[38]

24. The EU further found that, as part of the implementation, the GOC provided various forms of preferential financial support to IRNC Group in the Morowali Industrial Park, including preferential loans from Chinese state-owned banks and an equity injection by the China-ASEAN Investment Cooperation Fund, which is owned by Chinese state-owned financial institutions and subject to the GOC's control.[39]

25. The GOID in turn could track the financial flows for foreign investors and foreign capital through a monitoring process in place, including overseas funds channeled via local Indonesian branches of Chinese banks.[40] Moreover, offshore loans linked to development projects, such as the Morowali Industrial Park, are subject to specific approval and reporting requirements and close monitoring by an inter-Ministry team within the GOID.[41] In addition to monitoring the GOC's financial support through these mechanisms, the GOID has monitored the progress of the Morowali project by meeting with IMIP, the Indonesian company developing and managing the industrial park, and with Tsingshan, IRNC Group's main investor and ultimate parent company.[42]

26. In light of the above and other 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.

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[36] *See* Indonesia-China Five Year Development Program for Economic and Trade Cooperation signed in Jakarta on 2 October 2013, Point 5.2.1 (Exhibit EU-46).

[37] *See* Joint Statement of Strengthening Comprehensive Strategic Partnership between the PRC and Indonesia delivered in Beijing on 26 March 2015, para. 16 (Exhibit EU-48).

[38] *See* EU CVD Measure, recitals (579), (636)-(642) (Exhibit IDN-1).

[39] *See*, *e.g.*, EU CVD Measure, recitals (582)-(594), (724)-(731), (772)-(781) (Exhibit IDN-1).

[40] *See* EU CVD Measure, recital (676) (Exhibit IDN-1).

[41] *See* EU CVD Measure, recitals (703), (753)-(754) (Exhibit IDN-1).

[42] *See* EU CVD Measure, recital (633) (Exhibit IDN-1).

D. *Arguments Regarding Article 2 of the SCM Agreement*

27. 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.

28. 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.[43] 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).[44] 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 would also be the focus of the specificity analysis under Article 2.

29. This interpretation is consistent with the object and purpose of the SCM Agreement. As noted by both Indonesia and the EU,[45] 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.

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

30. 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.[46] While Indonesia makes several

[43] *See* EU CVD Measure, recital (685) (Exhibit IDN-1).

[44] The EU recognizes that "the starting point of the analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1 of the SCM Agreement". EU's First Written Submission, para. 66 (citing *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 747).

[45] *See* Indonesia's First Written Submission, para. 221; EU's First Written Submission, para. 67.

[46] Indonesia's First Written Submission, paras. 449-594.

arguments against the Commission's public bodies determination, the United States will focus on Indonesia's contention that the Commission inadequately found that the entities in question "possess governmental authority" or "exercise governmental functions."[47]

31. For its part, the EU Commission, in examining whether such entities were public bodies, found, first, 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 close relationship with the GOID."[48] Second, the Commission determined that "all mining companies, regardless of their ownership, are subject to and must implement a number of government-prescribed measures concerning the provision of nickel ore, namely: (1) domestic processing obligation ('DPO'), (2) export restrictions and/or export ban, (3) mandatory annual working plan and budget ('RKAB'), (4) divestment obligations, (5) mandatory pricing mechanism."[49] The Commission likewise noted that mining companies have the designation of "'National vital objects'", and as such have "the first priority from the Indonesian National Police Force in terms of security assistance when there is any disruption to operations or threat."[50] On the basis of this evidence, the Commission found that the GOID:

> has created a complete normative framework mining companies have to adhere to. As such, the core characteristics of the mining companies show that nickel mining companies, rather than being normal market operators, simply implement the framework set out by the GOID in the exercise of governmental functions with respect to the SSCR industry.[51]

32. 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.[52] 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,'"[53] 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."[54] The EU appears to agree with Indonesia that such "governmental authority" is required for an entity to be a public body,[55] and the Commission

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[47] Indonesia's First Written Submission, paras. 555-593.

[48] EU CVD Measure, recitals (377)-(393) (Exhibit IDN-1).

[49] EU CVD Measure, recitals (394)-(437) (Exhibit IDN-1).

[50] EU CVD Measure, recitals (438)-(442) (Exhibit IDN-1).

[51] EU CVD Measure, recital (444) (Exhibit IDN-1); *see also* EU's First Written Submission, paras. 254-308.

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

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

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

[55] EU's First Written Submission, paras. 248-253 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 310; *US – Carbon Steel (India) (AB)*, para. 4.29).

appears to have made its public bodies finding in light of this purported requirement.[56] Moreover, according to Indonesia, "[e]ven in circumstances where an entity is 'meaningfully controlled' by a government, a public body finding requires an investigating authority to show that the entity is performing a governmental function."[57] Thus, the United States understands Indonesia to be arguing that an investigating authority must always find, *in every circumstance*, that an entity is performing a governmental function before it may determine that such entity is a public body.

33. In brief, *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."[58] 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.

34. The SCM Agreement does not define the term "public body",[59] but definitions of the words "public" and "body" shed light on the ordinary meaning of this term. By definition, the noun "body" refers to a group of persons or an entity (as opposed to, for example, the "material frame" of persons). The definition in the sense of "an aggregate of individuals" is: "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society."[60] Turning to the adjective "public," the relevant definition that pertains to a "body" as a group of individuals is the first: "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation."[61]

35. Thus, 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.

36. 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

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[56] EU CVD Measure, recital (225) (Exhibit IDN-1).

[57] Indonesia's First Written Submission, para. 453 (citing *US – Carbon Steel (India) (Article 21.5)*, para. 7.22) (emphasis omitted).

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

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

[60] *The New Shorter Oxford English Dictionary*, at 253 (1993) (Exhibit USA-1).

[61] *The New Shorter Oxford English Dictionary*, at 2404 (1993) (Exhibit USA-1).

functions.[62] 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." These terms would have, through their ordinary meaning, more clearly conveyed the sense of exercising governmental authority. That they were not chosen sheds light on the different concept captured by the term that was chosen, "public body."

37. The ordinary meaning of the terms of a treaty must be understood "in their context."[63] 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.

38. 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. As the Appellate Body has recognized, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility.[64] Accordingly, the term "public body" should not be interpreted in a manner that would render it redundant with the word "government."

39. The term "government," as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[65] In *Canada – Dairy*, the Appellate Body explained that "[t]he 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."[66] The Appellate Body further explained that a "'government agency' is, in our view, 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."[67]

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

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

[64] *US – Offset Act (Byrd Amendment) (AB)*, para. 271; *see also US – Gasoline (AB)*, at p. 23.

[65] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing *Shorter Oxford English Dictionary*, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123).

[66] *Canada – Dairy (AB)*, para. 97.

[67] *Canada – Dairy (AB)*, para. 97.

40. 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."[68] 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.

41. That said, 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. After all, control over and authority to dispose of the public's economic resources is a core function of government in every WTO Member. 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. Ultimately, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government.

42. With regard to this attribution analysis, the United States agrees with the dissenting Appellate Body member in *US – Countervailing Duties (China) (Article 21.5 – China)* that this "examination involves an assessment of the relationship between the relevant entity and the government",[69] and that "[w]hen that relationship is sufficiently close, the entity in question may be found to be a public body and all of its conduct may be attributed to the relevant Member for purposes of Article 1.1(a)(1)."[70] The United States further agrees that "[t]he relationship between an entity and a government may take different forms, depending on the legal and economic environment prevailing in the relevant Member."[71]

43. Under Article 1.1(a)(1), any examination of whether an entity is a public body must be on a case-by-case basis, and thus whether the entity's conduct can be attributed to the relevant government, in light of all the evidence before it. As discussed above, 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. As noted above, requiring a finding that the entity in question has governmental authority or exercises governmental functions risks rendering synonymous the definitions of "government" and "public body", contrary to the principle of effectiveness.[72]

44. In sum, the Panel should assess whether the EU Commission appropriately found that the nickel ore mining companies at issue constituted public bodies under Article 1.1(a)(1) in light of

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[68] *Canada – Dairy (AB)*, para. 97.

[69] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (citing *US – Carbon Steel (India) (AB)*, para. 4.29; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317).

[70] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

[71] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

[72] *See US – Offset Act (Byrd Amendment) (AB)*, para. 271; *see also US – Gasoline (AB)*, at p. 23.

this case-by-case approach, and not impose a one-size-fits-all approach of assessing whether these entities had "governmental authority" or exercised "governmental functions". 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.

IV. CONCLUSION

45. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the SCM Agreement.