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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS616/R.

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 2 November 2023

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it. When the request is made prior to the due date for executive summaries, parties are encouraged to submit non-confidential summaries no later than 15 working days after the relevant due dates for submitting integrated executive summaries set forth in the timetable adopted by the Panel.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(5) Each party is encouraged to keep its submissions as brief as possible in the interest of efficient dispute resolution.

Preliminary rulings

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. the European Union shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Indonesia shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

   b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

   c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

   d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with all third parties.

   (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

   (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

   (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit in connection with the next submission thus would be numbered IDN-6. If a party withdraws an

exhibit or leaves one or more exhibits intentionally blank, it should indicate this on the cover page that provides the number of the blank exhibit.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

   a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

   b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it. As a general matter, the Panel intends to conduct such meetings in person but may provide for remote participation as the circumstances require.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

13. Each party shall provide to the Panel the list of members of its delegation no later than 5 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request by a party for interpretation from one WTO language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

   a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting with the parties shall be conducted in the same manner as the first substantive meeting with the parties, except that the European Union shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks in advance of this session.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

(3) Each third party shall provide, no later than three working days before the third-party session, a list of members of its delegation who will attend the session.

20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO language other than English, which is the language in which these panel proceedings are being conducted, and whether they would require interpretation from English to any other WTO language.

21. The third-party session shall be conducted as follows:

    a. All parties and third parties may be present during the entirety of this session.

    b. The Panel shall first hear the oral statements of the third parties. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

    c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least 10 days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

    d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

    e. The Panel may subsequently pose questions to any third party.

    f. Following the third-party session:

        i. Each third party shall submit the final written version of its oral statement, no later than 5 p.m. (Geneva time) on the first working day following the meeting.

        ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

23. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions and first and second oral statements, and may also include a summary of the party's first and second closing statements, responses to questions following the first and second substantive meetings, and comments on the other party's responses following the second substantive meeting. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to 30 pages.

25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this shall serve as the executive summary of that third party's arguments unless that third party indicates that it does not wish for the submission and/or oral statement to serve as its executive summary, in which case it shall submit a separate executive summary.

Interim review

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

28. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

29. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Report

30. The interim report, as well as the final report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

31. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

    a. Each party and third party shall submit all documents to the Panel by submitting them via the Disputes On-Line Registry Application (DORA) https://dora.wto.org by 5 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document into DORA shall constitute electronic service on the Panel, the other party, and the third parties. To the extent possible, all documents in PDF format, including exhibits, should be searchable and editable (i.e. not "image-only" or scanned).

    b. By 5 p.m. (Geneva time) the next working day following the electronic submission, each party and third party shall submit one paper copy of all documents it submits to the Panel, including the exhibits, with the DS Registry (office No. 2047). The DS Registrar shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page of the exhibit should indicate that the exhibit is only available in electronic format.

    c. The Panel shall provide the parties with the Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

d. If the parties or third parties have any questions or technical difficulties relating to DORA, they are invited to contact the DS Registry (DSRegistry@wto.org).

e. If any party or third party is unable to meet the 5 p.m. deadline because of technical difficulties in uploading these documents into DORA, the party or third party concerned shall inform the DS Registry (DSRegistry@wto.org) without delay and provide an electronic version of all documents to be submitted to the Panel by email including any exhibits. The email shall be addressed to DSRegistry@wto.org, the Panel Secretary, the other party and, if appropriate, the third parties. The documents sent by email shall be submitted no later than 5:30 p.m. on the due date established by the Panel. If the file size of specific exhibits makes transmission by email impossible, or it would require more than five email messages, owing to the number of exhibits to be filed, to transmit all of them by email, the specific large file size exhibits, or those that cannot be attached to the first five email messages, shall be filed with the DS Registry (office No. 2047) and provided to the other party and, if appropriate, the third parties by no later than 9:30 a.m. the next working day on an electronic medium acceptable to the recipient. In that case, the party or third party concerned shall send a notification to the DS Registrar, copying the Panel Secretary, the other party, and the third parties, as appropriate, via email, identifying the numbers of the exhibits that cannot be transmitted by email.

f. In case any party or third party is unable to access a document filed through DORA because of technical difficulties, it shall promptly, and in any case no later than 5 p.m. on the next working day after the due date for the filing of the document, inform the DS Registrar, the Panel Secretary, and the party or third party that filed the document, of the problem by email and shall, if possible, identify the relevant document(s). The DS Registrar will promptly try to identify a solution to the technical problem. In the meantime, the party or third party that filed the document(s) shall, promptly after being informed of the problem, provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry (DSRegistry@wto.org) and the Panel Secretary to allow access to the document(s) while the technical problem is being addressed. The DS Registrar may provide an electronic version of the relevant document(s) by email if the affected party or third party so requests. The DS Registrar shall in that case copy the party or third party that filed the document(s) on the email message.

g. Parties and third parties are responsible, through their DORA account administrators, for creating and updating their DORA accounts. The DS Registry is available to provide assistance with managing the DORA accounts.

Correction of clerical errors in submissions

32. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

Developments in circumstances

33. The Panel will conduct the proceedings and apply the present procedures in such a way as to mitigate any circumstances pertaining to the spread of COVID-19 or any other unforeseen circumstance. The Panel may provide further guidance in that regard as any such circumstances develop. If the Panel considers that the present Working Procedures cannot be applied effectively in light of such unforeseen circumstances, the Panel may modify these procedures after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Revised on 7 November 2023

1. For the purpose of this proceeding, business confidential information ("BCI") is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI, information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI includes information that was previously treated by the European Commission as confidential in the course of the anti-dumping and countervailing duty investigations at issue in this dispute.

2. Without prejudice to the provisions of paragraphs 3 and 4, no person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigations at issue in this dispute, or an officer or employee of an association of such enterprises.

3. Third parties' access to BCI shall be subject to the terms of these Additional Working Procedures. Where third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive a version of those submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the nature of the information at issue. The written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.

4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

5. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. When a party or third party includes BCI in a submission, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The specific information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. The cover and/or first page of the document shall also identify all those pages in the document that contain BCI. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit EU-1 (BCI)).

7. An alternative approach may be taken to that described in paragraph 6 for documents previously treated by the investigating authority of the party complained against as confidential or business proprietary information for purposes of the anti-dumping and countervailing duty investigations at issue in this dispute. For such documents, a party may mark on the cover of the document "This document was submitted to or created by the [name of investigating authority] and retains its original confidentiality markings". Where a party has so marked a document, information

marked as business proprietary information by the original confidentiality markings, or words to that effect (including headers and bracketing), shall be deemed to comply with the requirement set out in paragraph 6.

8. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

10. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6.

11. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

12. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

13. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. In the present dispute the Republic of Indonesia ("Indonesia") challenges the definitive countervailing and anti-dumping duties imposed by the European Union ("EU"), resulting from anti-subsidy and anti-dumping investigations into imports of Stainless Steel Cold-Rolled Flat Products ("SSCRFP") from *inter alia* Indonesia. Indonesia has demonstrated that the determinations made by the European Commission ("Commission"), leading to these duties, as well as the underlying investigations, are inconsistent with the EU's obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

2. The standard of review is derived from Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), as well as Article 17.6 of the Anti-Dumping Agreement.

II. CLAIMS IN CONNECTION WITH THE ALLEGED PROVISION OF PREFERENTIAL FINANCING AND OTHER SUPPORT BY CHINESE GRANTORS TO INDONESIAN SSCRFP PRODUCERS

A. VIOLATION OF ARTICLES 1.1(A)(1), 1.2, 2.1, 2.2 AND 2.4 OF THE SCM AGREEMENT IN CONNECTION WITH THE PROVISION OF PREFERENTIAL FINANCING AND OTHER SUPPORT BY CHINESE GRANTORS TO THE IRNC GROUP

1. THE EU'S ATTRIBUTION OF FINANCIAL CONTRIBUTIONS BY CHINESE GRANTORS TO THE GOID, AND THE EU'S DECISION TO CONSIDER THESE ATTRIBUTED FINANCIAL CONTRIBUTIONS AS SUBSIDIES CONTRAVENES ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

3. Indonesia submits that the EU contravened Article 1.1(a)(1) of the SCM Agreement by attributing financial contributions by Chinese grantors to the Government of Indonesia ("GOID"), and by considering these attributed financial contributions as subsidies within the meaning of that provision. An interpretation of the terms "*by a government*" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, based on which a financial contribution by the government of one World Trade Organization ("WTO") Member can be attributed to the government of another WTO Member, is legally incorrect.

a. ATTRIBUTING FINANCIAL CONTRIBUTIONS BY CHINESE GRANTORS TO THE GOID IS CONTRARY TO THE TEXT OF ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT, ITS CONTEXT, AND THE OBJECT AND PURPOSE OF THE SCM AGREEMENT

4. Indonesia interprets the term "*by a government*" pursuant to Article 31 of the Vienna Convention on the Law of Treaties, according to which the terms of a treaty must be given their ordinary meaning in their context and in the light of the treaty's object and purpose.

(i) The text of Article 1.1(a)(1) of the SCM Agreement

5. Indonesia submits that the terms of Article 1.1(a)(1) do not provide for the attribution of the actions of one WTO Member to the government of another WTO Member. Article 1.1(a)(1) SCM Agreement provides for a closed list of (categories of) entities whose actions can be attributed to the "*government*" of a WTO Member. Only actions of the following entities can be attributed to its "*government*": (1) actions of governments or public bodies (pursuant to Article 1.1(a)(1) of the SCM Agreement); (2) actions of private bodies entrusted or directed (pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement) by a government of one WTO Member; and (3) actions by funding mechanisms to which the government makes payments (pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement). It does not provide for any further attribution options. Indonesia considers

that the same reasoning and conclusion that applies for the list of government conduct that constitutes a financial contribution as set out in subparagraphs (i) to (iv) of Article 1.1(a)(1), which is a closed list,[1] also applies to the list of entities whose conduct can be attributed to a government. Similarly to the list of government conduct, not all cases of support may involve subsidization that is actionable under the SCM Agreement.[2]

6. In addition, Indonesia considers that the inclusion of the qualifier "*within the territory of a Member*" informs the meaning of both "*government*" and "*public body*" and should be given meaning in the interpretation of the *chapeau* of Article 1.1(a)(1) of the SCM Agreement. This inclusion confirms that the financial contribution must be granted by a government within the territory of the Member in which it is located for a subsidy to exist.

7. Moreover, Indonesia submits that there is no textual basis in Article 1.1(a)(1) or in Article 1.1(a)(2) of the SCM Agreement to support the EU's position that the reference to "*by a government*" in the *chapeau* of Article 1.1.(a)(1) means that the list of entities whose conduct can be attributed to a government of a WTO Member is open-ended. The use of "*a*" government can be explained by the fact that it is the first time that the term "*government*" has been used in the SCM Agreement. Indonesia notes that the *chapeau* of Article 1.1(a)(1) of the SCM Agreement also refers to "*a*" financial contribution. Yet, the list of government conduct in Article 1.1(a)(1) of the SCM Agreement is exhaustive.

8. Indonesia is concerned that the EU's interpretation of "*by a government*" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement could result in attributing conduct by a private body to a government without having to show entrustment or direction. The explicit inclusion of other "*circumvention scenarios*" into Article 1.1(a)(1)(iv) of the SCM Agreement and the historical exclusion of cross-border subsidies from the scope of US countervailing rules, even prior to the entry into force of the SCM Agreement[3] confirms that the drafters of the SCM Agreement did not foresee the possibility of attributing a financial contribution by one WTO Member to another WTO Member.

(ii) Relevant context

9. First, Article 2 of the SCM Agreement, which constitutes the most immediate context (because of the cross reference "*as defined in paragraph 1 of Article 1*"), mentions "*within the jurisdiction of the granting authority*". Indonesia submits that the interpretation of granting authority in Article 2 of the SCM Agreement as the authority that actually provides the subsidy, sets the conditions for eligibility and decides on the amount to be given constitutes relevant context for the interpretation of the chapeau of Article 1.1(a)(1) of the SCM Agreement as precluding attributing a financial contribution by the government of one WTO Member to the government of another WTO Member. In addition, paragraph 1 and footnote 63 to paragraph 2 of Annex IV to the SCM Agreement support Indonesia's interpretation of the *chapeau* of Article 1.1(a)(1) of the SCM Agreement.

10. Moreover, the procedural rights granted in Articles 13, 18.1, 19.1 and 22 and the obligation provided for in Article 25 of the SCM Agreement can only be exercised effectively, if the government of the exporting Member and that of the subsidizing Member are one and the same. Otherwise, the effective exercise of these rights and obligations would depend on the goodwill and cooperation of another WTO Member. Indonesia does not consider that an interpretation that makes these rights and obligations subject to the goodwill of another WTO Member constitutes an interpretation that gives "*meaning and effect to all the terms of the treaty*".[4]

(iii) Object and purpose of the SCM Agreement

11. Indonesia considers that the object and purpose of the SCM Agreement do not allow an interpretation of Article 1.1(a)(1) of the SCM Agreement that permits attributing actions of the government of one WTO Member to the government of another, exporting WTO Member and then

[1] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint) (DS353)*, para. 613. Indonesia notes that the EU agrees this is a closed list; *see*: EU response to the Panel question No 1(a), para. 1.

[2] Panel Report, *EC and certain member States – Large Civil Aircraft (DS316)*, para. 7.888.

[3] Horlick (2013) (Exhibit IDN-40).

[4] Appellate Body Report, *US – Gasoline (DS2)*, page 23, cited with approval in Appellate Body Report, *US – Carbon Steel (India) (DS436)*, para. 4.394; and Appellate Body Report, *Brazil – Aircraft (DS46)*, footnote 110.

imposing Countervailing Duties ("CVDs") on the exporting WTO Member. Such an expansive interpretation of Article 1.1(a)(1) of the SCM Agreement runs counter to the object and purpose of the treaty, which also is to impose more disciplines on the application of countervailing measures. Finally, the object and purpose of the SCM point to interpreting the provisions of the Agreement in a way that does not hinder economic development, as stated in the preamble to the Marrakesh Agreement Establishing the World Trade Organization, of which the SCM Agreement is an integral part. As foreign direct investment and value-addition contribute to economic development, the SCM should not be interpreted in a way that hinders those.

b. ARTICLE 11 OF THE ILC ARTICLES DOES NOT CONSTITUTE RELEVANT CONTEXT TO INTERPRET ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT AS ARTICLE 11 OF THE ILC ARTICLES DOES NOT CONSTITUTE A RELEVANT RULE OF INTERNATIONAL LAW APPLICABLE IN THE RELATIONS BETWEEN THE PARTIES, IN ACCORDANCE WITH ARTICLE 31.3(C) OF THE VIENNA CONVENTION

12. First, it is not settled whether specifically Article 11 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles") has attained the status of customary international law. In any case, Article 11 of the ILC Articles does not constitute a relevant rule of international law for the interpretation of the term "*government*" in Article 1.1(a)(1) of the SCM Agreement, as it is not concerned with and does not address the attribution of actions of a sovereign State to another concurrently existing sovereign State. The only State practice and *opinio juris* under Article 11 of the ILC Articles relates to instances of State succession or the subsequent adoption by a State of a private wrongful act which is still ongoing or has been conducted. Article 11 of the ILC Articles clearly limits the application of Article 11 to situations of conduct which is not attributable to a State under Articles 4, 5 or 8 of the ILC Articles. When conduct can already be attributed to a State at the time of commission pursuant to another Article of the ILC Articles, as is attributed in the present case to the Government of China ("GOC"), Article 11 of the ILC Articles cannot apply. The same conduct therefore cannot be further attributed to the GOID.

13. Overall, Indonesia notes that the EU in its written submissions and in the responses to the Panel's questions distances itself from the reliance on Article 11 of the ILC Articles. Indonesia recalls that the Panel's review should be restricted to what the EU argued in its Countervailing Duty Determination and should not include *ex post* explanations or rationalizations.[5] Indonesia also considers that the *chapeau* of Article 1.1(a)(1) of the SCM Agreement constitutes *lex specialis* in accordance with Article 55 of the ILC as to which acts can be attributed to a government or State as far as a financial contribution under the SCM Agreement is concerned.

14. In any case, Article 11 of the ILC Articles does not allow the Commission to disregard the clear and unambiguous term "*government*" in Article 1.1(a)(1) of the SCM Agreement to extend its meaning to new attribution scenarios not expressly provided for.

c. THE COMMISSION FAILED TO ESTABLISH THAT THE STANDARD FOR ATTRIBUTION WAS MET

15. The conditions of acknowledgment and adoption of Article 11 of the ILC Articles are cumulative, as indicated by the word "and". What is required is something more than a general acknowledgment of a factual situation, but rather that the State identifies the conduct in question and makes it its own.[6] This adoption must be specific, clear and unequivocal. Indonesia fails to see how something being public knowledge or someone being aware of something can amount to clear and unequivocal evidence that the GOID acknowledged and adopted as its own any financial contributions that may (or may not) have resulted from being part of the Belt and Road Initiative ("BRI"). In addition, the Commission did not carry out an *in concreto* examination for each financial contribution individually.[7] Finally, in its written submissions and in the responses to the Panel's questions, the EU moved away from its original "acknowledgment and adoption" standard. It is not clear which attribution standard the EU now considers to apply. The EU only puts forward an evidentiary threshold – a demonstrable link or a clean and explicit link – but it ignores the distinction

[5] *See also*: Appellate Body Report, *Japan – DRAMs (Korea) (DS336)*, para. 159.
[6] Crawford (2002) (IDN-42), page 123.
[7] *See*: Countervailing Duty Determination (Exhibit IDN-1), recital (680).

between attribution standards (what needs to be shown) and evidentiary standards (how does it need to be shown).

2. THE EU HAS VIOLATED ARTICLES 2.1 AND 2.2 OF THE SCM AGREEMENT BY CONCLUDING THAT THE GOID – AND NOT THE CHINESE GRANTORS – WAS THE GRANTING AUTHORITY AND, AS A RESULT, HAS ALSO VIOLATED THESE PROVISIONS BY DETERMINING THAT THE ALLEGED SUBSIDIES PROVIDED BY THE CHINESE GRANTING AUTHORITIES TO RECIPIENTS NOT WITHIN THE JURISDICTION OF THE CHINESE GRANTING AUTHORITIES WERE SPECIFIC

16. Indonesia challenged the Commission's determination that the GOID was the granting authority. Indonesia submits that, based on the wording of Article 2.1 and footnote 3 to Article 2.1(c) of the SCM Agreement, the "*granting authority*" is not the government to whom the subsidy is attributed, but rather the body/authority that issues the subsidy and administers it; sets the conditions for eligibility; and decides on the amounts to be given.[8] In addition, an essential part of the specificity analysis requires the proper identification of the jurisdiction of the granting authority.

17. First, Indonesia submits that the Commission mischaracterized the GOID as the granting authority and shows that the alleged subsidies are provided by Chinese grantors. The GOID was not involved at all in the administration or disbursement of the financial contributions, as this was done by Chinese entities, and the legislation that the Commission considered relevant is exclusively Chinese legislation. Second, as the (PT) Indonesia Ruipu Nickel and Chrome Alloy Group ("IRNC Group") is located in Indonesia, it is clearly not "*within the jurisdiction*" of the Chinese grantors, in the meaning of Article 2 of the SCM Agreement. The jurisdiction of the Chinese grantors is limited to the territory of China.

3. THE EU'S DECISION TO COUNTERVAIL ALLEGED SUBSIDIES PROVIDED BY CHINESE GRANTORS WITHOUT DEMONSTRATING SPECIFICITY IN ACCORDANCE WITH ARTICLES 1.2, 2.1, AND 2.2 OF THE SCM AGREEMENT ON THE BASIS OF POSITIVE EVIDENCE AS REQUIRED BY ARTICLE 2.4 OF THE SCM AGREEMENT RUNS COUNTER TO THESE PROVISIONS

18. First, the Commission did not substantiate its claims on regional specificity based on evidence which is of "*affirmative, objective and verifiable character, and […] credible*" to support its determination.[9] Second, the Commission failed to assess each alleged subsidy separately; instead, it grouped together in its specificity analysis different alleged subsidy schemes. Third, it failed to examine whether there are other potential recipients of a particular subsidy outside of the Morowali Park and, as a result, erred in concluding that the alleged subsidies were regionally specific. Indonesia showed that each of the schemes subject to this dispute are also provided to companies located outside of the Morowali Park.

B. VIOLATION OF ARTICLES 1.1(B), 10, 14, AND 32.1 OF THE SCM AGREEMENT IN CONNECTION WITH THE DETERMINATION OF THE EXISTENCE OF A BENEFIT – AND THE CALCULATION OF THE BENEFIT – FOR IN KIND CAPITAL CONTRIBUTIONS AND THE SHAREHOLDER LOANS

1. VIOLATION OF ARTICLES 1.1(B), 10 AND 32.1 OF THE SCM AGREEMENT BY FAILING TO PROPERLY ESTABLISH THE EXISTENCE OF A BENEFIT TO THE IRNC GROUP

19. Indonesia submits that the Commission did not provide sufficient evidence or explanation to establish that a benefit from contributions from the GOC received by the Chinese shareholders – and how much – was conferred to the IRNC Group in Indonesia. Indonesia does not agree with the EU's position that when two parties are related, there is no need at all to carry out a pass-through analysis and that it can simply be assumed that the (full) benefit has been passed through. An investigating authority cannot simply assume that a benefit received by shareholders of a company automatically translates into a benefit for the company owned by these shareholders. Some analysis is required as to whether (1) a benefit has passed through; and (2), if so, what amount of benefit did.

20. The investigating authority, however, did not show that the benefit has been passed through in the present case. Consequently, the Commission failed to establish the existence of a benefit

[8] Indonesia, Second Written Submission ("SWS"), paras. 220-227.
[9] Appellate Body Report, *US – Hot-Rolled Steel (DS184)*, para. 192.

pursuant to Article 1.1(b) of the SCM Agreement. In addition, this also resulted in a violation of footnote 36 to Article 10 of the SCM Agreement (since the EU imposed CVDs without showing a subsidy was bestowed indirectly on IRNC) and a violation of Article 32.1 of the SCM Agreement (which provides that no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement).

2. VIOLATION OF ARTICLE 14 OF THE SCM AGREEMENT

a. A VIOLATION OF ARTICLES 14(A) AND 14(B) OF THE SCM AGREEMENT BY INCORRECTLY RECLASSIFYING THE SHAREHOLDER LOANS INTO GRANTS

21. Indonesia submits that the Commission first reclassified shareholder loans to a capital contribution and then, in a second step, from a capital contribution into a grant. By taking this approach, the Commission avoided the application of the mandatory guidelines set out in Articles 14(a) (for capital contributions) and 14(b) (for loans) of the SCM Agreement. While an investigating authority can select any method that is in accordance with this article of the SCM, calculating benefit consistently with those methods is mandatory. The Commission was required to calculate the benefit on the basis of the difference between the amount for the loans received by the IRNC Group and the amount for a comparable loan the IRNC Group could obtain on the market. The Commission did not do so, thereby violating Article 14(b) of the SCM Agreement. In addition, although the Commission did not claim that no private investor would have invested in the IRNC Group, it calculated benefit based on a benchmark in a way that violated Article 14(a) of the SCM Agreement.

b. VIOLATION OF ARTICLE 14(D) OF THE SCM AGREEMENT IN CONNECTION WITH THE PROVISION OF EQUIPMENT AS CAPITAL IN KIND

22. First, Indonesia submits that the Commission did not establish that prices in the country of provision or purchase were distorted before resorting to an out-of-country benchmark. The Commission did not use prices of the country of provision or purchase, regardless of whether that country is Indonesia or China.

23. Second, the Commission did not adjust the out-of-country benchmark to reflect the prevailing market conditions in the country of provision or purchase. Third, the "*sample representative sets of equipment*" used as benchmark to establish the benefit did not allow to reflect the prevailing market conditions in the country of origin. The sample used was extremely small, as it related to only one (1) cold-rolling line excluding annealing that represented less than 10% of the total equipment investment of IRNC individually and only 1.7% of the total equipment investment of IRNC Group. Indonesia does not consider that such a small and unrepresentative sample allows to reflect the prevailing market conditions in the country of provision, and thus cannot be used for the calculation of the benefit that the IRNC Group, as a whole, might have obtained.

24. Finally, Indonesia urges the Panel to restrict its analysis to whether the measures at issue and the underlying reasoning therefore – in this specific case the Countervailing Duty Determination and the related investigation documents – complies with the provisions of the SCM Agreement and not the alternative explanations provided during the course of the present Panel proceeding.

III. CLAIMS IN CONNECTION WITH THE ALLEGED PROVISION OF NICKEL ORE

25. Indonesia challenged the Commission's findings that the GOID provided nickel ore to the stainless steel industry for less than adequate remuneration and that such subsidy was specific.

A. THE COMMISSION'S DETERMINATION THAT NICKEL ORE MINING COMPANIES CONSTITUTED PUBLIC BODIES IS INCONSISTENT WITH ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

26. Indonesia and the EU agreed that a "*public body*" is an entity that possesses, exercises, and is vested with governmental authority.[10] However, Indonesia disagreed that the Commission met this standard in the underlying investigation.

[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, para. 310.

27. In its determination, the Commission determined that all nickel ore mining companies in Indonesia are "*public bodies*" based on a holistic analysis of two main elements:[11]

i) an examination of "*ownership and formal indicia of control*" of nickel ore mining companies, which led the Commission to find that the Indonesian mining companies "*representing the substantial production of nickel ore*" are State-owned and State-controlled;[12] and

ii) an analysis of the regulatory framework in Indonesia, based on which the Commission concluded that nickel ore mining companies perform governmental functions and possess governmental authority.[13]

28. In addition, the Commission found that three mining companies were "*formally recognized as National Vital Object[s]*".[14]

29. Throughout the Panel proceedings, Indonesia demonstrated that the Commission's evaluation of each of these elements is significantly flawed. During these Panel proceedings, the EU has tried to distance itself from the ownership and control analysis, and attempted to downplay the role this element played in its determination. However, the Countervailing Duty Determination makes clear that the Commission based its findings on these elements *together*, such that if one of them is flawed, the entire determination fails.

30. **First**, the Commission's analysis of "*ownership and formal indicia of control*" is manifestly wrong. The Commission concluded that Indonesian mining companies "*representing the substantial production of nickel ore*" are State-owned and State-controlled.[15] This conclusion was based on data from only **six** companies that, according to the Commission's analysis, represented "*more than 27%*" of nickel ore production in Indonesia.[16] This means that more than 290 nickel ore mining companies were all found to be "*public bodies*", based on data of less than 2% of them. Moreover, the Commission made material factual errors in its assessment and treated companies as "*State-owned*" based on incorrect information. Thus, this 27% figure was manifestly erroneous, as it included data from companies that (i) were not even partially State-owned and (ii) the companies in which the State's ownership was as little as 10%.

31. Similarly, as confirmed by the EU during the Panel proceedings, the Commission made factual errors in its management and control inquiry and, importantly, failed to prove that the personnel of the investigated nickel ore companies made any decisions under the direction of the GOID.

32. The errors in the Commission's factual findings are material. Yet, the Commission's analysis on "*ownership and formal indicia of control*" was one of the cornerstones of the Commission's "*public body*" determination.

33. **Second**, the Commission's analysis of the regulatory framework does not show that nickel ore mining companies perform governmental functions or possess governmental authority.[17] It simply provided a general overview of a broad legal framework relating to several groups of mining commodities (including radioactive minerals, metal minerals, such as nickel, nonmetal minerals, rocks, and coal).

34. In these proceedings, the EU argued that nickel ore mining companies are vested with governmental authority due to the sole fact that they comply with the domestic legislation regulating the mining sector in Indonesia. However, the regulatory measures relied on by the Commission in the Countervailing Duty Determination do not grant the nickel ore mining companies any

[11] Countervailing Duty Determination (Exhibit IDN-1), recitals (377)-(393).
[12] Countervailing Duty Determination (Exhibit IDN-1), recitals (393) and (443).
[13] *See e.g.:* Countervailing Duty Determination (Exhibit IDN-1), recitals (413), (443) and (444). *See also:* Countervailing Duty Determination (Exhibit IDN-1), recitals (373), (394), (395), and (400).
[14] Countervailing Duty Determination (Exhibit IDN-1), recital (439).
[15] Countervailing Duty Determination (Exhibit IDN-1), recital (393).
[16] Countervailing Duty Determination (Exhibit IDN-1), recital (389).
[17] *See e.g.:* Countervailing Duty Determination (Exhibit IDN-1), recitals (413), (443) and (444). *See also:* Countervailing Duty Determination (Exhibit IDN-1), recitals (373), (394), (395), and (400).

governmental authority and do not show that they perform governmental functions. It is the GOID that performs governmental functions since it regulates mining activities in Indonesia.

35. In other words, compliance with the domestic regulation applicable in the mining sector is not sufficient to show that nickel ore mining companies "*possess, exercise, or are vested with the governmental authority*".[18] Rather, whether an entity is a public body must be based on the characteristics of the companies, such as their organizational features, chains of decision-making within the company, and the overall relationship with the government.[19] However, in the Countervailing Duty Determination, the Commission did not establish that there is a "*sufficient degree of commonality or overlap in the[] essential characteristics*" of nickel ore mining companies and the "*government*". In its determination, the Commission even failed to clarify which specific governmental functions are performed by the nickel ore mining companies, much less to explain a "*commonality*" or an "*overlap*" between the nickel ore mining companies and a government in a narrow sense.

36. Moreover, the EU's approach, which suggests that purely private companies can be considered to be public bodies merely because they follow governmental regulations, severely risks blurring the distinction between "*public bodies*" and government-entrusted or directed private bodies. Indonesia maintained that such an approach is unacceptable, as it reads out Article 1.1(a)(1)(iv) of the SCM Agreement.

37. **Third**, as has become evident during these Panel proceedings, the Commission's analysis of the regulatory framework is fundamentally flawed.

38. Notably, the Commission wrongly assumed that the GOID dictated the prices of nickel ore through the Metal minerals benchmark price ("HPM") mechanism. It failed to properly establish the facts and made unreasonable and unjustifiable inferences from the facts. Therefore, in fact, the Commission's conclusion that via the HPM mechanism, "*the GOID exercised meaningful control over the mining companies' ability to otherwise set prices at a different level on the basis of normal market supply and demand*"[20] is erroneous and, as such, does not support the Commission's ultimate conclusion.

39. It has also become evident that the Commission wrongly assessed the facts relating to the domestic processing obligation (DPO). While the regulation required nickel ore producers to minimally purify nickel ore in Indonesia before it could be exported, this obligation does not support the conclusion that those companies are "*vested with government authority and perform government-mandated activities as a result*".[21]

40. **Finally**, as established by Indonesia during these proceedings, the Commission's analysis of "*national vital objects*" is fundamentally flawed. It fails to demonstrate that mining companies possess, exercise, or are vested with governmental authority.

41. **In sum**, neither of the elements of the Commission's determination withstand the scrutiny. As a consequence, the entire "*public body*" finding is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

B. THE COMMISSION'S DETERMINATION THAT NICKEL ORE MINING COMPANIES WERE ENTRUSTED OR DIRECTED BY THE GOID TO PROVIDE NICKEL ORE TO THE STAINLESS STEEL INDUSTRY IS INCONSISTENT WITH ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

42. The Commission determined that in the alternative, private mining companies in Indonesia were entrusted or directed to provide nickel ore to the stainless steel industry. Indonesia challenged this finding. Indonesia also requested the Panel to exercise its discretion and address the entrustment or direction determination, even if it finds the public body determination to be WTO-consistent. Indonesia considers that the Panel's findings on the consistency of both the public body and the entrustment/direction findings will facilitate the sufficient resolution of the dispute.

[18] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, para. 310.
[19] Appellate Body Report, *US – Countervailing Measures (Article 21.5 – China) (DS437)*, para. 5.104.
[20] Countervailing Duty Determination (Exhibit IDN-1), recital (437).
[21] Countervailing Duty Determination (Exhibit IDN-1), recital (404).

43. Indonesia challenged the EU's entrustment or direction determination on various grounds. The EU and Indonesia agreed that the existence of a "*financial contribution*" by a government must be "*proven by reference to the action of the government*"[22] rather than the reactions by the private bodies to the governmental acts or consequences of those acts,[23] but disagreed on whether this standard had been met.

44. **First**, it remains unclear from the Countervailing Duty Determination and the EU's submissions whether the Commission concluded that the GOID entrusted or directed mining companies to provide nickel ore to smelters or to the stainless steel industry. The Commission appears to conflate the two – and the EU confirms as much. Moreover, the EU argued in these proceedings that if the mining companies were entrusted or directed to provide nickel ore to smelters, this would, in essence, show that those companies were entrusted or directed to provide nickel ore to the stainless steel industry since some smelters are integrated with stainless steel producers. However, (i) these are different industries, and (ii) such a theory would focus on the *consequences / results* of the government regulations and not the nature of those regulations.

45. **Second**, the Commission determined that the GOID entrusted or directed the mining companies to provide nickel ore to the stainless steel industry through three legislative instruments: a domestic processing obligation (DPO) – which required nickel ore to be minimally purified before it could be exported,[24] export restrictions of unpurified nickel ore,[25] and the HPM – a pricing mechanism.[26] However, the Commission's assessment of those legislations is flawed – as the Commission overlooked important information on the functioning of those laws and drew unjustified inferences from them. Through the three legislative instruments, the GOID did not "*give responsibility*" to or "*exercise authority*" over the mining companies to carry out the function of providing goods to the stainless steel industry. The only "*responsibility*" the mining companies were given was to increase the added value of nickel ore through the DPO before exporting and, starting from 13 May 2020 – *i.e.*, the end of the investigation period ("IP") – to take into account the *minimum* price in their transactions. Indeed, as follows from the evidence provided by the EU in its responses to the second set of questions, until 13 May 2020, the nickel ore prices in Indonesia were determined by market factors and not the HPM.

46. **Third**, Indonesia maintained that if the GOID had entrusted or directed nickel mining companies to provide nickel ore to the stainless steel industry, those mining companies would have been constrained by the Indonesian regulation in such a way that they would have to provide nickel ore to the stainless steel industry. However, this is not the case. The companies extracting nickel ore are not constrained in their activities to provide nickel ore to the stainless steel industry. Nickel ore mining companies had many business choices other than providing nickel ore to the stainless steel industry. Therefore, any provision of nickel ore to the stainless steel industry would be a reaction of the mining companies, which does not establish entrustment or direction by the government.

47. **In sum**, none of the regulations, whether taken individually or together, show that the mining companies were either given the responsibility to provide nickel ore to the stainless steel producers or that the GOID exercised its authority over the mining companies to provide nickel ore to the stainless steel producers. The facts on the record point to a regulatory framework "*in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market*".[27]

[22] Panel Report, *US – Export Restraints (DS194),* para. 8.34. (emphasis original)

[23] Panel Report, *US – Countervailing Measures (China) (DS437),* para. 7.400 and Panel Report, *Korea – Commercial Vessels (DS273)*, para. 7.370.

[24] Countervailing Duty Determination (Exhibit IDN-1), recital (404).

[25] Countervailing Duty Determination (Exhibit IDN-1), recitals (405)-(413).

[26] Countervailing Duty Determination (Exhibit IDN-1), recital (461).

[27] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs (DS296)*, para. 114 (referring to Panel Report, *US – Export Restraints (DS194)*, para. 8.31).

C. THE COMMISSION'S DETERMINATION THAT GOID'S ALLEGED PROVISION OF GOODS CONFERRED A BENEFIT TO THE STAINLESS STEEL INDUSTRY IS INCONSISTENT WITH ARTICLES 1.1(B), 10, 14(D), 19.4 AND 32.1 OF THE SCM AGREEMENT AND THE GATT 1994

48. Indonesia challenged two aspects of the Commission's benefit determination: the Commission (i) used a flawed benchmark, and (ii) failed to establish the extent to which the alleged subsidies passed through to stainless steel producers that were unrelated to producers of intermediate input products.

49. **First**, the Commission used an external benchmark that did not reflect the prevailing market conditions for the provision of nickel ore in Indonesia and also failed to adjust it to take into account the effect of Indonesia's measures on the benchmark prices. Specifically, Indonesia challenged the Commission's benchmark because there was record evidence that there were inherent differences between the Indonesian nickel ore industry and the corresponding Philippine industry, which the Commission ought to have taken into account. For example, Indonesia is significantly more endowed with nickel ore than the Philippines, which gives it a competitive advantage over the Philippines in the mining of nickel ore. For Indonesia, the evidence showed that the two countries differed with regard to the "*availability*" of nickel ore, a factor that the Commission should have (but did not) interrogated.

50. **Second**, while the Commission noted that the Philippine prices reflected the effect of the GOID's regulatory measures (including the export restrictions), the Commission also did not adjust those prices to arrive at an undistorted benchmark price. By using distorted prices, the Commission failed to "*ascertain as accurately as possible the amount of subsidization bestowed on the investigated products*".[28]

51. In these Panel proceedings, Indonesia also emphasized the role of the Commission, as an investigating authority, to actively seek out pertinent information that would assist it in properly evaluating facts.[29] An investigating authority cannot remain a passive player, but rather must ensure that the benchmark that it selects is appropriate for the purpose of establishing the extent of the subsidy. Moreover, the obligation to ensure that the selected out-of-country benchmark reflects the prevailing market conditions in the country of provision through adequate adjustments lies squarely on the investigating authority, not on the respondents. Therefore, the Commission's actions are to be assessed in this context.

52. **Finally**, Indonesia challenged the Commission's failure to properly determine the duty rate applicable to the non-sampled cooperating exporter. The Commission knew that this exporter was not vertically integrated and, therefore, did not benefit from purchases of allegedly subsidized nickel ore. Since utilised nickel ore was purchased in arm's length transactions or imported intermediate products, it could not be presumed that its stainless steel benefited from the alleged subsidy given to the Indonesian upstream producers. Moreover, the Commission had on its record information that the IRNC was the only vertically integrated stainless steel producer. Therefore, an objective investigating authority would have established whether other producers of stainless steel benefitted from the alleged subsidy.

D. THE COMMISSION'S FINDING THAT THE ALLEGED SUBSIDY WAS SPECIFIC TO THE STAINLESS STEEL INDUSTRY IS INCONSISTENT WITH ARTICLES 1.2, 2.1 AND 2.4 OF THE SCM AGREEMENT

53. Indonesia challenged the Commission's finding that the alleged subsidy was *de jure* specific. In its determination, the Commission did not establish that there was an "*explicit*", *i.e.*, unambiguous, limitation of access. It did not point to any specific legislation or regulation through which access to the alleged subsidies was expressly limited to the stainless steel industry. The EU referred to findings of the previous panels and Appellate Body that, where the inherent characteristics of a good that is provided by the government at LTAR make it utile only to certain enterprises, "*it is all the more likely*" that such provision is specifically provided to certain enterprises only.[30] However, Indonesia considered that those findings were not relevant in this case. Such an assessment would only be relevant in a *de facto* specificity analysis, not a *de jure* one. Indonesia

[28] Appellate Body Report, *US – Washing Machines (DS464)*, para. 5.268.
[29] Appellate Body Report, *EU – PET (Pakistan) (DS486)*, para. 5.133.
[30] Panel Reports, *US – Softwood Lumber IV (DS257)*, para. 7.116; *US – Carbon Steel India (DS436)*, paras. 7.131-7.132; and Appellate Body Report, *US – Carbon Steel India (DS436)*, para. 4.398.

also maintained that, for a *de jure* analysis, it is insufficient to show that entities active in the nickel value chain benefitted from the alleged subsidy. In a *de jure* analysis, the limitation of access must be by the granting authority, or the legislation pursuant to which the granting authority operates.

IV. CLAIMS IN CONNECTION WITH GOVERNMENTAL REVENUE THAT IS OTHERWISE DUE, WHICH IS ALLEGEDLY FOREGONE OR NOT COLLECTED

A. THE COMMISSION ERRONEOUSLY DETERMINED THAT INDONESIA'S INCOME TAX HOLIDAY AND INCOME TAX ALLOWANCE FACILITY WERE SPECIFIC WITHIN THE MEANING OF ARTICLES 1.2, 2.1, AND 2.4 OF THE SCM AGREEMENT

54. The Commission erroneously determined that the income tax holiday granted to IRNC was specific to certain companies active in certain sectors that are qualified as "*pioneer industries*".[31] In its assessment, the Commission failed to consider that any industry in Indonesia could apply to receive the income tax holiday, even if they were not explicitly listed among the "*pioneer industries*". The criteria for eligibility to the subsidy were the same, both for industries listed as "*pioneer industries*", and all other industries which wished to benefit from the subsidy. The criteria were also objective and neutral. Therefore, this tax benefit is available very broadly across the Indonesian economy, and as such, could not be specific.

55. The Commission also erroneously determined that the income tax allowance facility granted to PT. Sulawesi Mining Investment ("SMI") (a company related to IRNC) was specific to certain companies depending on their business activities.[32] The granting legislation makes the tax facility so broadly available across the Indonesian economy that it cannot properly be regarded as being "*sufficiently limited*", and therefore specific, under Article 2.1(a) of the SCM Agreement.

B. THE COMMISSION'S DETERMINATION THAT THE IMPORT DUTY EXEMPTION ON RAW MATERIALS CONSTITUTED A COUNTERVAILABLE SUBSIDY IS INCONSISTENT WITH FOOTNOTE 1 TO THE SCM AGREEMENT AS WELL AS ARTICLES 1.1(A)(1)(II), 1.1(B), 1.2, 2.1(A), 2.2, 2.3, 2.4, 3.1(A) AND 14 OF THE SCM AGREEMENT. CONSEQUENTLY, THE COMMISSION ALSO VIOLATED ITS OBLIGATIONS UNDER ARTICLES 10 AND 32.1 OF THE SCM AGREEMENT, AND ARTICLES VI:3 AND VI:4 OF GATT 1994

1. THE COMMISSION'S DISMISSAL OF THE VALID IMPORT DUTY EXEMPTION SCHEME IN INDONESIA IS INCORRECT AND LEADS TO A VIOLATION OF FOOTNOTE 1 TO THE SCM AGREEMENT AS WELL AS ARTICLES 1.1(A)(1)(II), 1.1(B), 3.1(A), AND 14 OF THE SCM AGREEMENT, AND ARTICLES VI:3 AND VI:4 OF THE GATT 1994

56. The Commission erroneously determined that the import duty exemptions granted by the GOID under the bonded zones scheme for imported raw materials used in the production of final products destined for export constituted a countervailable subsidy. By virtue of Footnote 1 to the SCM Agreement, exemption of an exported product from duties borne by like products when destined for domestic consumption shall not be deemed to be a subsidy. By establishing the existence of a financial contribution based on duty exemptions that are covered under Footnote 1, the Commission violated Article 1.1(a)(1)(ii) of the SCM Agreement.

57. Indonesia submits that there was a properly functioning exemption scheme at play and that the Commission's determination is based on an incorrect factual and legal basis. More specifically, the Commission determined that the GOID lacked a proper system to check the correctness of the content of imported raw materials in the value of the products sold domestically, and that it had no guidelines for calculating the customs duties due.

58. **First**, Indonesia showed that the GOID had a proper system to check the correctness of the content of imported raw materials in the value of the products sold on the Indonesian market.[33] This system entailed, *inter alia*, the use of information technology to manage the movement of goods; the use of CCTV for inspection, submission of documents regarding activities of Bonded Zones for audits, physical inventory, and a bookkeeping requirement. Indonesia also showed that, in practice, the GOID *does* undertake such checks, and imposes measures where such checks reveal flaws in

[31] Countervailing Duty Determination (Exhibit IDN-1), recital (876).
[32] Countervailing Duty Determination (Exhibit IDN-1), recital (885).
[33] *See*: Indonesia, First Written Submission ("FWS"), paras. 802-803.

the calculations, as proven by specific verification exhibits. Indonesia submits that the Commission made a conclusory statement on this issue, but an objective investigating authority would have weighed the evidence before it and based its determination on the entirety of the record evidence. Indonesia provided concrete examples of evidence that customs authorities indeed conducted checks on companies and imposed enforcement measures in cases of non-compliance, which the Commission disregarded or ignored, drawing inexplicable conclusions.[34]

59. **Second**, Indonesia established that there were guidelines for calculating the customs duties due and checking the percentages of each raw material used in the manufacturing process and that the Commission's determination to the contrary has no factual basis.[35] The EU's assertion that the GOID stated that there were no guidelines was neither supported by the evidence, nor discussed during the investigation. There is no question of any "discretion" on the part of the GOID.

60. In addition, the Commission also acted inconsistently with Article 3.1(a) of the SCM Agreement, essentially treating the exemption scheme as a prohibited export subsidy. Further, in the absence of a financial contribution there could not have been a benefit, and in so establishing a benefit the Commission also violated Articles 1.1(b) and 14.

2. The Commission's decision to countervail the entire amount of exempted duties is inconsistent with Footnote 1 to the SCM Agreement, as well as Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), and 14 of the SCM Agreement, and Articles VI:3 and VI:4 of the GATT 1994

61. Indonesia submits that the Commission erred by treating as a financial contribution the entire amount of duties for which IRNC was exempted, not only those "*in excess*" of any duties that may have accrued. The Commission should have determined whether an *excess* exemption occurred through the Indonesian import duty exemption scheme. Instead, the Commission offered no reasoned or adequate explanation as to why the *entire* amount of unpaid duties was considered a subsidy. All exports of SSCRFP, a product that was *exported* in a ratio of over 95%, and entirely manufactured from duty-free inputs, due to their production in a bonded zone, are now made to pay a CVD *as if* 100% of these exports were destined to the *domestic* Indonesian tariff area. With the evidence at the disposal of the EU, it would have been possible to assess the excess remission on inputs, if any, given the percentage of products exported. The Commission provided no legal basis for departing from the "*Excess Remissions Principle*".

62. In addition, in accordance with Annex II(II)(2) of the SCM Agreement, where there is a need to conduct a further examination, the *legal* responsibility of informing the exporting Member lies with the investigating authority.[36] Moreover, the EU's allegation that there is an absence of monitoring and control and that the GOID had no control over import duty exemptions is unsupported by the record and its argument about the usage conversions is lacking from the underlying investigation. Articles 29(1), (2), and (3) of MOF Regulation No. 131/2018 set out clear rules for the calculation of duties on goods manufactured from the bonded zones that can be exempted. The government performs periodic testing to ensure any conversion rates used by each company for each product are accurate (transparent), can be measured, and are consistent. If the government cannot verify the conversion rate, the subject entity will not be exempted from the duties.[37]

63. Consequently, the Commission acted inconsistently with Footnote 1 and Article 1.1(a)(1)(ii) of the SCM Agreement. Moreover, the EU calculated the alleged benefit as the difference between the import duties collected and *all* the other import duties on inputs not collected. Hence, the Commission's benefit valuation is inflated and inconsistent with Articles 1.1(b) and 14 of the SCM Agreement. The Commission also violated Article VI:4 of the GATT 1994. Finally, the countervailing duty being levied in excess of the subsidy amount also violates Article VI:3 of the GATT 1994.

[34] *See*: Indonesia, SWS, paras. 549-555.
[35] *See*: Indonesia, FWS, paras. 804-805.
[36] Indonesia, SWS, paras. 572-574; Appellate Body Report, *EU – PET (Pakistan) (DS486)*, para. 5.122.
[37] Indonesia, Response to Panel question No. 299.b.

3. THE COMMISSION'S DETERMINATION OF SPECIFICITY WITH RESPECT TO THE INDONESIAN IMPORT DUTY EXEMPTION SCHEME VIOLATES ARTICLES 1.2, 2.1, 2.2, 2.3, AND 2.4 OF THE SCM AGREEMENT

64. Indonesia challenged the Commission's findings that the import duty exemption scheme was specific because it is available only to certain companies depending on their export performance and location in specific geographic areas within the jurisdiction of the granting authority.

65. **First**, Indonesia maintained that the import duty exemption scheme was not an export subsidy. As such, it is not specific within the meaning of Article 2.3 of the SCM Agreement.

66. **Second**, Indonesia submitted that the scheme is also not geographically specific. There are no *designated geographical regions* that determine eligibility for the duty exemption – and the Commission did not establish that they were. There were no pre-defined areas identified as "bonded zones". Companies across Indonesia with valid industrial business licenses and facilities that allow supervision can apply to become a "*bonded zone*".[38] Thus, the location of enterprises is not the determining eligibility factor for the scheme at issue. Indonesia also clarified that bonded zones are not "*designated geographical regions*" within the meaning of Article 2.2; but rather are facilities used to store imported goods before they are processed or assembled.[39]

67. Indonesia also maintained that the fact that bonded zones were required to be set up in industrial or cultivation zones did not render them geographically specific. Indonesia is free to preserve portions of its territories from industrial exploitation through measures such as zoning regulations[40], but those administrative choices do not inform whether a subsidy is geographically specific. Moreover, Indonesia argued that the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint) (DS353)* – that "*whether an enterprise not located in a specific subsidised area may become part of that area in the future does not change the fact that only enterprises located in such area are eligible to receive the subsidy*"[41] – were not relevant in this case. In DS353, the granting authority could expand or reduce the size of the geographical areas to which eligibility was limited. On the contrary, in this case, the government does not expand or reduce the geographical areas to which eligibility was limited. Rather, enterprises that wanted to benefit from the scheme could, themselves, establish bonded zones.

V. CLAIMS IN CONNECTION WITH ACTIONS AND OMISSIONS DURING THE COURSE OF – OR IN RELATION TO – THE SSCRFP CVD INVESTIGATION

A. THE COMMISSION'S DECISION TO REQUIRE THE GOID TO CONDUCT A PART OF THE SSCRFP CVD INVESTIGATION ON BEHALF OF THE COMMISSION IS INCONSISTENT WITH ARTICLES 10 AND 12 OF THE SCM AGREEMENT

68. Indonesia recalls that the authority's obligations that are relevant in the present case are: (1) to notify the interested parties/Members of the information required from them; and (2) to seek out and collect this information from the parties/Members.

1. THE COMMISSION ERRED BY FAILING TO TREAT THE NICKEL ORE MINING COMPANIES AS "INTERESTED PARTIES" IN THE SSCRFP CVD INVESTIGATION

69. Indonesia submits that the nickel ore mining companies fall within the definition of "*interested parties*" in Article 12.9 of the SCM Agreement. These companies had a clear and legitimate "*interest*"[42] in the SSCRFP CVD investigation, because: (i) they were considered by the Commission (and by themselves) to be intricately involved in the provision of subsidies; (ii) they held information necessary for the Commission's determination; and (iii) they had an interest in the outcome of the investigation.

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[38] Countervailing Duty Determination (Exhibit IDN-1), recital (917); RCC Report of GOID and Indonesia EXIM Bank (Exhibit IDN-117), pages 16-17.

[39] *See* for example: GOID AS Questionnaire Response – open (Exhibit IDN-71), page 100.

[40] Appellate Body Report, *US – Washing Machines (DS464)*, para. 5.238.

[41] EU, SWS, para. 254.

[42] Appellate Body Report, *Japan – DRAMs (Korea) (DS336)*, paras. 238, 242.

70. Despite this, the Commission failed to designate the nickel ore mining companies as "*interested parties*" in the SSCRFP CVD investigation, although it was well aware of the existence (and interest) of such companies. The Commission did not invite these companies to participate in the investigation, neither did it notify them of the information required from them. As a consequence, these companies were effectively excluded from the entire investigation *ab initio* and were not accorded due process rights. However, the Commission sought information from them, verified that information, used it, and then (incorrectly) concluded that these companies were involved in subsidization.

2. REQUIRING THE GOID TO PROVIDE NICKEL ORE MINING COMPANIES NOTICE OF INFORMATION REQUIRED IS INCONSISTENT WITH ARTICLES 10 AND 12 OF THE SCM AGREEMENT

71. The Commission required the GOID to forward the "questionnaire for input suppliers" to them. However, pursuant to Article 12.1 of the SCM Agreement, the obligation to notify the nickel ore mining companies of the information that was required from them lies on the investigating authority, not the GOID. The Commission improperly transferred the responsibility of discharging that obligation on the GOID. This violation of Article 12.1 cannot be justified on the ground of "*administrative convenience*". Article 12.1 of the SCM Agreement requires a direct notification (communication or conveyance of information) from the investigating authority.

3. REQUIRING THE GOID TO CONDUCT FACT-FINDING ON BEHALF OF THE COMMISSION IS INCONSISTENT WITH ARTICLES 10 AND 12 OF THE SCM AGREEMENT

72. The Commission made the GOID responsible for collecting information in the form of questionnaire responses from the nickel ore mining companies, although fact-finding is a core responsibility of the investigating authority. The Commission even resorted to facts available against the GOID on the ground that it had (allegedly) failed to collect information from the nickel ore mining companies. This violation of Article 12.1 of the SCM Agreement cannot be justified on the ground that the nickel ore mining companies were allegedly public bodies. The SCM Agreement does not allow an authority to transfer its responsibilities to the interested Member, the GOID, especially since the GOID did not have the power to force these companies to cooperate, and a majority of them were privately owned.

73. There is no legal basis for the "obligation-sharing" approach suggested by the EU with respect to the notification and fact-finding obligations. An authority cannot "*forego*" its procedural obligations,[43] and neither can those be unilaterally shifted upon (or even shared with) the interested party/Member.

B. THE COMMISSION'S UNJUSTIFIED RESORT TO FACTS AVAILABLE AND ITS INCORRECT SELECTION OF REPLACEMENT FACTS IS INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

74. Indonesia makes two preliminary observations. First, facts available are not to be applied by the authorities "in the abstract"; rather, they need to be applied in a specific instance (*i.e.*, with respect to the specific entity). Second, there must be symmetry between the entity with respect to whom non-cooperation is established, and the entity with respect to whom facts available are applied.

1. THE COMMISSION'S RESORT TO FACTS AVAILABLE AGAINST THE NICKEL ORE MINING COMPANIES IS WITHOUT LEGAL BASIS AND IS THEREFORE INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

75. The Commission applied facts available against the nickel ore mining companies. The Commission identified allegedly "*necessary*" information required from the nickel ore mining companies, which is the first step under Article 12.7. The Commission also determined that nickel ore mining companies had been non-cooperative, which is the second step under Article 12.7. It is recalled that an investigating authority need not have explicitly declared its use of facts available.[44]

[43] Panel Report, *Ukraine – Ammonium Nitrate (Russia) (DS493)*, para. 7.254.
[44] Panel Report, *Colombia – Frozen Fries (DS591)*, paras. 7.184-7.185.

Indonesia submits that the Commission resorted to *de facto* facts available against or with respect to these companies, even if it did not declare this expressly.

2. THE COMMISSION'S RESORT TO FACTS AVAILABLE AGAINST THE NICKEL ORE MINING COMPANIES IS EITHER SUBSTANTIVELY OR PROCEDURALLY FLAWED

76. If the Panel agrees with Indonesia's position that the nickel ore mining companies were "*interested parties*" in the SSCRFP investigation, then the Commission's resort to facts available was unlawful for procedural reasons. Before facts available can be applied, there must have been a direct notification to these companies for the information required. In the alternative, if the Panel considers that the nickel ore mining companies were not "*interested parties*", then Indonesia submits that an authority cannot resort to facts available against an entity that was not an interested party or Member and, hence, the Commission committed a substantive error.

3. THE COMMISSION'S RESORT TO FACTS AVAILABLE AGAINST THE GOID IS UNJUSTIFIED AND IS THEREFORE INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

77. It is clear from the case-record that the Commission also resorted to facts available against the GOID. There are two main problems in this respect.

78. **First**, the Commission incorrectly attributed the alleged noncooperation of the nickel ore mining companies to the GOID. As noted in the second preliminary observation regarding the symmetry between the non-cooperating entity and the entity with respect to whom facts available is applied, non-cooperation of one entity cannot justify a resort to facts available with respect to another entity.

79. **Second**, the GOID did not fail to provide any "necessary" information that was held/possessed by it; nor did it significantly impede the investigation in any way. Facts available can only be used if the entity in question actually possesses or holds the requested information. The GOID does not bear the legal responsibility of providing information that it does not possess or hold. Thus, there cannot said to be a 'failure' to provide the information. The use of facts available in such a circumstance would be without basis, and punitive, and therefore unlawful.

80. With respect to the alleged provision of nickel ore at less than adequate remuneration, Indonesia has shown in detail in its written submissions and in its responses to the Panel's questions that the Commission's resort to facts available was unjustified in relation to the following nine incorrect conclusions of the Commission:

i) That PT Antam did not reply to Appendix B: the resort to facts available on this basis is incorrect, as information about this company was not necessary, given that it did not sell its nickel ore to any stainless steel producer; and, in any event, PT Antam submitted a reply, though the EU rejected it for being an allegedly late submission.

ii) That the GOID did not provide certain 'BC' forms is incorrect, as the GOID was given only 8 days to provide these forms, which were only asked for during verification. The GOID moreover provided these forms, but they were rejected without sufficient reasoning, although they could have proven that the customs authorities do check calculations and coefficients.

iii) That the GOID did not provide information regarding the nickel ore mining companies' shareholding structures is incorrect, as the GOID provided this information, to the extent and in the format that the GOID possessed or held it.

iv) That the GOID did not provide the Annual working and budget plans (RKAB) of PT GAG Nikel is incorrect, as the GOID submitted them, but they were rejected for being submitted after the expiry of the deadline, even though the deadline provided was only 7 days, and the information belonged to the company, not the GOID.

v) That the GOID did not provide certain feasibility studies is incorrect, as they did not constitute "*necessary*" information, and they were provided, although the GOID was given only an 8-day deadline and only at the stage of verification. Additionally, the blackened text concerned

business-sensitive information that was not necessary for the Commission to make its determination, and the GOID was not asked about the scenario of post-target setting.

vi) That the GOID provided "*inconsistent data*" for the consumption of nickel ore in Indonesia is incorrect, as it did provide figures for both, total consumption in Indonesia, and the consumption by the SSCRFP industry, but the Commission did not explain what the problem was. In addition, the GOID provided all the information given to it by the SSCRFP producers and all that it had at its disposal.

vii) That the GOID provided "*inaccurate information*" regarding PT Vale is incorrect, because information about this company was not "*necessary*", as PT Vale was not State-owned during the IP and did not sell nickel ore to anyone.

viii) That the GOID did not provide information about the prices of nickel ore in Indonesia is incorrect since the Commission should have directly requested the companies, as these were the primary holders of the information at issue.

ix) That the GOID did not provide certain translations does not justify the resort to facts available, as the GOID was not given sufficient time and, specifically with respect to the RCC exhibits, the Commission did not require a translation of those documents by the GOID.

81. With respect to the alleged cooperation between the GOID and the GOC, Indonesia has shown in detail in its written submissions and responses to Panel questions that the Commission's resort to facts available is inconsistent with Article 12.7. More specifically, Indonesia submits that the following three conclusions, based on which the Commission found the GOID to be non-cooperative on the issue of GOID-GOC cooperation, are incorrect:

i) It is incorrect that the GOID refused to provide "*the cooperation agreement*" between PT Bintang Delapan Investama and Shanghai Decent Investment (Group), as this is a private *business-to-business* agreement and the GOID did not possess it.

ii) It is incorrect that the GOID failed to provide the list of priority projects under the "*Indonesia-China Program*". The Commission initially did not provide clear instructions which precise list it was after, and, subsequently, it rejected the GOID's notification that this list did not exist, although the burden of proof that such a list existed was on the Commission.

iii) It is incorrect that the GOID failed to provide documentation regarding the Indonesian KIT team, because such documentation did not exist.

82. The Commission failed to take into account the GOID's cooperation to the best of its abilities, despite unreasonable burdens being placed upon it by the Commission.

4. THE COMMISSION'S RESORT TO FACTS AVAILABLE AGAINST THE IRNC GROUP IS UNJUSTIFIED AND IS THEREFORE INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

83. Indonesia submits that the Commission's resort to facts available with respect to the IRNC is unjustified for three reasons. **First**, the Commission's application of Article 12.7 of the SCM Agreement is based on information that is not "*necessary*". **Second**, the Commission's instructions did not clearly require non-Indonesian related parties of PT IRNC to respond to Sections A and E of the exporter questionnaire. **Third**, the Commission incorrectly concluded that the IRNC Group was non-cooperative in the investigation, since the Group provided all "necessary information" that was in its possession or was held by it. Specifically, Indonesia disagrees with the Commission's conclusion that the IRNC Group failed to provide sufficient information with respect to the alleged provision of machinery for less than adequate remuneration, the alleged cooperation between the GOID and the GOC, and the alleged shareholder loans.

5. THE FACTS SELECTED BY THE COMMISSION DID NOT "REASONABLY REPLACE" THE ALLEGEDLY MISSING INFORMATION, INCONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

84. Indonesia submits that the replacement facts selected by the Commission were incorrect or otherwise did not reasonably replace the allegedly missing information. In addition, some

determinations made by the Commission are based entirely on "*assumptions*", "*inferences*" and "*speculation*".[45] However, in circumstances where information is missing, determinations cannot be based solely on inferences.[46] The text of Article 12.7 itself states that determinations can be made only on the basis of *facts* that are available. "*Further analysis*" is required[47] to support an inference. Consequently, factual findings can be the result of a combination of a reasonable inference and confirmatory factual evidence from the record, but not simply on unsupported assumptions. Particularly, Indonesia disagrees with the facts and assumptions used in the determination of: (i) alleged provision of nickel ore at less than adequate remuneration, (ii) alleged cooperation between the GOID and the GOC, and (iii) alleged preferential financing.

C. THE COMMISSION'S UNTIMELY AND INCOMPLETE DISCLOSURE OF ESSENTIAL FACTS IS INCONSISTENT WITH ARTICLES 12.8 AND 12.1 OF THE SCM AGREEMENT

85. Indonesia submits that the timing of the Commission's disclosure violated the due process rights of the IRNC Group in the SSCRFP CVD investigation. First, the Commission failed to grant the IRNC Group sufficient time to comment on the disclosure, thereby preventing it from defending its interests and presenting in writing all evidence that it considered relevant, in violation of Articles 12.1 and 12.8 (second sentence) of the SCM Agreement. The IRNC was given 11 days during a major holiday season to respond to a lengthy GDD and supporting documentation of about 250 pages and 80 worksheets, covering several complex issues, many of which were revealed for the first time to the interested parties. In addition, as there was no preliminary determination in this investigation, the disclosure stage represented the first and last time that parties like the IRNC Group could comment on the facts under consideration.

86. Second, the Commission failed to disclose, in a coherent way, all "essential facts under consideration" that formed the basis of the Commission's decision to apply CVDs, thereby violating Article 12.8 (first sentence) of the SCM Agreement. In particular, there were essential facts missing from the disclosure documents, with respect to the Commission's determination regarding: (i) the alleged provision of nickel ore at less than adequate remuneration; (ii) the alleged provision of land at less than adequate remuneration; (iii) alleged preferential financing; and (iv) alleged injury to the domestic industry.

D. THE COMMISSION'S INSUFFICIENTLY DETAILED FINAL DETERMINATION IS INCONSISTENT WITH ARTICLE 22.3 OF THE SCM AGREEMENT

87. Indonesia claims that the Commission failed to provide sufficient details regarding its findings and conclusions, as well as "*reasoned and adequate explanations*" as to how "*the evidence on the record supported its factual findings; and (b) how those factual findings supported its overall determination*".[48] First, the final determination lacks details and explanations with respect to the Commission's decision to require the GOID to conduct a part of the SSCRFP CVD investigation on behalf of the Commission. Second, there are significant details and explanations missing with respect to certain aspects in the Commission's determination regarding alleged provision of nickel ore at less than adequate remuneration. Details and explanations are also missing with respect to the Commission's determination regarding, third, alleged cooperation between the GOID and the GOC, fourth, alleged preferential financing, and fifth, alleged government revenue foregone or not collected that is otherwise due.

E. CLAIM REGARDING THE PASS-THROUGH ANALYSIS

88. Indonesia submitted[49] that the Commission failed to justify its decision to not conduct a pass-through analysis to determine whether and to what extent (1) any benefit accruing to IRNC's Chinese shareholders had passed through to the IRNC Group (in terms of alleged financial assistance); and (2) any alleged benefit accruing to the nickel ore mining companies passed through to the non-sampled SSCRFP producers. Given Indonesia's view presented in section II.B.1 above

[45] Panel Report, *EC – Countervailing Measures on DRAM Chips (DS299)*, para. 7.143; Appellate Body Report, *US – Carbon Steel (India) (DS436)*, para. 4.417.

[46] Panel Report, *EC – Countervailing Measures on DRAM Chips (DS299)*, para. 7.80

[47] Appellate Body Report, *US – Supercalendered Paper (DS505)*, para. 5.82.

[48] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs (DS296)*, para. 186; Appellate Body Report, *US – Lamb (DS177/DS178)*, para. 103.

[49] Indonesia, Response to Panel question No. 216.

that such an analysis was necessary, the Commission failed to explain why it considered that the entire amount of benefit passed-through in the two cases mentioned above. The explanation and factual basis for the Commission's decision that no pass-through analysis is required in the above identified two instances, is missing from the investigation's record. This inaction violates the Commission's obligations under Articles 12.8 and 22.3, and the *chapeau* of Article 14; as well as its obligation to provide "reasoned and adequate" explanations of its determinations – including the calculation of alleged benefit.

VI. CLAIMS IN CONNECTION WITH THE OBLIGATION TO MAKE A FAIR COMPARISON BETWEEN THE EXPORT PRICE AND THE NORMAL VALUE AND TO MAKE DUE ALLOWANCES FOR DIFFERENCES AFFECTING PRICE COMPARABILITY

A. VIOLATION OF ARTICLES 2.4 AND 6.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1 OF THE GATT 1994 BY FAILING TO MAKE A FAIR COMPARISON BETWEEN THE NORMAL VALUE AND THE EXPORT PRICE

89. Indonesia claims that the EU's imposition of an antidumping duty of 10.2% on IRNC violated Articles 2.4 and 6.1 of the AD Agreement and Article VI:1 of the GATT 1994.

1. VIOLATION OF ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE *CHAUSSETTE* OF ARTICLE VI:1 OF THE GATT 1994 BECAUSE THE COMMISSION DEDUCTED CERTAIN TRANSPORT-RELATED AND STORAGE EXPENSES ONLY FROM THE EXPORT PRICE BUT NOT FROM THE NORMAL VALUE

90. The Commission deducted all the transport-related expenses and the expenses incurred for the temporary transit and storage in Xiamen port from the export price to the EU. By contrast, the Commission refused to deduct all the expenses linked to the storage and the costs incurred to transfer the goods from the domestic sales price (or the normal value), because these were considered an internal cost before a product is sold to the first independent buyer. IRNC objected to this in the provisional and final Anti-Dumping disclosure.

91. Indonesia agrees with the EU that there is a "netting back" obligation to ensure that both the export price and the normal value/domestic price are at the same level of trade. However, Indonesia submits that the netting back process the Commission carried out results in a comparison that is not at the same level of trade, as the export price is established at the ex-factory level (or ex-works (Morowali warehouse)), and the normal value/domestic sales price at the ex-warehouse level (or ex-works (Surabaya warehouse)).

92. With regard to the transport related expenses, first, a rented warehouse located more than 1,000 kms away cannot be considered an "internal" warehouse forming part of the premises of IRNC. Therefore, the expenses incurred for transporting the goods from the Morowali warehouse to the Surabaya warehouse are not part of the ex-works Morowali warehouse price.[50] Second, by requiring that the identified difference not only affects price comparability but is also an "external" difference that occurred after the sale, the Commission introduced an additional requirement pursuant to the third sentence of Article 2.4 of the Anti-Dumping Agreement. This is absent from that provision as interpreted by panels and the Appellate Body.

93. With regard to the warehouse expenses, the Commission made a downward adjustment to the export price for transshipment in Xiamen and demurrage expenses despite an absence of evidence that these expenses were reflected in the sales price. By contrast, no adjustment was made for the warehouse expenses incurred for the domestic sales, on the basis that it was not shown that those were reflected in the sales price. This leads to a comparison that is not unbiased and even-handed.

94. Consequently, the EU violated Article 2.4 of the Anti-Dumping Agreement, also violating the fundamental obligations enshrined in the *chaussette* of Article VI:1 of the GATT 1994.

[50] Indonesia, SWS, paras. 874-885.

2. VIOLATION OF ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT AND THE *CHAUSSETTE* OF ARTICLE VI:1 OF THE GATT 1994 BECAUSE THE COMMISSION DEDUCTED SG&A EXPENSES AND A NOTIONAL PROFIT ONLY FROM THE EXPORT PRICE FOR EXPORT SALES THROUGH RELATED TRADERS WHILE IT DID NOT DEDUCT SUCH SG&A EXPENSES AND NOTIONAL PROFIT WHEN DOMESTIC SALES WERE MADE THROUGH RELATED TRADERS

95. All export sales to the EU were made through related traders located outside Indonesia or the EU. On the domestic market, IRNC also sold mostly (for 95% of the domestic sales) through related trading companies. The Commission made a downward adjustment to the export price to reflect the involvement of these related traders, but it made no adjustment to the normal value (or the domestic sales price) for the involvement of these related trading companies located in Indonesia.

96. **First**, Indonesia submits that the Commission made an adjustment for a difference that has not been shown to affect price comparability. The involvement of related trading companies and the existence of a mark-up equally applied to both export sales and domestic sales and, therefore, do not indicate a difference affecting price comparability. An effect on price comparability is required pursuant to the third sentence under Article 2.4 of the Anti-Dumping Agreement for allowances to be made. The burden of proof to show the existence of a difference that affects price comparability was on the Commission, as it made a downward adjustment to the export price for the involvement of the related traders on its own initiative.

97. **Second**, Indonesia submits that the Commission failed to make an adjustment to the normal value for the involvement of related traders. The Commission was under an obligation to examine the request for a downward adjustment to the domestic sales price/normal value on substance. The Commission explicitly confirmed in both its pre-disclosure and the Provisional Anti-Dumping Determination that the personnel working for the related trader were also involved with domestic sales. If such involvement warrants an adjustment on the export side, the (same) involvement on the domestic side warrants an adjustment on the normal value side. The Commission also had the necessary documentary evidence at its disposal that these same factual reasons applied on the domestic sales side.

98. **Therefore**, Indonesia submits that the EU violated Article 2.4 of the Anti-Dumping Agreement, also violating the fundamental obligations enshrined in the *chaussette* of Article VI:1 of the GATT 1994.

3. VIOLATION OF THE FINAL SENTENCE OF ARTICLES 2.4 AND 6.1 OF THE ANTI-DUMPING AGREEMENT BECAUSE THE COMMISSION DID NOT INDICATE WHAT INFORMATION WAS NECESSARY TO ENSURE A FAIR COMPARISON

99. Indonesia submits that IRNC claimed in its comments on the Provisional and Final Disclosure that a failure to make the adjustment to the normal value as it requested would result in a comparison that is no longer at the same level of trade. From that point onwards, the obligation was on the Commission to indicate what information it would need in order to ensure a fair comparison.[51] However, the Commission did not enter in a dialogue with IRNC, neither did it address the issue of the adjustment to the normal value in its Additional Final Disclosure, but only rejected the request in its Definitive Anti-Dumping Determination as unsubstantiated. At that time, IRNC had no longer an opportunity to request or substantiate the adjustment.

100. Therefore, Indonesia submits that the EU violated the final sentence of Article 2.4 of the Anti-Dumping Agreement and its obligation pursuant to Article 6.1 of the Anti-Dumping Agreement.

VII. CONCLUSION

101. Indonesia has demonstrated in this case that the Commission's actions, omissions and decisions in or with respect to the SSCRFP CVD and anti-dumping determinations and underlying investigations have resulted in a violation of the EU's obligations under the SCM Agreement, the Anti-Dumping Agreement and the GATT 1994. Pursuant to Article 19.1 of the DSU, Indonesia

[51] Panel Report, *Pakistan – BOPP Film (UAE) (DS538)*, para. 7.200.

requests the Panel to recommend that the EU bring its measures into conformity with the SCM Agreement, the GATT 1994, and the Anti-Dumping Agreement.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. The measures at issue in this dispute are the definitive countervailing and anti-dumping duties imposed on imports of stainless steel cold-rolled flat products ("SSCR") originating in Indonesia. Indonesia makes five sets of claims against these measures under a plethora of WTO provisions. The EU requests the Panel to find that the EU acted consistently with all its obligations under the SCM Agreement, the Anti-Dumping Agreement and the GATT 1994.

2. The SSCR investigations were properly conducted in accordance with the standards and evidence required under the WTO rules. The European Commission ("the Commission"), the EU's investigating authority, managed to collect substantive evidence on all the elements needed to justify its determination. Where necessary and because of the lack of cooperation, *inter alia*, by the GOID, the Commission drew inferences and applied facts available.

3. As a first preliminary remark, the EU fully respects the principle of permanent sovereignty over natural resources. The EU did not enter into how Indonesia encourages the use of its natural resources, in particular, its reserves of nickel ore. However, how a WTO Member organises its natural resources to booster the development of downstream industry together with legitimate FDI should comply with WTO rules.

4. As a second preliminary remark, the SSCR investigation showed that this dispute is remarkably different from legitimate foreign investment. The GOID and the GOC had not merely agreed to cooperate to foster investment in Indonesia; rather, both governments agreed to join forces by setting up and developing a special area in the Indonesian Morowali Industrial Park to support Chinese companies in achieving the objectives of both governments.

5. The terms "by a government" in the chapeau of Article 1.1(a)(1) of the SCM Agreement, when interpreted in their context as well as the object and purpose of the SCM Agreement, do not preclude the possibility that a financial contribution provided by a WTO Member be attributed to another WTO Member, in light of the specific evidence available. The evidence clearly showed that the GOID, rather than providing the financial support directly, induced the GOC to provide it on its behalf and adopted the Chinese financial support as its own. By so doing, the financial support provided by the GOC can be attributed to the GOID.

6. Contrary to what Indonesia suggests, the EU did not take a unilateral action against legitimate development policies through FDI, and indeed Indonesia does not bring a claim under Article 23 of the DSU. Rather, the EU addressed a very specific situation where, in the EU's view, the SCM Agreement permits the imposition of countervailing duties to offset subsidies provided by the GOID, both in cases where the financial support is provided directly to its companies or via the GOC. Thus, the imposition of countervailing duties on imports of SSCR originating in Indonesia aims at restoring the level playing field by offsetting the subsidies which are causing material injury to the Union industry. The measures at issue in this case are fully in line with the WTO Agreements.

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

2.1. Alleged violations of Articles 1.1(a)(1), 1.2, 2.2 and 2.4 of the SCM Agreement as regards the Commission's findings on the preferential financing and other support provided by the GOC to the IRNC Group

7. First, the European Union considers that the attribution of the preferential financing and other support provided by the GOC to the GOID was consistent with Article 1.1(a)(1) of the SCM Agreement.

8. In the first place, rather than providing support directly, the GOID set up a bilateral cooperation framework with the GOC to ensure that the GOC, in order for Chinese companies to secure the necessary supply of nickel ore, provided preferential financing for the investment of Chinese companies in Indonesia in the context of preferential policies.

9. The GOID-GOC bilateral cooperation materialised through a list of bilateral agreements and documents. The scope and objective of such bilateral cooperation went well beyond those of generic development and cooperation agreements between two governments.

10. From the wide array of evidence available, and despite the lack of cooperation of the GOID and the GOC, a demonstrable link was established between the actions by the GOID, inducing the GOC to provide financial support, and the steps taken by the GOC in order to provide the agreed preferential support to the IRNC Group. The evidence showed that the GOID proactively sought from China and hence adopted as its own the preferential financial support to the stainless steel producer in the Morowali Park, in line with the agreed commitments to develop and support the development of the stainless steel industry in Indonesia. Thus, rather than providing the financial contribution in the form of preferential financial support to the IRNC Group directly, the GOID induced the GOC provided such support on its behalf. The "indirect" nature of this financial support does not change the fact (i) that the IRNC Group received the support on its balance books – from the perspective of the IRNC Group, financial support is an interchangeable asset, its source (be it from the GOC or the GOID) being irrelevant; and (ii) that European producers were injured by the subsidised steel produced by the IRNC Group and exported to the EU.

11. In the second place, the EU submits that Indonesia has failed to make a *prima facie* case that the text of the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, interpreted in its context, and in the light of the object and purpose of the SCM Agreement, precludes a financial contribution granted by the government of a third country from being attributed to the government of the country of origin or export in a case such as that at issue in the present case, in light of the specific evidence available.

12. Regarding the text, the terms in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement are neutral in this respect and permit the interpretation that "by a government" includes situations where the financial contribution can be imputed to the government of the country of origin or export. The use of "a" refers to a non-specific or non-particular member of the group of WTO Members in a generic manner, without explicitly limiting the scope of the financial contribution to the territory of the government providing the financial contribution. In the same sense, the terms "within the territory of a Member" do not impose limitations as to whether a "financial contribution" by a government can be attributed to another government. Importantly, the connection between "financial contribution" and "a government" in the *chapeau* of Article 1.1(a)(1) of the SCM Agreement is made through the use of the preposition "by", which ordinarily indicates that something can be attributed/imputed to somebody as the subject of the action. Furthermore, neither the list of forms that a financial contribution may take in Article 1.1(a)(1) nor the alternative "income/price support" in Article 1.1(a)(2) of the SCM Agreement indicate that the *chapeau* in Article 1.1(a)(1) should be narrowed to only direct government interventions.

13. In the relevant context in the SCM Agreement, the permitted attribution of the financial contribution to the GOID in Article 1.1(a)(1) of the SCM Agreement has a cascading effect throughout the SCM Agreement, in the sense that the provisions of the SCM Agreement can and should all be read and interpreted harmoniously with that permitted attribution.

14. Regarding the object and the purpose of the SCM Agreement, Article 1.1(a)(1) of the SCM Agreement must not be interpreted rigidly or formalistically in a manner that would undermine its ability to discipline trade-distorting subsidisation. If no action could be allowed under the current subsidy disciplines in the specific factual circumstances found in the SSCR investigation, this would create a big hole in how WTO Members can address distortions in international trade derived from mechanisms structured to channelling financial support which causes material injury.

15. Indonesia's interpretation is systemically dangerous, as it opens the door to circumvention of the rules disciplining subsidies. The situation like the one in the SSCR investigation where the

financial support provided by the GOC to the IRNC can be attributed to the GOID is in line with the object and purpose of the SCM Agreement, as otherwise, WTO Members can easily elude the subsidy disciplines, just by agreeing with other countries to provide financial support on their behalf to companies within their respective territories (see *US – FSC (Article 21.5 DSU)* and *Brazil–Aircraft*).

16. In the third place, the EU further argues that the same conclusion is confirmed when taking into account the relevant rules of international law in the sense of Article 31(3)(c) of the Vienna Convention, and in particular Article 11 of the ILC Articles.

17. Article 11 of the ILC Articles constitutes customary international law, because the ILC Articles are an integral and important branch of customary international law, in accordance with the mandate of the UN General Assembly under Article 13(1)(a) of the UN Charter. General international law principles thus form part of the WTO legal order, which is not a self-contained regime. Moreover, Article 11 of the ILC Articles is a relevant rule of international law, since it is placed under Chapter II of the ILC Articles, with the title "Attribution of conduct to a State". The fact that Article 1.1 of the SCM Agreement does not refer explicitly to the possibility to attribute financial support provided by one State to another State is not an obstacle to interpret the terms "by a government" in line with the attribution principles and guidance provided in the ILC Articles.

18. Rather than relying solely on whether the attribution standard in Article 11 of the ILC Articles was met, the EU applied a standard, similar to the attribution standard generally applicable in cases of entrustment or direction of private bodies by a government, and thus not exogenous to the SCM Agreement. There was a demonstrable link, considered that "the GOID has proactively induced the GOC to provide financial support to companies in Indonesia by specifically contributing to the creation and development of the stainless steel industry in Indonesia through the Morowali Park" and by leveraging "its privileged position of having the large nickel ore reserves that the Chinese industry badly needed to induce the GOC to actively engage in providing the necessary support to the specific project".

19. In the fourth place, the EU properly attributed the financial support provided by the GOC to the GOID on the basis of the abundant and unequivocal evidence in the SSCR investigation showing that the GOID sought, acknowledge and accepted the GOC's financial support to the IRNC Group in the Morowali Park as its own.

20. Contrary to what Indonesia asserts, the fact that the GOID was closely involved in the activities of IMIP, properly monitored the agreed financial support shows, ensured that the commitments were fulfilled demonstrates that such a support should be attributed ultimately to the GOID as its own.

21. Indonesia also faults the EU for not having carried out the attribution analysis at the level of each financial contribution in question. The EU does not see any error in proceeding on the basis of a global analysis in this case, since all the transactions had the same features and context.

22. Second, the Commission properly found that the GOID's subsidies, including the financial support provided to the GOC to the IRNC Group's activities in Indonesia, were specific in accordance with Articles 2.1 and 2.2 of the SCM Agreement.

23. Indonesia's claim about the alleged European Union's errors in identifying the granting authorities (i) and their relevant jurisdiction (ii) are misguided and should be dismissed.

24. On (i), Indonesia's essential error is to consider that the EU found that the "subsidies" were provided by the GOC. The EU did not make such finding, rather, those subsidies were actually granted by the GOID. Once the financial contribution provided by the GOC was imputed to the GOID, and a benefit was thereby conferred, those measures properly qualified as GOID's subsidies. For the specificity analysis, it does not matter that the financial contribution is provided and administered by the GOC, since those financial contributions were made in the context of the specific project between the GOC and the GOID in the Indonesian Morowali Park.

25. On (ii), Indonesia's argument that the IRNC Group, which is located in Indonesia, is not "within the jurisdiction" of the Chinese grantors within the meaning of Article 2 of the SCM Agreement is wrongly premised. The GOID was the granting authority for the purpose of Article 2 of the SCM Agreement. The Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* did not find that the assessment of specificity under Article 2.1(a) of the SCM Agreement "must limit itself to the granting authority that actually provides the subsidy".

26. Third, the Commission properly found, on the basis of positive evidence, that the GOID's subsidies were specific in accordance with Articles 1.2, 2.1 2.2, and 2.4 of the SCM Agreement.

27. The universe of eligible companies to benefit from the explicit terms of the GOID-GOC cooperation was limited and, by all accounts, specific in the sense of Article 2.2 of the SCM Agreement. For the examination of their specificity, whether companies outside the Morowali Park may benefit from Chinese preferential support is simply irrelevant. The same should be concluded as regards Indonesia's reference to CAF and support by shareholders on behalf of the GOC under the BRI.

2.2. Alleged violations of Articles 1.1(b), 10, 14 and 32.1 of the SCM Agreement as regards the determination of the existence of a benefit and the calculation of the benefit for inter-company loans and in-kind capital contributions

28. On the one hand, based on all the evidence on the funding under the BRI of projects outside of China including Indonesia, as well as on the findings in previous anti-subsidy investigations concerning China, the EU concluded that the Chinese parent companies received a financial contribution in the form of grants or preferential financing that were then used, *inter alia*, to provide inter-company loans to their subsidiaries to facilitate their financial capabilities and operations in Indonesia. Those loans were subordinated to the banks loans, and in most cases with no end date, no interests to be paid, and outstanding repayments. Those conditions showed that the Chinese parent companies fully allocated the benefit from the grants and preferential loans received in China to its activities in Indonesia.

29. On other hand, based on all the evidence on the funding under the BRI of projects outside of China including Indonesia, as well as on the findings in previous anti-subsidy investigations concerning China, the EU concluded that the Chinese parent companies received a financial contribution in the form of grants or preferential financing that were then used, *inter alia*, to provide capital in-kind to their subsidiaries to facilitate their financial capabilities and operations in Indonesia. The provision of equipment by the Chinese parent companies to their subsidiaries in Indonesia squarely fit into the GOC's policy objective of promoting BRI projects in the steel industry, and the provision of foreign assets was seen as a means by the GOC to improve the overall financial capabilities of such companies.

30. As regard allegations that the EU did not use a price from the country of provision or purchase of the equipment, the Commission could not verify the origin of the equipment and whether it was purchased in China or elsewhere and the use of data from the Indian sampled company in the case at hand was not feasible.

31. Indonesia wrongly attempts to contest the well-established principle that, when the supplier of the subsidised input is related to the producer of the processed product, a pass-through analysis is not required. In this dispute, the shareholder loans and equipment concern transactions provided by the Chinese parent companies to the related companies within the IRNC Group for its activities in Indonesia.

32. Indonesia also disregards the specific situation found in the SSCR investigation. What the EU did was to first note the how the flow of funds provided by the GOC to the Chinese parent companies reached the IRNC Group's activities in Indonesia (as quasi-capital injections), and then, to determine the amount of benefit characterising the outstanding/unpaid amounts of the inter-company loans as a full grant, from which any interests paid was deducted. Thus, in line with the observations made by the panel in *EC – Countervailing Measures on DRAM Chips*, cited by Indonesia, the EU took into account the specific characteristics of the measure and properly qualified it as a grant for the purpose of the calculation of the amount of benefit.

33. Since Indonesia was not the country of purchase, using Indonesia as a benchmark would thus not have been aligned with the factual situation of the IRNC Group. It is incorrect to state that the origin of the equipment was clearly stated to be Chinese since the import declarations of the companies in Indonesia showed that the goods were coming from China, for customs purposes. This did not show whether the equipment was made and sourced by the Chinese parent companies in China or elsewhere. Since the EU could not find any information about prices in China and no information was provided about the origin of the equipment, the EU decided to use a combination of prices for similar equipment from Europe and US as a proxy. Finally, the Commission did not just use one single type of equipment in its calculation, but several types of equipment which are part of a production line, such as parts of a twenty-roll reversible cold rolling mill, grinder, part of the bridge crane, winding unit, slitting machine, and others.

3. CLAIMS CONCERNING THE PROVISION OF NICKEL ORE BY THE GOID TO THE IRNC GROUP FOR LESS THAN ADEQUATE REMUNERATION

34. The EU established that the Indonesian government provided nickel ore (at less than adequate remuneration) to processors, i.e. smelters and integrated stainless steel producers through the nickel ore mining companies as public bodies. In the alternative, the EU established that the Indonesian government entrusted or directed the nickel ore mining companies to provide nickel ore to the processors. The objective of the Indonesian government was to develop the downstream processing industries in Indonesia.

3.1. Alleged violation of Article 1.1(a)(1) as regards the EU finding of financial contribution

35. The EU established that the relevant financial contribution is the "provision of goods" under Article 1.1(a)(iii) of the SCM Agreement as also acknowledged by Indonesia during the proceedings. Indonesia's claims in this respect must therefore be dismissed.

3.2. Alleged violation of Article 1.1(a)(1) as regards the EU's "public body" findings

36. The EU correctly established that all Indonesian nickel ore mining companies constitute "public bodies" under Article 1.1(a)(1) of the SCM Agreement.

37. The Commission based its public body analysis on different factors. In particular, the Commission demonstrated that the legal framework in Indonesia provides the Indonesian government with unprecedented and far reaching control powers over all activities of the mining companies, from exploration to the final sale of nickel ore.

38. Under the Indonesian Constitution the government controls minerals such as nickel ore. Under the 2009 Mining Law, the management of minerals such as nickel "*must be under the control of the State in order to provide real added value to the national economy*". According to Article 5(1) of the 2009 Mining Law the GOID "*may adopt a policy on preference for domestic mineral and/or coal needs*", notably through the control of production and exports under Article 5(2). According to Article 5(3) the GOID has the authority to set the annual production of each commodity for each province. According to Article 89 of GR 23/2010 the Minister "*shall control the production of minerals*" and such control shall "*include mineral prices*". The Indonesian government also adopted a large number of specific regulations for the nickel ore mining sector.

39. The Indonesian government introduced a domestic processing obligation in Articles 102 to 104 of the 2009 Mining law which requires that nickel ore mining companies must either process nickel ore themselves, if they have processing facilities, or otherwise must sell (provide) nickel ore to processors, i.e. smelters or integrated stainless steel producers with smelting facilities. In other words, the Indonesian government mandates to which customers nickel ore mining companies may provide nickel ore. If mining companies do not comply with this obligation, they will be subject to administrative sanctions including the revocation of the mining licence.

40. The Indonesian government in 2014 also introduced a complete export ban for nickel ore with a content of 1.7% or higher which is used for the production of stainless steel (MEMR 1/2014). This export ban was in place for the entire period of investigation and prevented nickel ore

mining companies from selling nickel ore abroad. Mining companies had to sell nickel ore domestically (to the processors under the domestic processing obligation).

41. The Indonesian government also imposed very detailed reporting obligations for nickel ore mining companies, notably through the so-called RKABs (annual working plans and budget). MEMR 11/2018 prohibits the mining companies from any construction, mining, processing or selling activities before the annual RKABs are approved. In addition to the RKABs, the mining companies also had to submit periodic reports, final reports and special reports including information on production and sales activities. The government also controlled all sales transactions on the domestic market. According to Article 10 of MEMR 7/2017 mining companies must submit every single sales contract to the Minister.

42. The Indonesian government also introduced a divestment obligation for nickel ore mining companies that are not at least 51% Indonesia owned which requires that 5 years after production the foreign owned mining companies must start divesting so that in the tenth year at least 51% of their shares are owned by Indonesian participants (Article 97 of GR 23/2010). While in theory such ownership could be divested to private companies, the Indonesian government adopted rules that made it very likely that foreign-owned mining companies would be divested to the government or State-owned entities (rights of first purchase for the government, more favorable rules for the government when acquiring divested shares). The Indonesian government therefore made sure that foreign-owned mining companies would end up under majority government ownership.

43. As of 2017 the Indonesian government started regulating, on a mandatory basis, the nickel ore price (the HPM) that mining companies had to charge in their sales transactions with processors (MEMR 7/2017, Article 85 GR 1/2017). The HPM was determined through a price formula in MEMR Decree 2946K/30/MEM/2017. If mining companies deviated from the HPM they were subject to severe sanctions, including the revocation of the mining licence. In 2020, the Indonesian government further strengthened the pricing regulation for sales transactions by subjecting not only the sellers of nickel ore to sanctions but also the purchasers if they deviated from the HPM. Hence the price regulation became even "double mandatory" (MEMR 11/2020).

44. In short, the regulatory framework enabled the Indonesian government to control every aspect of the mining companies' business activities including production quantities, exports, sales prices, divestments, customers etc. In order to ensure that the mining companies would comply with the government regulations and policies reflected therein, the legal provisions provide for extremely detailed reporting obligations to the point that every sales contract must be submitted to the Minister.

45. The Commission also took into account in its public body analysis that mining companies accounting for a substantial part of nickel or production (around 27%) were either owned by the government or subject to other formal indicia of government (e.g. appointment of board members by the government). The Commission's assessment in this respect was made difficult by the lack of cooperation on the side of Indonesia which required the Commission to resort to the use of facts available. However, the Commission was able to establish, even on the basis of the few companies that it was able to investigate, that six nickel ore mining companies were fully or partially State-owned, five of which were among the top 10 producers in Indonesia, further demonstrating the very close relationship of the mining companies with the government.

46. The Commission also took into account in its analysis, as supporting element, the fact that three mining companies or their mines were designated under law as "national vital objects".

47. The Commission's analysis established that all mining companies are public bodies. Nickel ore mining companies are designated as public bodies under Indonesian law which in itself suffices for a public body finding. In addition, as a result of the regulatory framework which applies to all mining companies, the Indonesian government is able to exercise meaningful control – and exercises such control – over all mining companies. The Indonesian government, through the mining companies, implements its government objectives, notably the development of the processing industries in Indonesia. In view of these considerations the mining companies must be attributed to the Indonesian government because they are possessing, exercising or are vested with governmental authority in line with WTO case law.

48. Indonesia's claims as to why the Commission's public body determination would be defective are without merit.

49. Contrary to Indonesia's allegations, the Commission did not disregard the case-by-case nature of "public body" determinations. No individual assessment of companies was required for the elements relating to the regulatory framework because the regulatory framework applies equally to all Indonesian nickel ore mining companies. As regards the element "ownership and indicia of control" (as well as "national vital objects"), the Commission did carry out a company-by-company analysis for the six State-owned companies, the three companies with GOID management and the three companies that the Commission identified as "national vital objects".

50. The Commission also did not "disregard" information about private nickel ore companies as regards "ownership and control" but necessarily focused the public body analysis on the companies that were controlled or managed by the government.

51. Indonesia alleges several factual errors by the Commission in the assessment of ownership and control indicia, for example concerning the fact that individual commissioners related to the government were not active during the period of investigation or that shares were only acquired after the period of investigation (PT Vale). The EU rebutted these alleged errors. In any event, even if the share of government-owned production would be as low as Indonesia alleges in its submissions, such share would still remain "substantial" and relevant for the Commission's analysis. And even if the entire "ownership and control" analysis would be found to be defective (*quod non*), the Commission's public body analysis would not be affected because the regulatory framework in itself is sufficient to support the Commission's public body finding. There is nothing in the case law that would prevent a public body finding based only on the regulatory framework. In fact, denying this possibility – as Indonesia argues - would provide Members with an incentive to regulate companies in a similar restrictive and controlling manner as Indonesia and thereby escape the disciplines of the SCM Agreement.

52. The EU also demonstrated that the Commission's public analysis in the present case is fully in line with WTO case law. In *US – Anti-Dumping and Countervailing Duties (China)* an entire sector (banking loans) in a country – like in the present case - was found to be composed of public bodies. Hence such a sector-wide finding is nothing new or unusual as argued by Indonesia. In that case, the public body analysis was based mainly on the near complete ownership of the sector by the government and on one single "soft" legal provision – not subject to sanctions - according to which the banks should "carry out their business upon the needs of the national economy and under the guidance of State industrial policies." While the government ownership in the present case is "substantial" and not "near complete", this is more than outweighed by the fact that the element of regulatory framework in Indonesia does not only consist of one soft law provision but takes into account dozens of provisions instructing the mining companies how to conduct their business in line with government policies, often under the threat of severe sanctions. The government of Indonesia therefore did not need to own or manage the mining companies to achieve its objectives, it simply regulated the mining business so that they would have to carry out their business in line with the government's policies.

53. Lastly, the Commission did not have to "classify" the importance of the different elements used as evidence for the public body analysis as alleged by Indonesia. Indonesia cites to no case law because there is no such obligation. In any event, the EU demonstrated that the determination makes very clear that only the regulatory framework covers "all" mining companies and hence the "ownership and formal control" element covering 27% of nickel ore production cannot be determinative for the overall finding relating to all mining companies. Indonesia's arguments must be rejected.

3.3. Alleged violation of Article 1.1(a)(1)(iv) resulting from the Commission's finding that nickel ore companies were entrusted or directed by the GOID to provide nickel ore to the stainless steel industry

54. In the alternative, the Commission established in the Contested AS Regulation that the GOID provided a financial contribution by entrusting or directing nickel ore mining companies (as

private bodies) to sell nickel ore to the stainless steel producers for less than adequate remuneration within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.

55. The EU demonstrated that the Indonesian government, through the export ban and other measures (the domestic processing obligation, the mandatory pricing mechanism setting below-market prices and the public statements) entrusted nickel ore mining companies to provide nickel ore to smelters and integrated stainless steel producers such as IRNC Group.

56. Indonesia agrees that the relevant legal question in the present case is whether the provision of nickel ore by the mining companies was the intended objective of the export ban or whether it was an "inadvertent by-product" or "effect" of that ban. Indonesia also agrees that the relevant evidence for entrustment or direction is the "government's actions" as opposed to the "private companies' reactions".

57. The EU demonstrated that the fact that nickel ore mining companies provide nickel ore to processors, i.e. smelters and integrated stainless steel producers such as IRNC Group is not a mere "side effect" of the export ban. On the contrary, the export ban was put in place precisely for that purpose. The export ban was a cornerstone of the Indonesian government's policy to develop the processing industry in Indonesia by providing cheap nickel ore to the processors. The export ban made sure that no nickel ore with a nickel content of 1.7% or above (used for stainless steel) could be exported and had to be sold domestically.

58. While such export ban would on its own likely have resulted in low prices and, due to lack of alternatives, in the provision of nickel ore to processors, the Indonesian government expressly regulated these aspects by law. It adopted a domestic processing obligation by which it ensured that mining companies were under a legal obligation (subject to severe sanctions) to provide nickel ore to processors. In addition, the Indonesian government adopted a mandatory pricing mechanism to ensure that such provision of nickel ore would occur at below market prices in order to attract processing capacities. The Indonesian government also made public statements to the effect that the objective of the low prices was to benefit the downstream industries. These government actions demonstrate that the provision of nickel ore was by no means a mere "effect" of the export ban. On the contrary, the cheap provision of nickel or to the processors was the intended objective of the Indonesian government. As a result of the various regulatory measures, Indonesia developed, within only a few years, from an importer of stainless steel to the world's largest exporter of stainless steel and the world's second largest producer. It is not credible for Indonesia to claim that such a massive expansion of its stainless steel industry would be an "inadvertent by-product" of the export ban.

59. The present case is very different from previous WTO cases in which export restrictions were found not to amount to entrustment or direction. Especially instructive is a comparison with *US – Softwood Lumber VII*. In that case the panel found that export restrictions imposed on Canadian log suppliers did not amount to entrustment or direction and the provision at low prices was a mere "effect" of the export restriction. However, in that case Canadian log suppliers were able, under certain conditions, to continue exporting and hence were merely "discouraged" from doing so which was an important element for the panel to reject entrustment or direction. In Indonesia, by contrast, there is total export ban. Mining companies are not only "discouraged" from exporting, they are prohibited from exporting (under the threat of sanctions). The panel in *US – Softwood Lumber VII* also noted that there would be entrustment or direction if the Canadian government had regulated the customers to which log suppliers may provide their logs or had regulated the prices of those logs. This was not the case in Canada but, as demonstrated by the EU, it is very much so the case in Indonesia where the Indonesian government regulates to whom mining companies may sell nickel ore (only processors) and at what price (at the below-market HPM price). Hence Indonesia's argument that the Commission's finding would not comply with the legal standard under WTO law must be rejected.

60. Indonesia argues that the Commission did not show that the mining companies "had no choice" but to provide nickel ore to the stainless steel industry. The EU demonstrated that Indonesia's "no choice" legal standard has no basis under WTO law. It is sufficient that private companies are "induced" to provide goods.

61. Indonesia also argues that the Commission did not show that mining companies could only provide nickel ore to the stainless steel industry since they could provide nickel ore also to smelters. The Commission would have equated stainless steel producer and smelters in its determination. The EU demonstrated that entrustment or direction is not excluded by the fact that the good must be provided to two groups of industries (smelters and integrated steel producers). It is in fact the Indonesian legislation that equates smelters and integrated stainless steel producers by referring to the term "processors" in the domestic processing obligation. In any event, IRNC Group is both a smelter and a stainless steel producer and hence covered by entrustment or direction under any circumstances.

62. Indonesia contends that the mining companies had different business options despite the obligation to provide nickel ore to processors if they cannot process themselves (e.g. they could cooperate with smelters to process or sell to smelters for the production of intermediate products). The EU demonstrated that such alleged "business options" (even hypothetically assuming they exist), concern the companies' reactions but do not change the fact that Indonesia, by law, regulates that nickel ore must be provided to processors which is a "government action" establishing entrustment or direction.

63. Indonesia further argues that intermediate nickel products (nickel matte, NPI) could be exported which would call into question the Commission's entrustment or direction findings. The EU showed that the Commission's case was only about the provision of nickel ore and not about the provision of intermediate products. The fact that intermediate products could be exported or the lack of findings about intermediate products in the determination is therefore irrelevant.

64. Indonesia, through alleged "interpretations" of the relevant legal provisions in MEMR 7/2017 that are highly flawed, *contra legem* and outright misleading attempts to build an argument that the HPM price did not apply to sales transactions and was not mandatory prior to 2020. However, under MEMR 7/2017 the mining companies "must be guided" by the HPM and the use of the HPM is expressly referred to in the regulation as a legal "obligation" that is subject to severe sanctions including the revocation of the mining licence. The same language is used under the MEMR 11/2020 which only changed the terms "must be guided" to "must refer" (which makes no difference legally) and with respect to which Indonesia acknowledges that the HPM is mandatory. Hence there is nothing voluntary about the HPM price. The HPM also applied to sales transactions which is clearly reflected in the relevant provision ("in selling") in the 2017 regulation. The same language is used in the revised 2020 regulation ("in selling") with respect to which Indonesia acknowledges that the HPM applies to sales transactions.

65. In any event, even if the HPM price would be only voluntary (which would make no sense in light of the wording of the law and the in-depth level of regulation), the fact remains that the Indonesian government regulated the HPM which constitutes a "government action" that is relevant for entrustment or direction. Indonesia's arguments must be rejected.

3.4. The provision of nickel ore for less than adequate remuneration conferred a benefit to the stainless steel industry (alleged violation of Articles 1.1(b), 10, 14(d), 19.4 and 32.1 of the SCM Agreement)

66. Concerning the EU's determination of benefit as well as its quantification of the provision of nickel ore for less than adequate remuneration, the European Union has detailed analysis of the market developments in Indonesia against an appropriate benchmark.

67. Considered that domestic prices in Indonesia were distorted by the GOID's intervention in the nickel ore market and could not be used as benchmark for the purpose of determining benefit, the EU looked for an appropriate out-of-country benchmark. The export price from the Philippines constituted an appropriate benchmark: the Philippines' laterite nickel ore has the same properties as the Indonesian laterite nickel ore, it is extracted according to the same open mine process as in Indonesia and has similar nickel content as Indonesian ore and, more important, it is not affected by the government measures.

68. As regards the argument that the external benchmark did not reflect the prevailing market conditions for the provision of nickel ore in Indonesia, neither the GOID nor the IRNC Group substantiated how the elements they referred to on different technical characteristics and output

quantities between the Indonesian and the Philippines nickel ore impacted those Philippine prices, nor did they submit any evidence attempting to quantify any possible adjustments resulting from these differences to the Philippines prices used as benchmark.

69. As for the claim that the cost of production of nickel ore in Indonesia is lower than in the Philippines, the EU recalls that the Indonesian nickel ore miners did not cooperate in the investigation and the EU is not required to make its determination on the basis of allegedly publicly available information.

70. In addition, Indonesia has not provided any evidence of the existence of a comparative advantage of Indonesia compared to the Philippines. That Indonesia produces more quantities of nickel ore than the Philippines does not show whether Indonesia has an advantage over the Philippines in the production of nickel ore (e.g. by being more efficient). Indonesia has failed to show how having more extractions of nickel ore could taint the use of the Philippines's nickel ore prices as a benchmark reflecting the prevailing market conditions in the market of provision, or how the EU offset in this case differences in comparative advantages between countries.

71. As regards the argument the EU used a distorted benchmark since the nickel ore export prices from the Philippines were affected by the GOID's interventions, even if Indonesia's export ban on nickel ore could have an impact on international prices of nickel ore, the use of the Philippines' export prices mostly to Chinese stainless steel producers using the same technology as IRNC Group was entirely appropriate. In this respect, the Philippines' export prices of nickel ore were not affected by the same financial contribution or subsidy found in the SSCR investigation.

72. As regards the argument that the EU failed to adjust the Philippines' export prices of nickel ore to take into account the effect of Indonesia's measures on the benchmark prices, those alleged effects, even assuming that existed, no interested party provided any quantification or indicated the amount of the adjustment to be made.

73. Lastly, the EU properly established the amount of subsidisation as regards the non-sampled cooperating exporting producers. The EU did not investigate BNM, as a non-sampled cooperating exporter, because its reply to the sampling form did not contain information about the company's activities and was not verified. The EU considered it appropriate to set the duty rate on the basis of the subsidy amount found for the only sampled exporter for which the EU found subsidisation above de minimis (i.e. the IRNC Group).

3.5. The provision of nickel ore for less than adequate remuneration was specific (alleged violation of Articles 1.2, 2.1 and 2.4 of the SCM Agreement)

74. The Commission provided a reasoned and reasonable conclusion that the provision of nickel ore for less than adequate remuneration was specific in accordance with Article 2.1(a) of the SCM Agreement. The EU explicitly found that there was a limitation on the access to the subsidy at issue, i.e. the provision of nickel ore for less than adequate remuneration. The GOID's set of measures were directed to benefit certain industries. That the buyers could keep the processed product internally or sell it domestically or abroad does not mean that the provision of such input to a limited group of enterprises or industries ceases to be specific. The EU carefully examined all the evidence available.

4. CLAIMS CONCERNING GOVERNMENTAL REVENUE FOREGONE

75. The EU properly concluded that the GOID's income tax holiday and the income tax allowance facility were specific subsidies, since the GOID's tax benefits were granted to certain enterprises or industries and were not based on objective eligibility criteria, according to Articles 1.2, 2.1 and 2.4 of the SCM Agreement. The phrase "certain enterprises" of the *chapeau* of the Article 2.1 of the SCM Agreement means that the relevant enterprises must be "known and particularized", but not necessarily "explicitly identified".

76. The income tax holiday scheme was granted to certain enterprises which were active in certain sectors, qualified as "pioneer industries". The income tax holiday scheme provides a financial contribution in the form of revenue forgone by the GOID, which conferred a benefit, that is equal to the tax saving, to the IRNC Group. The income tax holiday has all the features to be considered

de jure specific under Article 2.1(a) of the SCM Agreement, based on the limited scope created by Indonesia in MoF 150/2018. Limitative and discretionary criteria such as "conduct of activities in the pioneer industries" or "new investment with minimum value of one billion rupiahs" effectively limit the eligibility of the companies that can have access to the benefits from the income tax holiday scheme. The eligibility criteria for access to the income tax holiday, such as the size of the minimum value of investments to be made, are not analogous to the objective criteria described in the SCM Agreement. Furthermore, the fact that only a certain company from the IRNC Group could benefit from the scheme shows how subjective were those criteria.

77. The income tax allowance facility was also specific because it was granted to specific enterprises based on their business activities. Article 3 of MoF No 89 of 2015 refers to three criteria for eligibility for the income tax allowance scheme, which are (i) high investment value or for export, (ii) large absorption of workers and (iii) high local content. Those requirements cannot be considered as "neutral" in the sense of Article 2.1(b) of the SCM Agreement. It is left to the discretion of the granting authority to assess which investments can be recognised as a "high value" or have a "high" local content or export levels.

4.1. Alleged violations of Footnote 1 of the SCM Agreement as well as Articles 1.1(a)(1)(ii), 1.1(b), 1.2, 2.1(a), 2.2, 2.3, 2.4, 3.1(a) and 14 of the SCM Agreement, and as a consequence Articles 10 and 32.1 of the SCM Agreement, and Articles VI:3 and VI:4 of GATT 1994, as regards the determination that the import duty exemption scheme on raw materials to designated bonded zones constituted a countervailable subsidy

78. The EU properly examined the import duty exemption scheme granted to bonded zones and found that the granting of duty exemptions to the IRNC Group was in reality entirely at the discretion of the GOID. There was no system of control allowing to know the inputs incorporated into finished products and the GOID entirely relied on the self-declarations made by the IRNC Group. Under those circumstances, the EU decided to countervail the entire amount of import duties exempted as this was the amount of government revenue foregone or not collected. Finally, the subsidy scheme was undisputedly export contingent and, thus, *per se* specific in accordance with Article 2.3 of the SCM Agreement. In any event, the subsidy scheme was provided only to companies located in specific areas within Indonesia, designated as bonded zones.

79. Indonesia's claim that the EU violated Footnote 1 to Article 1.1(a)(ii) of the SCM Agreement should be rejected since the EU properly examined all the evidence on file to come to the reasoned and reasonable conclusion that the import duty exemption scheme granted to bonded zones was not covered by Footnote 1 of the SCM Agreement, which must be read in accordance with Annexes I to III.

80. There was no system of control allowing to know the inputs incorporated into finished products and the GOID entirely relied on the self-declarations made by the IRNC Group. Such a scheme did not fall under Footnote 1 of the SCM Agreement.

81. Since the EU determined that the entire sum of exempted import duties on raw materials constituted a financial contribution to the IRNC Group in the form of government revenue foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement, the EU made no error when considering the benefit amount as the entire amount of import duties exempted rather than only an hypothetical (and by all means unmeasurable) excess amount.

82. The EU properly found that the import duty exemption scheme granted to bonded zones is specific because it is available only to certain companies depending on their export performance - more than 50 % of total yearly production must be exported outside of Indonesia according to Article 31 of MOF Regulation No. 131/2018 - and location in specific geographic areas - companies recognised as bonded zones - within the jurisdiction of the granting authority.

5. CLAIMS CONCERNING PROCEDURAL VIOLATIONS DURING THE INVESTIGATION

5.1. Alleged violation of Articles 10 and 12 of the SCM Agreement by requiring the GOID to conduct part of the SSCR investigation on behalf of the EU

83. Article 12.9 of the SCM Agreement includes a mandatory list of interested parties and a residual clause, which leaves the investigating authority a wide discretion as to which other entities would be granted the status of "interested party". To support its argument of a mandatory application of the residual clause, Indonesia refers to case law, which requires any de facto involvement of a party to reflect back on the mindset of the investigating authority "allowing" that party to become an "interested party". According to the Appellate Body, this is a requirement for the residual clause of Article 12.9 of the SCM Agreement to be fulfilled. However, Indonesia at no stage of their written submissions argued let alone substantiated such a mindset of the European Commission in the present case. Their late submission in answering the questions of the Panel after the second substantial hearing comes late and violates the principle of equality of arms.

84. Further to this, as noted by the panel in *Mexico – Olive Oil*, it is left to the investigation authority's discretion to consider such other parties "interested parties". It was within the discretion of the Commission not to consider the nickel ore mining companies as interested parties. Since the Commission did not consider them as interested parties, it follows that the rights and obligations assigned to interested parties in the SCM Agreement did not apply either.

85. If Indonesia's interpretation is upheld by the Panel, parties with only remote interests in the matter would be assigned time, procedural rights and access to information without good justification adding to the burden of an investigation, which seeks to conclude swiftly and efficiently. Potentially or very remotely affected parties therefore should not be accepted as "interested parties".

86. Indonesia also seems to seek support for its assumption that the Commission should have treated the nickel ore mining companies as interested parties from the fact that the Appendix B constituted a "questionnaire" in the sense of Appellate Body Report, *EC – Fasteners (China) (DS397)*, para. 623. At no time did the Appellate Body discern from a substantial information request the procedural rights of an "interested party".

87. Second, Indonesia's claim that the Commission improperly forced the GOID to discharge the notification obligation in Article 12.1 of the SCM Agreement is ineffective as there was no obligation on the side of the Commission to consider the nickel ore companies as "interested parties". The EU considered that requesting the GOID to collect the information on the EU's behalf was more effective than addressing the communications directly to the Indonesian mining companies. Companies may be more inclined to provide information if the request comes from its government as opposed to the government of a third country. Under general principles of good faith and cooperation between country governments, the EU's request to the GOID to convey some forms to be filled in by the nickel ore mining companies was entirely reasonable and not contrary to the SCM Agreement.

88. Indonesia's claim that there could not be a justification under Article 12.1 of the SCM Agreement on the ground of "administrative convenience" is also ineffective. The case law quoted by Indonesia does not apply, because the stakeholders notified through the GOID were not "interested parties". The EU fails to see any obstacle in the SCM Agreement permitting the investigating authority to seek collaboration from the government of the exporting country.

89. Third, there is no violation of Articles 10 and 12 of the SCM Agreement. The EU did not request the GOID to conduct part of its investigation. It merely requested the exporting country to forward the relevant questionnaires to certain Indonesian actors. The Commission was in its right to consider the most effective way of gathering all necessary information, in this case via the GOID. The information was either in the possession of the GOID, such as the RKABs of the mining companies, or could be obtained by the GOID, e.g. information from Antam, a State-owned company, including data on total consumption of nickel ore in Indonesia.

5.2. Alleged unjustified resort to facts available and incorrect selection of replacement facts under Article 12.7 of the SCM Agreement

90. In the Contested AS Regulation, the Commission concluded that the absence of sufficient cooperation by the GOID allowed the Commission to collect all the information it considered relevant for its findings in the SSCR investigation, including facts available.

91. At the outset, Indonesia presents a misguided view as to the role and scope of facts available in an anti-subsidy investigation. Article 12.7 of the SCM Agreement does not punish non-cooperating parties by choosing adverse facts for that purpose. Rather it allows to replace missing "necessary information", with a view to arriving at an accurate determination. This provision permits investigating authorities to fill gaps of information to complete an investigation.

92. As regards nickel ore mining companies, Indonesia's claim rests on an improper understanding of what the Commission did in the case at present. The application of facts available in accordance with Article 12.7 of the SCM Agreement was only made with respect to the GOID's lack of cooperation in providing the requested necessary information about the nickel ore market in the context of determining whether the GOID provided nickel ore for less than adequate remuneration. Since the nickel ore mining companies were not an "interested party" in the SSCR investigation, the Commission did not apply Article 12.7 of the SCM Agreement to the nickel ore mining companies. The Commission applied facts available in the sense of Article 12.7 of the SCM Agreement only with respect to the GOID, the GOC and the IRNC Group.

93. As regards the GOID, Indonesia's claim is again based on a misunderstanding of what the Commission did in the SSCR investigation. Recitals (353) and (377) of the Contested AS Regulation do not show that the Commission attributed the lack of cooperation of the nickel ore mining companies to the GOID. Those recitals only state an undisputed fact: that the mining companies did not cooperate in the investigation since they did not provide the information requested. The Commission had to apply facts available with regard to the information requested from the GOID. In view of the fact that the GOID either entirely failed to provide such information or contradicted itself between what it declared in the questionnaire reply and deficiency letter reply and what it explained at the RCC.

94. Indonesia maintains that, even if the GOID were responsible for providing certain information, this information would not have been "necessary" for the Commission to make its determination(s). All "necessary" information that was held/possessed by the GOID would have indeed been duly provided to the Commission and "within a reasonable period". Indonesia raises this point with regard to two issues: the provision of nickel ore for less than adequate remuneration (a) and the cooperation between the GOID and the GOC (b).

95. On (a), none of Indonesia's arguments are capable of putting into question the EU's conclusion that the GOID did not cooperate to its best availability as regards the provision of nickel ore for less than adequate remuneration.

96. The Commission has the legal obligation to complete the investigation within the statutory deadline. Appendix B of Antam was submitted only on 8 December 2021, after the deadline extension and in reply to the Commission's Article 28 Letter to the GOID, informing of its intention to apply facts available. The BC forms were submitted by the GOID far beyond what could have been considered a "reasonable period" at that stage of the proceeding - at the end of the 10th month of investigation -. A request for information on the shareholding structure of the nickel producers cannot be answered with a website link. GAG Nikel indeed provided the RKABs (only in Bahasa) in response to the Article 28 Letter, without prior warning and after the deadline for the submission of the information had expired. The GOID failed to provide actual feasibility studies and avoided to engage in discussions concerning how the production targets were set for each company. Indonesia did have the information as regards total consumption and consumption absorbed by the stainless steel industry, since the quarterly reports submitted by nickel companies required even the indication of nickel sales on a transaction by transaction basis(seerecital (325) of the Contested AS Regulation). The fact that the GOID did not provide any information on PT Vale - the country's biggest producer of nickel ore - casts a shadow on the accuracy and completeness of the data provided. The translation requirement was neither

unreasonable nor were the omissions minor as to not impede the investigation. According to the case law, it is important that translations be provided whenever requested.

97. On (b), the EU recalls that the conclusion that the Commission had to rely on facts available on certain matters concerning the bilateral cooperation between the GOID and the GOC was based on the shortcomings from the two governments.

98. The GOID failed to provide:

- The cooperation agreement between BDI and SDI (Group): according to the information available to the Commission, it sets out to jointly establish IMIP and the subsequent development of the Morowali Industrial Park and the GOID confirmed the existence of this document during its RCC.

- The list of priority projects selected under the "Indonesia–China Program". The EU fails to see how there could have been any doubt as to which "Indonesia-China-Program" would have been addressed by the Commission and, in any event, the Commission quite specifically quoted from the "Indonesia-China Five-Year Development Program for Economic and Trade Cooperation".

- Documentation regarding the Indonesian KIT team: it is inconceivable for the EU that an entity created by *Decree No 432/M-IND/KEP/7/2014* would not, sometime after, have produced any documentation at all.

99. As regards the IRNC Group, in the absence of any reply from the Chinese parent companies as well as from the GOC, the Commission had to rely partially on facts available for its findings concerning these shareholder loans.

100. In the context where the exporter was aware of the subsidy allegations arising from the bilateral cooperation between the GOID and the GOC (including the potential allocation of benefits received from the Chinese parent companies to the IRNC Group's activities in Indonesia), the Commission had to examine the information in Sections A and E of the exporter's questionnaire.

101. While it is true that the Commission did not request the agreement to IRNC, it was requested to IMIP and the GOID. The Commission also did not apply facts available to IRNC Group in so far as it did not receive the said agreement.

102. Due to the lack of cooperation on the shareholder loans, the Commission was unable to identify the actual source of financing and substantiate in detail through which means such a financial contribution was made.

103. The EU also reasonably selected the facts replacing the missing information, having regard to all facts that were properly before the Commission as well as the procedural circumstances in which the information is missing.

104. The EU's estimate that the share of State-owned nickel ore mining companies in Indonesia was more than 27% constituted the "best information available" in the specific circumstances of the SSCR investigation. The feasibility studies were requested because during the RCC the GOID explained their role for the RKABs. Clearly, the GOID was in possession of the feasibility studies, so it did not need to request other entities to obtain them, but refused to provide them. Since investigating authorities are entitled to take into account the "procedural circumstances in which the information is missing", the Commission properly concluded that the GOID's refusal to provide those studies showed that the mining companies' core characteristics and functions were to provide nickel ore in line with the government objective to support the downstream stainless steel industry (as opposed to exploiting the natural resources under market rules and conditions). The same should be concluded as regards the missing information regarding the KIT team in Indonesia, which the GOID refused to provide.

105. Finally, the EU would like to underline, that the concept of inference is distinguished from mere speculation in that it concludes on the basis of facts. This analysis is not structurally

different from the evaluation of evidence which does not always represent only one piece of reality, but requires interpretation. In the present case the EU made all its inferences on the basis facts and in line with the case law of the WTO Panels and Appellate Body.

5.3. Alleged violation of Article 12.8 (first sentence) of the SCM Agreement, by failing to disclose all essential facts under consideration, and of Article 12.8 (second sentence) and Article 12.1 of the SCM Agreement, by failing to disclose essential facts in sufficient time, which prevented parties/Members from defending their interests

106. The Commission fully disclosed all essential facts which were under its consideration in the SSCR investigation, and which formed the basis for its decision to impose countervailing duties. The Commission provided interested parties/GOID sufficient time to adequately defend their interests. However, time constraints are imposed on the Commission to conclude the investigation through statutory deadlines. During the entire investigation, including after the final disclosure, all interested parties had ample opportunities to present their views and evidence in writing.

107. First, the disclosure of the essential facts in the SSCR investigation was indeed timely and gave sufficient time to all interested parties to defend their interests. In any event, Indonesia fails to substantiate why this defence was indeed hampered due to time constraint.

108. Second, whilst investigating authorities are required to make available, through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities (Article 22.3 of the SCM Agreement), investigating authorities are not required to disclose all reasoning underpinning their determinations in the disclosure.

109. Regarding the provision of nickel ore for less than adequate remuneration, none of Indonesia's arguments shows any breach of Article 12.8 of the SCM Agreement as regards the Commission's determination:

- With respect to its determination that nickel ore mining companies were allegedly "owned" or "controlled" by the GOID, the Commission did fully and coherently disclose the information it applied to the assessment of State ownership.

- As to the various conclusions reached on the issue of nickel ore, through the use of facts available, the EU considers that it properly disclosed the essential facts under Article 12.8 of the SCM Agreement . It also disclosed the source, in particular "the annual reports" of the companies.

- With respect to its resort to facts available against the nickel ore mining companies, the volumes reported by the GOID did not correspond to the information provided by the IRNC Group, which left doubts as to the veracity of the information submitted by the GOID with regard to the consumption of nickel ore.

- With respect to the out-of-country nickel ore prices employed to determine the alleged benefit received by Indonesian SSCR producers, the disclosure includes a statement explaining that "[d]etailed daily prices are available in the attached document 'Nickel ore and chromium benchmark'". There was no requirement to disclose the Commission's conclusion as to why an adjustment was unnecessary.

110. The Commission addressed the argument of provision of land for less than adequate remuneration in recitals (850) to (860) of the Contested AS Regulation. The GOID may disagreed with the factual assessment, but the Commission rebutted those arguments in the Contested AS Regulation. This does not show that the Commission failed to disclose any essential fact.

111. Regarding preferential financing, the EU notes that in recitals (659) – (660) of the final disclosure document the Commission disclosed how the benefit as regards the equity injection provided by the CAF was calculated and that in recital (661) of the final disclosure document, the Commission explained that as regards "the provision of equipment at preferential terms, the

benefit was calculated as the difference between the purchase price paid by the companies in the IRNC Group and a market price for comparable equipment purchases".

112. Regarding injury of domestic prices, the EU refers to recital (765) of the final disclosure document, where the Commission explained how Indian and Indonesian imports of SSCR were competing also with the Union like product, and SSCR was sold to similar categories of customers.

5.4. Alleged violation of Article 22.3 of the SCM Agreement by failing to provide sufficient detail of the determinations in the Contested AS Regulation

113. Article 22.3 requires Members to address only those issues which are "*considered material by the investigating authorities*". First, the Contested AS Regulation provided sufficient details within the meaning of Article 22.3 of the SCM Agreement with respect to the Commission's decision to allegedly require Indonesia to conduct part of the CVD investigation on behalf of the Commission. Matters of organisation of the investigation do not belong in the Contested AS Regulation as they have no bearing on the substantive determination and, they are not "material" within the meaning of Article 22.3 of the SCM Agreement.

114. Second, the Contested AS Regulation provided sufficient details within the meaning of Article 22.3 of the SCM Agreement with respect to the Commission's determination regarding provision of nickel ore for less than adequate remuneration.

115. To recall, the finding was based on the information on file including information coming from the Commission's own research due to the extensive non-cooperation by the GOID.

- On the allegation that the Commission allegedly did not clarify what it meant by "State-owned", "State ownership" is a common, self-explanatory concept and it is clear from its First Written Submission and the GOID's response to the questionnaire that Indonesia had no problem in understanding what the Commission meant by "State-owned".

- The Commission's determination that "*the share of the State-owned companies in the total production in 2020 was more than 27%*", is a matter substance that can only be reviewed under the applicable substantive rules not capable of violating Article 22.3 SCM Agreement.

- On the allegation that the factual bases regarding the Commission's findings on the alleged "*management and control*" structure of nickel ore mining companies is missing, the EU refers to recitals (390) and (391) of the Contested AS Regulation and, in any case, Indonesia merely questions whether the evidentiary base was sufficient to justify the determination, which is a substantive matter, not capable of violating Article 22.3 of the SCM Agreement.

- On the allegation that the Commission did not provide a source of its finding that the shareholder of PT Tonia Mitra Sejahtera, one of the companies mentioned by the GOID, was the Indonesian Ministry of Trade, the EU refers to Exhibit IDN-88a (BCI) and, again, whether or not such finding is backed by evidence is a substantive matter, not capable of violating Article 22.3 of the SCM Agreement.

- Concerning the Commission's finding that there are links between PT GAG Nikel's Board of Commissioners and Board of Directors, on the one hand, and Indonesia on the other: had the publicly available evidence being incorrect, the GOID had multiple opportunities to rebut the Commission's understanding, which t did not. Again, it is not a matter capable of violating Article 22.3 of the SCM Agreement

- Concerning the finding that three out of ten Commissioners of PT Vale's Board of Commissioners were somehow related to the GOID: even if the website may have been removed by the company in the meantime, the source of the information remains clear and valid.

- Whether the members of the board appointed by GOID were in fact not acting independently, is a substantive matter, not capable of violating Article 22.3 of the SCM Agreement.

116. Third, the Contested AS Regulation provided sufficient details within the meaning of Article 22.3 of the SCM Agreement with respect to the Commission's determination regarding alleged cooperation between Indonesia and the GOC. Since the list of priority projects was never provided, the Commission used facts available.

117. Fourth, the Contested AS Regulation provided sufficient details within the meaning of Article 22.3 of the SCM Agreement with respect to the Commission's determination regarding preferential financing.

118. Indonesia submits that the Commission failed to provide details or explanations with respect to an alleged equity injection by the China-ASEAN Cooperation Fund (CAF). However, the interested parties and the public at large could understand perfectly well how the relevant benefit was calculated by the Commission. In its calculation the Commission used all the relevant available transactions from the recent past, regardless of which types of shares were being traded. More detailed information was unavailable and any challenge to this methodology is a substantive rather, not capable of violating Article 22.3 of the SCM Agreement.

119. Indonesia submits that the Commission would not have provided an explanation or rationale as to why it selected the 11 sales transactions (spread over a period of *13 years*) that were used by it in the determination oto determine the alleged benefit arising from the CAF equity injection. However, pursuant to recital (797) of the Contested AS Regulation, to establish the benefit, "similar transactions in the steel industry in the last years" were used.

120. Fifth, the Contested AS Regulation provided sufficient details within the meaning of Article 22.3 of the SCM Agreement with respect to the Commission's determination regarding government revenue foregone or that was not collected but due. The Commission properly explained in the Contested AS Regulation why the import duty exemption scheme for bonded zones was discretionary in nature and, hence, it was appropriate to countervail the totality of the import duties exempted as government revenue foregone or not collected. In any event, Article 22.3 is a procedural provision that does not discipline the substantive adequacy of an investigating authority's reasoning.

121. With respect to the income tax holiday, the Contested AS Regulation allowed for "full understanding of the reasons for the imposition of measures". The EU considers its conclusion on financial contribution, and specificity, in the context of the alleged income tax allowance facility fully complete, coherent and understandable. Again, that Indonesia disagrees with the EU's determination on a particular issue cannot show a violation of Article 22.3 of the SCM Agreement.

6. CLAIMS CONCERNING THE ANTI-DUMPING DETERMINATION: ALLEGED VIOLATIONS OF ARTICLES 2.4 AND 6.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1 OF THE GATT 1994 WHEN FAILING TO MAKE A FAIR COMPARISON BETWEEN THE NORMAL VALUE AND THE EXPORT PRICE

122. Indonesia's claims are based on an erroneous interpretation of the relevant provisions of the Anti-Dumping Agreement ('ADA') and mischaracterisation of the facts on the record. Article 2.4 ADA requires investigating authorities to ensure a fair comparison between the export price and the normal value "*at the same level of trade*". In order for comparison to be fairs export price and normal value must be adjusted to: (a) net them back to the same level of trade (second sentence of Article 2.4); and (b) make allowances for differences affecting price comparability (second sentence of Article 2.4). An objective review of the determination of the Commission reveals that the EU correctly interpreted and applied Article 2.4 ADA when making adjustments to the export price and to the normal value to: (a) net them back to the ex-works/ex-factory level of trade; (b) make allowances for elements affecting price comparability and refusing adjustments for elements that were not claimed nor shown to have such effects.

6.1. Alleged violation of Article 2.4 of the Anti-Dumping Agreement and the cassette of Article VI:1 of the GATT 1994 because the Commission deducted certain transport-related and storage expenses only from the export price but not from the normal value

123. The Commission correctly compared the export price and the normal value at the same level of trade (ex-factory) removing elements affecting price comparability which do not belong at that level and maintaining those which do. Contrary to the initial claim the EU demonstrated that the Commission did not compare ex-works export price to ex-warehouse normal value. Indonesia essentially conceded that the comparison was made between ex-works normal value and ex-works export price, as both values were established at the gate of a warehouse either owned (Morowali) or rented (Surabaya) by IRNC. Indonesia's subsequent argument that comparison between ex-works prices at the warehouses was not at the same level of trade was demonstrated by the EU to confuse the level of trade with location. Article 2.4 ADA requires the comparison to be made at the same level of trade not at the same location.

124. Finally, IRNC was invited to demonstrate that the warehousing in Surabaya (and the related transfer costs) had an impact on price comparison. IRNC failed to do so. Such approach of the Commission cannot be said to have "*compromised the fairness of the comparison*" or did not act in "*an unbiased and even-handed manner*".

6.2. Alleged violation of Article 2.4 of the Anti-Dumping Agreement and the last sentence of Article VI:1 of the GATT 1994 because the Commission deducted SG&A expenses and a notional profit only from the export price for export sales through related traders while it did not deduct such SG&A expenses and notional profit when domestic sales were made through related traders

125. The Commission correctly adjusted the export price for commissions, a price element that was found to exist in the export sales channel. A similar price element was not claimed to exist in the domestic sales channel.

126. Contrary to the claim, by demonstrating, based on evidence, that the traders in question performed functions similar to those of an agent working on commission basis and that they were renumerated for this by a mark-up, the investigating authority did demonstrate that the commission paid on the export sales resulted in a difference which affects price comparability.

127. Under Article 2.4 of the Anti-Dumping Agreement, it was for the Indonesian interested parties in the investigation to make and substantiate their claim that no adjustments were warranted or that a similar adjustment should be made to the normal value side. Whilst being fully informed of the elements which the Commission took into consideration in its analysis of the relationship between the producer and the related traders on the export side, IRNC did not claim that a similar relationship is present between the producer and the traders on the domestic side. It is clear from the facts of the case that no proper claim for the adjustment of the normal value for commissions was made by IRNC at any stage of the investigation.

6.3. Alleged violation of Articles 2.4 and 6.1 of the Anti-Dumping Agreement because the Commission did not indicate what information was necessary to ensure a fair comparison

128. The additional final disclosure was part of the dialogue which explained clearly which elements were used for the adjustment for commission and which facts were relevant. It gave IRNC "*a meaningful opportunity to request adjustments in the light of the information shared by the investigating authority towards the end of that dialogue*" within the meaning of Appellate Body in *EC – Fasteners (China)*.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

1. Argentina refers to one of the core issues brought before the Panel which is whether a financial contribution of one WTO Member can be attributed to another WTO Member. This is a matter of very important systemic implications.

2. Financial contribution is a central element for a determination of the existence of a subsidy under the Subsidies and Countervailing Measures Agreement (SCM Agreement). It is also the core of the case at hand, because attributing the financial support provided by the Government of China (GOC) to the Government of Indonesia (GOID) was a necessary step in the analytical framework implemented by the investigating authority to ultimately attribute the subsidies determined under Article 1.1 of the SCM Agreement to the GOID.

3. The first paragraph of Article 31 of the Vienna Convention on the Laws of Treaties (Vienna Convention) represents a useful interpretative tool to shed light on the scope of Article 1.1(a)(1) of the ASCM, which, in accordance of the rules of interpretation of the former should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

4. Argentina considers that the text of Article 1.1(a)(1) is clear and unequivocal and consists of the following three elements: there must be: 1) a *financial contribution*, made by 2) a *government or public body*, and that financial contribution must occur, 3*) within the territory of a Member*. While all subparagraphs i) to iv) further elaborate on the forms a financial contribution may take, subparagraph iv) adds yet another entity, a *private body*, to which the granting of a financial contribution can be attributed provided it acted on behalf of a government.

5. Pursuant to an interpretation based on the rules of interpretation of the Vienna Convention and previous WTO case law, Argentina agrees with previous determinations that have characterized Article 1.1(a)(1) of the SCM Agreement as "exhaustive" and concluded that it establishes a "closed list" of transactions when referring to financial contributions.

6. While Argentina concurs with the European Union (EU) on delimiting the scope of the examination of the Panel to financial contribution, not subsidies, Argentina fundamentally disagrees on the proposal that logical reason should inform the type of inquiry to be conducted by the Panel. Instead, a complete analysis of every word contained in the article is required according to the Vienna Convention.

7. Article 1.1(a)(1) is silent about the possibility of financial contributions by one public entity or government taking place in the territory of another Member, and even when as the EU claims, the article does not expressly prohibit this possibility[1], the ordinary meaning of the text does not seem to allow for a stretch so far as to create new scenarios of applicability.

8. Following the same analytical methodology, Argentina considers that the entities to which said Article refers should be narrowly interpreted under the light of the phrase "*within the territory of a Member*". The EU recognizes that the terms "within the territory of a Member" establish that public entities located in the territory of the government are part of the term "government". Argentina considers that such a definition leaves out public entities located outside the territory of a Member.

9. The phrase "(…) within the territory of a Member" in Article 1.1(a)(1) is not trivial. It expresses the will of negotiators to refer to the scope of a government authority, in particular, in territorial terms. In Argentina's opinion, the interpretation of government in the "narrow sense", as mentioned above, does not allow considering other governments but only the one exercising authority within its borders. Moreover, in light of the chapeau of Article 1.1(a)(1), the term government could be both in its generic or more specific version: government or public body, respectively.

[1] *Id.*

10. Argentina considers that due account must be taken that there are other cases in which WTO provisions allude to specific relationships between Members or cross-border effects, and those are expressly established. That is the case of core provisions such as Article XXIV of the GATT Agreement or more procedural ones such as Article 6.7 of the Anti-Dumping Agreement and Article 31bis of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

11. Argentina also considers that Article 1.1(a)(1) is a self-sufficient provision and that should be interpreted without referring to other sources of law.

12. Argentina is of the opinion that Article 11 of the Draft Articles of Responsibility of States for Internationally Wrongful Acts is a strict and unique provision that requires certain actions of a State in order to assume responsibility, namely: the acknowledgment and the adoption of the given conduct, which are not present in this case. These two elements leave little room to subjective or creative interpretations, in particular, in sensitive situations such as determining whether a government could be responsible for actions of another government. Where the acknowledgment and adoption of any conduct is in doubt, then the strict and clear purpose of Article 11 of the ILC is blurred and its invocation could be misleading.

13. This case entails a relevant discussion of systemic implications. The Panel shall decide whether, according to Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures, there can be situations where the financial contribution of one WTO Member can be attributed to another WTO Member. The answer to that question – either positive or negative – may undoubtedly have a considerable impact on the proper working of the multilateral trading system, the effectiveness of its rules and legal devices to address potentially non-traditional distortive practices, and the conditions for Foreign Direct Investment, an important tool for development in developing and least developing countries alike.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. Systemic implications

1. This dispute raises issues of fundamental importance to the effective functioning of the rules-based multilateral trading system. The object and purpose of the SCM Agreement is to discipline subsidies which distort international trade.[1] In Australia's view, an interpretation which constrains Members' ability to use the SCM Agreement to properly address trade-distortive subsidies risks undermining the credibility of the rules-based trading system. The Panel should therefore be careful to avoid endorsing any interpretation of the SCM Agreement which unduly reduces the ability of WTO Members to discipline these types of arrangements.

II. Attribution

A. The Task Before the Panel

2. The task of the Panel is to assess whether the Commission's conclusions were 'reasoned and adequate' in light of the evidence on the record.[2] The Panel's role is not to undertake a *de novo* review, and neither should it defer to the conclusions of an investigating authority.[3] In the event that the Panel takes the view that the Commission did *not* meet that standard in this case, the Panel need not delineate a general test or threshold that would need to have been met in order for attribution to have been permissible under the SCM Agreement.

3. In making its findings on the issue of attribution, the Panel should not foreclose an interpretation of the SCM Agreement that would allow for attribution, if doing so would provide a pathway for the circumvention of the WTO subsidy rules. Australia recalls that the SCM Agreement expressly contemplates the risk that its disciplines may be circumvented through various funding arrangements. The anti-circumvention elements of the subsidy definition are broadly framed to encompass a wide range of actions and conduct that may be attributed to a WTO Member. Australia also emphasises that the SCM Agreement does not contain an exhaustive list of the factual circumstances that will justify the attribution of conduct to a WTO Member.

4. Equally, the Panel should ensure its findings do not result in undue expansion of WTO subsidy rules in a way that would impact the ability of WTO Members to attract investment, including through the use of regular, commonplace funding arrangements. The Panel's focus should remain on the specific bilateral arrangements at issue in this dispute, and whether the Commission's conclusions were 'reasoned and adequate'.

5. As to whether attribution must be assessed at the level of each financial contribution,[4] Australia refers to guidance from the Appellate Body in relation to attribution in the 'public body' context.[5] While these findings on attribution were made in a different context, Australia considers that they support a conclusion that, for the purposes of Article 1.1(a)(1) of the SCM Agreement, it is not always necessary to conduct an attribution analysis at the level of each financial contribution in question. That is, there are circumstances where an investigating authority can properly conduct its attribution analysis at a 'global' level.[6]

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[1] Panel Report, *Brazil – Aircraft*, para. 7.26.
[2] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[3] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[4] See the Panel's questions to third parties – question no. 11.
[5] Appellate Body report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para 5.100. See also Australia's response to the Panel's questions to third parties – question no. 11.
[6] See also Australia's response to the Panel's questions to third parties – question no. 11.

B. The Relevance of Article 11 of the ILC Articles

6. Australia observes that while ILC Articles are not themselves binding, the principles they embody largely reflect customary international law.[7] WTO panels and the Appellate Body have long cited and relied on the ILC Articles in their interpretation of WTO law. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* confirmed that 'if … certain ILC Articles have been "cited as containing similar provisions to those in certain areas of the WTO Agreement" or "cited by way of contrast with the provisions of the WTO Agreement", this evinces that these ILC Articles have been "taken into account" in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases'.

7. The Appellate Body has found the requirement that a rule of international law be 'relevant' to concern the 'subject matter of the provision at issue'.[8] Where there is no conflict or inconsistency, or where the SCM Agreement does not otherwise seek to preclude the application of customary rules of international law, Article 11 of the ILC Articles could be considered to be a relevant rule for the purposes of Article 31.3(c) of the Vienna Convention which can be taken into account, together with the context, in the interpretation of the words 'by a government' in Article 1.1(a)(1). Australia reiterates, however, the task of the Panel remains to interpret the treaty terms in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose.[9]

C. Attribution and Article 2.1 of the SCM Agreement

8. Australia recalls that the WTO Appellate Body in *US – Countervailing Measures (China)* confirmed that an investigating authority's determination under Article 1.1 as to the existence of a subsidy 'will inform' the assessment of whether such subsidy is specific to certain enterprises within the jurisdiction of the granting authority.[10]

9. In this dispute, the Commission's inquiries resulted in a determination that the relevant financial contributions were provided by a 'government' – specifically, the GOID. Australia considers it is reasonable that the Commission's assessment that the GOID was the 'government' providing financial contributions for the purposes of Article 1.1 informed its identification of the 'jurisdiction of the granting authority' for the purposes of the specificity analysis. In Australia's view, any other approach would lead to an illogical result.[11]

D. Attribution and Article 18 of the SCM Agreement

10. Australia agrees with the EU's view that, in cases where a financial contribution is attributable to the exporting WTO Member, and a benefit is conferred, that Member is capable of agreeing to eliminate or limit the subsidy (even if the relevant financial contribution comes from a different WTO Member) for the purposes of Article 18 of the SCM Agreement.[12]

11. Australia considers that if a financial contribution provided by another Member is properly attributable to the exporting Member (as the EU argues in this dispute), it is logical to conclude that the exporting Member would be capable of deciding to no longer receive the relevant financial contribution, or limit the amount received. This means, by extension, that it would be capable of eliminating or limiting the subsidy for the purposes of Article 18 of the SCM Agreement.[13]

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[7] See Australia's response to the Panel's questions to third parties – question no. 4; Australia's written submissions, paras. 22 and 23.

[8] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 846. See also Australia's response to the Panel's questions to third parties – question no. 5; Australia's written submissions, para. 26.

[9] Vienna Convention, Article 31(1).

[10] Appellate Body report, *US – Countervailing Measures (China)*, para. 4.167.

[11] See also Australia's response to the Panel's questions to third parties – question no. 13.

[12] European Union's first written submission, para. 79.

[13] See also Australia's response to the Panel's questions to third parties – question no. 2.

III. Specificity

12. Where a good has been provided for less than adequate remuneration, specificity may be evident from the 'inherent characteristics' of the relevant good. Australia recalls that the Panel in *US – Softwood Lumber IV* provided helpful examples of when the provision of natural resources for less than adequate remuneration would and would not be considered a 'specific' subsidy.[14] It first clarified that '[we] do not consider that… any provision of a good in the form of a natural resource automatically would be specific'.[15] It then distinguished between different types of natural resources, remarking that goods such as oil, gas and water 'may be used by an indefinite number of industries', while the 'inherent characteristics' of standing timber 'limit its possible use to "certain enterprises" only'.[16] The relevant question is therefore, in Australia's view, whether a relevant natural resource may be used by an 'indefinite number of industries', or whether its use is limited to 'certain enterprises' only. Australia considers that it is difficult to see how the natural resource at issue in this dispute, nickel ore, could be used by an 'indefinite number of industries'.

IV. Notice requirements

13. In Australia's view, Article 12.1 of the SCM Agreement does not define the 'means of communication' which must be used by an investigating authority, and nor does it preclude the investigating authority from choosing a manner of delivery that imposes less of an administrative burden than direct delivery.[17] Members have 'considerable discretion' under Article 12 to 'define their own procedures'.[18]

[14] Panel Report, *US – Softwood Lumber IV*, para. 7.116.
[15] Panel Report, *US – Softwood Lumber IV*, para. 7.116.
[16] Panel Report, *US – Softwood Lumber IV*, para. 7.116.
[17] See also Australia's response to the Panel's questions to third parties – question no. 28; Australia's written submissions, paras. 30 to 33; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.231.
[18] Panel Report, *Mexico – Olive Oil*, fn. 63.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. FINANCIAL CONTRIBUTIONS BY ENTITIES IN CHINA

1. In the determination underlying this dispute, the European Commission found that Indonesia and China entered into an extensive framework of bilateral cooperation agreements designed to encourage Chinese investment in Indonesia's stainless steel industry, which included the provision of preferential financing to Indonesian stainless steel exporters by Chinese state-owned banks.[1] Canada is concerned that these types of bilateral cooperation arrangements are having trade-distortive effects that are challenging for Members to address under the disciplines of the SCM Agreement.

2. However, Canada recalls that the Panel's role under Article 3.7 of the Dispute Settlement Understanding is to assist the parties in securing a positive solution to their dispute, and not to address every legal claim.[2] Neither is the Panel's task in this dispute to resolve the question of whether it is possible in any circumstance to countervail subsidies provided by the government of a country other than the country of export of the subsidized goods.

3. In the context of this dispute, the first question that the Panel must answer is whether the expression "by a government" in Article 1.1(a)(1) of the SCM Agreement permits the attribution of the conduct of the Chinese banks to the Indonesian government. If this is not a permissible interpretation, there is no need for further analysis regarding financial contributions. As a result, the Panel does not need to determine if there was a benefit to the recipient, if the subsidy is specific, or which State is the "granting authority".

II. PROVISION OF NICKEL ORE FOR LESS THAN ADEQUATE REMUNERATION BY INDONESIAN PUBLIC BODIES

4. Indonesia argues that, in order for nickel ore mining producers to be considered "public bodies," there must be evidence of government ownership and control, as well as a specific regulation instructing them to carry out governmental functions. Canada disagrees with this claim.

5. The Appellate Body defines a public body as "an entity that possesses, exercises or is vested with governmental authority".[3] The focus is, therefore, not on government ownership or control over the entity but on "whether an entity is vested with authority to exercise governmental functions".[4] Government ownership and control of the relevant companies can be helpful evidence, albeit not determinative.

6. It is well-established that there are different ways in which a government can vest an entity with governmental authority, and different types of evidence can be relevant in this determination.[5] A formal legal instrument or other informal methods of control can meet the evidentiary standard.

7. When conducting a public body inquiry, the investigating authority must consider all relevant characteristics of the entity and avoid focusing on a single characteristic without considering others.[6]

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[1] 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 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 ("Countervailing Duty Determination"), **Exhibit IDN-1**, paras. 560-594.

[2] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China*), para. 317.

[4] Ibid, para. 318 (emphasis original).

[5] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10. See also, Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[6] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. See also, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20 and Appellate Body Report, *US – Countervailing Measures (China)*, para. 5.96.

The core features of the entity and its relationship with the government should be assessed. The legal and regulatory framework within which the entities operate can inform the analysis.

8. Indonesia argues that the determination of whether an entity or entities is acting as a public body requires a case-by-case determination, and that this necessitates an individual assessment of each entity. Canada disagrees with this interpretation. The Appellate Body does not prescribe a specific method for conducting a public body analysis but emphasizes the need to consider various organizational characteristics. Members have flexibility in conducting countervailing duty investigations as long as the determination provides a reasoned and adequate explanation. In this context, Canada notes that the Appellate Body upheld the USDOC's determination that Chinese state-owned banks were public bodies, which was based on an analysis of the entire sector and not the relationship between the government and each individual bank.[7]

9. Canada agrees that the public body analysis depends on specific facts and evidence. There are different ways in which entities can be vested with governmental authority, and the same evidence may apply to similarly situated entities. If the investigating authority demonstrates with positive evidence that the factual situation is the same for different entities, an entity-specific examination may not be necessary. Where more than one entity is subject to the same regulatory framework, it would be relevant to examine that framework, its impact on the nature of the entities concerned and their relationship with the government in the narrow sense. It remains incumbent on the investigating authority to establish, considering the regulatory framework amongst other elements of evidence, that the entities concerned possess, exercise or are vested with governmental authority.

10. Canada notes that a finding that an entity is a "public body" could be based solely on the domestic regulatory framework of a Member, even if such an entity is wholly privately-owned. The fact that an entity is wholly privately-owned does not prevent a government from vesting it with governmental authority.

III. THE RELATIONSHIP BETWEEN GOVERNMENT REGULATORY ACTION AND ENTRUSTMENT AND DIRECTION

11. Canada agrees with the disputing Parties that the analysis of whether a private body has been entrusted or directed by a government should focus on the nature of the governmental action rather than its effects. The investigating authority must examine the government's actions and determine whether it gives responsibility to or exercises authority over a private body to provide goods. Threats or inducements may serve as evidence of entrustment or direction.

12. Policy pronouncements alone do not constitute entrustment or direction, and entrustment or direction cannot be inadvertent or a by-product of government regulation. However, regulatory measures may still constitute entrustment or direction, even where they apply to more than one private body. The investigating authority must examine the design, structure, and intended operation of the governmental action to determine its nature. For entrustment or direction, the government must intend to use a private body as a proxy to provide financial contributions within the meaning of the SCM Agreement.

13. As to export restrictions, Canada notes that several decisions have established that they alone do not amount to entrustment or direction of a private body to provide the good subject to the export restrictions.[8] However, government regulatory measures often exist on a spectrum, with those that have indirect effects on the behaviour of private parties, like export restrictions, on one end, to explicit direction of those parties, on the other. Whether a particular government action or series of actions falls closer to this end of the spectrum, or to the export restrictions end of the spectrum, requires close consideration of the facts of the case at issue.

[7] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

[8] Panel Report, *US – Softwood Lumber VII*, paras. 7.600-7.603, citing Panel Reports, *US – Countervailing Measures (China)* and *US – Export Restraints*; and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*.

IV. PASS-THROUGH ANALYSIS

14. The Appellate Body and panels have repeatedly found that "where the input producers and producers of the processed products operate at arm's length, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority."[9]

15. The logical corollary to this statement is that where parties are not operating at arm's length, it may be presumed that the benefit passes through. This is due to the fact that, where companies are related, the input producer does not have the same incentive to maximize its revenue and profits as it would if it were operating at arm's length from the producer of the processed product. Under such circumstances, the input producer may not seek to retain the full benefit of the subsidy, but instead pass it through to its related producer of the processed product.

16. However, the presumption of a pass-through between related producers may be rebutted by presenting evidence that the transaction prices between the input producer and the producer of the processed product are consistent with relevant market conditions. There are certainly instances where input producers and producers of the processed product that are related may decide to transact at market prices.

V. OUT-OF-COUNTRY BENCHMARKS UNDER ARTICLE 14(D) OF THE SCM AGREEMENT

17. In *US - Softwood Lumber IV*, the Appellate Body concluded that a benchmark other than private prices for a good in the country of provision or purchase can only be used if "private prices in that country are distorted because of the government's predominant role in providing those goods".[10] The possibility of using alternative benchmarks is limited, and distortion must be determined on a case-by-case basis. The Panel in *US – Countervailing Measures (China) (Article 21.5 - China)* found that distortion can also be present in other circumstances, not just when prices are dictated by the government.[11]

18. When choosing an out-of-country benchmark, the Appellate Body emphasized that prevailing market conditions in a WTO Member cannot be presumed to reflect conditions in another Member. Adjustments should be made to the benchmark to align with the country of provision's market conditions. Investigating authorities, not respondent companies, are responsible for ensuring proper adjustments.

19. Indonesia argues that the out-of-country benchmark for nickel ore selected by the Commission was inappropriate as those prices were influenced by Indonesia's nickel ore export restraints. Canada notes that the fact that government action in a market may affect market conditions in another country does not make prices in that other country's market ineligible to serve as a proper external benchmark. Otherwise, one could argue that, as soon as government action distorts prices in one market and affects international prices, it is no longer possible to select an external benchmark in a market where international trade takes place.

20. Furthermore, in *US – Softwood Lumber IV*, the Appellate Body rejected the argument that the expression "market conditions" in Article 14(d) "necessarily implies a market undistorted by the government's financial contribution".[12] If it is not necessary for the market in the country of purchase or provision to be undistorted by the government's financial contributions in order to serve as an appropriate benchmark, then it is not reasonable to require that an out-of-country benchmark be free from the effects of the financial contribution.

[9] Appellate Body Report, *US – Softwood Lumber IV*, para**.** 143; see also Panel Reports, *US – Ripe Olives from Spain,* para. 7.150 and *Mexico – Olive Oil*, para. 7.142.

[10] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

[11] Panel Report, *US – Countervailing Measures (China) (Article 21.5 - China)*, paras. 7.164 and 7.168.

[12] Appellate Body Report, *US – Softwood Lumber IV*, para. 87.

VI. INDONESIA'S CLAIMS UNDER ARTICLE 12 OF THE SCM AGREEMENT

A. Requirement to Identify and Notify Interested Members/Parties

21. Indonesia argues that the Commission was required to consider the nickel ore mining companies as interested parties because they had a sufficient interest in the matter under investigation, and as a result, to notify them directly of the information required of them, rather than requesting that the Government of Indonesia forward them a portion of the questionnaire.

22. Canada takes issue with this argument for two reasons. First, the investigating authority has discretion in designating interested parties. Article 12.9 allows, but does not require, an investigating authority to treat an entity other than those listed in paragraphs (i) and (ii) as an interested party. The existing cases on the interpretation of "interested party" do not set a clear standard for the level of interest that would be required to confer "interested party" status, nor do they stand for the proposition that an investigating authority has an obligation to treat an entity as an interested party if certain criteria are met. Furthermore, the Panel in *Japan – DRAMS (Korea)* explicitly recognized that investigating authorities could request information from third parties who were not considered "interested parties" within the meaning of Article 12.9.[17] Thus, requesting information from an entity does not, by itself, grant that entity "interested party" status.

23. Second, Canada notes that Article 12.1 of the SCM Agreement does not, in any way, circumscribe the form of the notice of the information required from an interested party or Member. The Panel in *China – Broiler Products (Article 21.5 – US)* found that "individual communications to all other interested parties" are not required, and that an investigating authority "may choose a manner of giving the required notice that imposes less of an administrative burden."[13]

24. An objective and unbiased investigating authority should reach out and make all interested Members/parties aware of the information that is required, and should not rely on the initiative of the interested parties for the fulfilment of obligations which are really its own.[14] That said, the legal obligation is to notify only "[i]nterested Members and all interested parties." The investigating authority has no obligation to notify a non-interested Member/party, such as, depending on the circumstances, input providers or raw material suppliers.

B. The Use of Facts Available

25. Article 12.7 of the SCM Agreement sets out the limited circumstances in which an investigating authority may have recourse to facts available, that is if an interested party: (1) refuses access to necessary information within a reasonable period; (2) fails to provide necessary information within a reasonable period; or (3) significantly impedes the investigation.[15]

26. An investigating authority may not use the facts available provisions to mitigate the absence of any or unnecessary information, but rather, to "overcom[e] the absence of information required to complete a determination".[16] The investigating authority has the onus of establishing that the information was necessary to complete its determination before resorting to facts available.[17] Where necessary information is missing, it is well-established that an investigating authority must select "reasonable replacements" for that information and may not select facts available for the purpose of punishing a party (or Member) that did not provide requested information, even if replacement facts could, in practice, adversely impact the interests of a non-cooperating party/Member.[18]

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[13] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.231.

[14] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.199.

[15] Appellate Body Reports, *US – Supercalendered Paper*, para. 5.71; *US – Carbon Steel (India)*, para. 4.416; *Japan — DRAMs (Korea)*, para. 235; and Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 16.16 and 16.9. For Article 6.8 of the AD Agreement, *see* Panel Reports, *Argentina – Ceramic Tiles*, para. 6.20 and *Egypt – Steel Rebar*, para. 7.147.

[16] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 and Panel Report*, US – Supercalendered Paper*, para. 7.174.

[17] Panel Report, *US – Supercalendered Paper*, para. 7.175.

[18] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.302 and 7.41. See also, Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.190.

27. Contrary to Indonesia's argument in this case, facts available are not used "against" any interested party/Member. Rather, as per the language of Article 12.7, they are used "[i]n cases in which" any interested party/Member fails to cooperate. Generally, it is true that an interested party's failure to provide requested information will only impact itself. However, there could be circumstances where such a failure could impact another entity. In this context, Canada notes that the Panel in *Japan – DRAMs (Korea)* recognized that the failure of a third party, that was not considered an interested party, to provide requested information could result in the application of facts available.[19]

[19] Panel Report, *Japan – DRAMs (Korea)*, para. 7.393.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. Interpretation of "Financial contribution by a government or any public body within the territory of a Member" under Article 1.1(a)(1) of the SCM Agreement

1. As background of the CVD Determination at issue, China notes that the Morowali park of Indonesia has proven to be fruitful in facilitating the object and purpose of the WTO Agreement, including the optimal use of the world's resources in accordance with the objective of sustainable development.

2. With regard to treaty interpretation, China recalls that Article 3.2 of the DSU provides that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[1] In this regard, China notes that certain third party argues that the Panel should examine whether the EU's interpretation is a permissible interpretation under the GATT 1994 and the SCM Agreement. However, neither the GATT 1994 nor the SCM Agreement refers to the notion of "permissible interpretation". Without treaty basis, such language shall not be read into the SCM Agreement or the GATT 1994.

A. The EU's interpretation contradicts the design and architecture of multilateral rules on subsidies and countervailing measures and the principle of harmonious interpretation

3. The ordinary meaning of the text of Article 1.1(a)(1), properly interpreted in its context, clearly stipulates that subsidies can only be found to be granted by entities within the territory of the exporting WTO Member. The EU's interpretation contradicts the design and architecture of multilateral rules on subsidies and countervailing measures and the principle of harmonious interpretation. As clarified by the Appellate Body, "countervailing duties may only be imposed in accordance with the provisions of Part V of the SCM Agreement and Article VI of the GATT 1994, taken together"[2].

4. It is evident from the wording and structure of Article VI:3 of the GATT 1994 ("No countervailing duty shall be levied…in excess of…") that countervailing duties are not permitted except when levied in accordance with the conditions thereunder. Such conditions include the geographic limits of application, as the terms "territory of any contracting party" and "territory of another contracting party" clearly indicate that the multilateral rules on countervailing duties have been designed since the very beginning to be applied between the territories of two WTO Members only. Notably, Article VI:3 limits the amount of countervailing duty to "the estimated bounty or subsidy determined to have been granted … *in the country of origin or exportation*".

5. Furthermore, Article VI:6(b) of the GATT 1994 permits countervailing duties to be levied in relation to the territory of a third Member in special circumstances subject to approval by the multilateral institution, which is known as "third country countervailing duty".[3] The existence of this provision further confirms that, by design, the multilateral rules on countervailing duties apply between the territories of the importing and exporting WTO Members only, unless the treaty explicitly stipulates otherwise.

B. Article 1.1(a)(1) as properly interpreted requires that a financial contribution must be granted by a government within the territory of the allegedly subsidizing Member

6. China disagrees with the EU that the terms "a Member" under Article 1.1(a)(1) permits the attribution of a financial by a government within the territory of one WTO Member to another. [4]

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[1] Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

[2] Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

[3] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 provides for rules concerning "anti-dumping action on behalf of a third country" under Article 14.

[4] The European Union's First Written Submission, paras. 51 and 55.

Properly understood in this context, the terms "a Member" shall refer to the Member allegedly granting a subsidy being defined herein, or the *subsidizing Member*.

7. In China's view, Article 1.1(a)(1) refers to "a Member" because this is the first instance where the SCM Agreements refers to the subsidizing Member. Here, "a" means that any one of the WTO Members can be the subsidizing Member subject to disciplines under the SCM Agreement, instead of meaning that the financial contribution may come from the territory of any Member. The EU's interpretation ignores the explicit terms "within the territory of a Member" in Article 1.1(a)(1).

8. The EU further errs in its interpretation that "the terms 'within the territory of a Member'…merely qualify the terms 'public body'",[5] as supported by the negotiation history.[6] China observes that the negotiation documents referenced by the EU contain nothing that supports its interpretative theory. Rather, as one commentator recalled, the terms "within the territory" were added to Article 1 of the SCM Agreement because negotiators "decided not to treat as countervailable those subsidies given by a government outside of its territory".[7]

C. Relevant context supports the interpretation of Article 1.1(a)(1) that a financial contribution must be granted within the territory of the allegedly subsidizing Member

9. China notes that relevant context as referred by Indonesia[8] supports the interpretation of Article 1.1(a)(1) that a financial contribution must be granted within the territory of the allegedly subsidizing Member. Specifically, Article 2 of the SCM Agreement refers to the terms "within the *jurisdiction* of the *granting authority*". The ordinary meaning of "grant" is "to give or allow someone something, usually in an official way"[9], and the term "jurisdiction" means "the extent or range of judicial or administrative power; the territory over which such power extends".[10] The terms "granting authority" shall therefore be interpreted as referring to an authority that officially gives subsidies to recipients within the extent or range of its administrative power, suggesting that enterprises receiving subsidies shall fall within the extent or range of the administrative power of the authority that actually grants or gives subsidies. This immediate and relevant context disproves the EU's interpretation of Article 1.1(a)(1).

10. The EU's interpretation is further disproved by the context provided in Article 19.1, which contemplates the withdrawal of the subsidy as a remedy available to the producing or exporting Member. China notes that the ordinary meaning of the term "withdraw" under Article 19.1 is "to take or move out or back, or to remove".[11] Withdrawing a subsidy is therefore the reverse action of granting a subsidy by the subsidizing Member. In this sense, China agrees with Indonesia that only the WTO Member providing the financial contribution can withdraw the subsidy and enjoy the procedural rights under Article 19. [12]

11. The EU's heavy reliance on the so-called "*cascading effect*"[13] misses the point. In essence, the EU sets its erroneous interpretation and application of Article 1.1(a)(1) as the benchmark, and then has all other provisions under the SCM Agreement to align with the erroneous benchmark and serve its conclusory assertion that "attribution" is permitted. This approach is obviously putting the cart before the horse.

II. The European Commission's Attribution of the Alleged Preferential Financing Is Inconsistent with Article 1.1(a)(1) of the SCM Agreement As Properly Interpreted

12. China notes that, the European Commission and the European Union heavily relied on Article 11 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") in attributing the preferential financing to Indonesia. In China's view, it is not necessary

[5] The European Union's First Written Submission, para. 56.
[6] *Ibid*.
[7] Exhibit IDN-40, Gary Horlick, An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures.
[8] Indonesia's First Written Submission, paras. 96-124.
[9] See Cambridge Dictionary, definition of "*grant*", at https://dictionary.cambridge.org/dictionary/english/grant
[10] Exhibit IDN-53, Online OED Dictionary, definition of "*jurisdiction*".
[11] See Cambridge Dictionary, definition of "*withdraw*", at: https://dictionary.cambridge.org/dictionary/english/withdraw.
[12] Indonesia's First Written Submission, para. 116.
[13] The European Union's First Written Submission, paras. 63, 72, 76, 84.

to refer to the ILC Articles as the meaning of Article 1.1(a)(1) is unequivocal. China agrees with Indonesia and certain third parties that Article 1.1(a)(1) exhaustively set out the conducts of which entities can be attributed to the exporting WTO Member.[14] The chapeau of Article 1.1(a)(1) explicitly limits such entities to "the territory of a Member". Thus, the ordinary meaning of the text of Article 1.1(a)(1), properly interpreted in the context including Article VI of the GATT 1994, clearly stipulates that subsidies can only be found to be granted by entities within the territory of the exporting WTO Member.

13. However, assuming that the Panel were to consider the EU's arguments relying on the ILC Articles, a threshold question is whether Article 11 of the ILC Articles constitutes "relevant rule of international law" under Article 31.3(c) of the *Vienna Convention on the* Law *of Treaties* ("Vienna Convention"). In light of the divergent views expressed by the parties on this point, the Panel should objectively and rigorously assess this threshold question.[15] In any event, China is of the view that Article 11 is not "relevant" to the interpretation issue before the Panel for the following reasons.

14. *First*, Article 11 is only relevant to a scenario where a State *subsequently* acknowledges and adopts a conduct not otherwise attributable to it.[16] However, in the CVD Determination at issue, the European Commission asserted that the Government of Indonesia ("GOID") "proactively induced the Government of China ('GOC') to provide financial support"[17], "proactively sought the Chinese financing support"[18] and that "Chinese financial institutions are encouraged to support financing"[19]. Even taking these assertions at face value, inducing, seeking and encouraging financing support by the GOID were clearly acts *prior* to the actual provision of such financing, not any *subsequent* acknowledgement and adoption of the conduct.

15. *Second*, setting aside the temporal issue, the GOID has never acknowledged and adopted the alleged preferential financing conduct as its own. Essentially, acknowledgement and adoption by a State must indicate its intention to accept international responsibility for the conduct. As clarified by the commentaries to Article 11, provided the State's intention to accept responsibility is clearly indicated, Article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve and sought to prevent. On the other hand, if a State takes a position that amount to approval or endorsement in a general sense but do not involve any assumption of responsibility, no attribution can be made to that State.[20] In the present dispute, the GOID's awareness[21], inducement[22], encouragement[23], monitoring[24] and endorsement[25] of the alleged preferential financing by no means amount to acknowledgement and adoption. Crucially, the GOID has never indicated its intention to assume international responsibilities for the alleged preferential financing. To the contrary, in these proceedings, the GOID firmly denies any such responsibility.

16. *Third*, Article 11 of the ILC Articles provides no basis to attribute conducts of one State to another. Rather, Article 11 is "based on the principle that *purely private conduct* cannot as such be attributed to a State"[26], except under prescribed circumstances. Thus, Article 11 allows an exceptional scenario where a State, through subsequent acknowledgement and adoption, assumes responsibility for *private conducts*. The EU cannot rely on this provision to assert that the preferential financing allegedly provided by the GOC can be attributed to the GOID.

[14] Indonesia's First Written Submission, para. 181; Thailand's Third Party Written Submission, para. 11; Egypt's Third Party Written Submission, para. 49.

[15] Indonesia's First Written Submission, paras. 139-176; the European Union's First Written Submission, paras. 98-118.

[16] Exhibit IDN-44, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), ("Draft *ILC Articles with Commentaries (2001)*"), p.52, emphasis added.

[17] See, e.g., Exhibit IDN-1, CVD Determination at Recitals 654, 668.

[18] See, e.g., Exhibit IDN-1, CVD Determination at Recital 670; see also Recital 703.

[19] *Ibid*

[20] *Ibid*.

[21] Exhibit IDN-1, CVD Determination, at Recital 672.

[22] *Ibid*, at Recitals 580, 654, 661, 668 and 682.

[23] *Ibid*, at Recitals 586-588, 654-655 and 670.

[24] *Ibid*, at Recital 676.

[25] *Ibid*, at Recitals 677 and 678.

[26] Exhibit IDN-44, *Draft ILC Articles with Commentaries (2001)*, p. 52, emphasis added.

III. The European Commission's Determination of "Public Body" Is Inconsistent with Article 1.1(a)(1) of the SCM Agreement As Properly Interpreted

17. China notes that legal threshold to determine whether a private entity constitutes a "public body" is very high in terms of both substance and evidence.[27] The concept of "public body" has been interpreted consistently by panels and the Appellate body in previous disputes as an entity that "*possesses, exercises or is vested with governmental authority*".[28] For the evidentiary standard, the mere existence that formal links between an entity and government in the narrow sense, such as the majority shareholding of the government, is unlikely sufficient to demonstrate that an entity is a public body.[29] Furthermore, a public body analysis should be conducted on a case-by-case basis, as "the precise contours and characteristics of a public body are bound to differ from entity to entity".[30] However, the European Commission failed to satisfy the said legal and evidentiary standard in concluding that "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement provided the alleged preferential financing to Indonesian SSCRFP producers.

18. For example, the European Commission's assertions regarding the China – ASEAN Investment Cooperation Fund ("CAF")'s shareholding structure, management appointment and establishment process merely purported "formal links" with the government, but did not prove any bestowment of government authority. The European Commission failed to give any explanation as to how the alleged evidence support that the CAF possessed, exercised or was vested with governmental authority.

19. In this connection, China disagrees with the United States' interpretation of "public body" focusing on "control", which finds no treaty basis. In previous disputes, China and the United States have discussed at length and in detail on the proper interpretation of the term. Throughout those disputes, panels and the Appellate Body have consistently interpreted "public body" as an entity that "possesses, exercises or is vested with governmental authority".[31] In China's view, the interpretation conforms to the ordinary meaning of the term properly interpreted in the relevant context, including the collective term "government" which indicates a sufficient degree of commonality between government and public body.[32] The interpretation draws further support from the context under Article 2 of the SCM Agreement, which refers to "the jurisdiction of the granting authority". As a public body shall be an "authority" granting subsidies within its "jurisdiction", it must possess or be vested with governmental authority.

[27] Indonesia's First Written Submission, para. 455.

[28] The European Union's First Written Submission, para. 249; Indonesia's First Written Submission, para. 451, citing to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317; Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.96.

[29] The European Union's First Written Submission, para. 251; Indonesia's First Written Submission, para. 453, citing to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[30] *Ibid*, para. 451.

[31] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317; Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.96.

[32] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 288-290.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF EGYPT

I. INTRODUCTION

1. Egypt welcomes this opportunity to present its views as a third party in the dispute *EU – CVD/AD on SSCRFP (Indonesia) (DS616)*. Indonesia raises several claims under both the SCM Agreement and the Anti-Dumping Agreement. This submission is limited only to those claims under Articles 1.1(a)(1), 1.1(b), 12.7, and 14(b) and (d) of the SCM Agreement concerning the "Cooperation between Indonesia and China and the Morowali Industrial Park". Egypt takes no position on the other claims.

II. INDONESIA'S CLAIMS CONCERNING THE FINANCIAL CONTRIBUTIONS (ATTRIBUTION) ANALYSIS

2. Indonesia challenges the Commission's approach of attributing various financial contributions, granted by the Chinese government, to the Government of Indonesia. Egypt provides certain additional views on the appropriate rules of attribution that should be applied in this dispute.

- *The relevant rules of attribution are set out in Article 1.1(1)(a) of the SCM Agreement*

3. Indonesia argues that the rules of attribution for purposes of the determination of a financial contribution are those found in the SCM Agreement itself and that Article 11 of the ILC Articles is not relevant to determining to what government a financial contribution may be attributed.[1]

4. In this dispute, the Panel need not assess whether ILC Article 11 is applicable, or whether it is customary international law. The relevant rules of attribution for the granting of a financial contribution are exhaustively contained in Article 1.1(a)(1) of the SCM Agreement. It states the entities to which a financial contribution may be attributed: a government in the narrow sense, a public body, and a private body that is entrusted or directed by "a government".

5. In this dispute, the Commission did not find that the Chinese Government or the Chinese banks were Indonesian public bodies or were private bodies entrusted or directed by the Indonesian Government. Rather, under the Commission's logic, the relevant financial contributions were granted by the Indonesian government "in the narrow sense" because it "sought, acknowledged, and adopted" the financing from the Chinese Government. The Commission's position appears to be inapposite. As explained above, Article 1.1.(a)(1) recognizes the two types of entities (other than the government in the narrow sense itself) that can provide financial contributions attributable to the government: public bodies vested with governmental authority and private bodies that are entrusted or directed. To the contrary, Article 1.1(a)(1) does not mention other entities, such as foreign governments.

6. In addition, WTO dispute settlement reports have found that, under Article 1.1(a)(1), not every act of a "public body" may provide a financial contribution, but only one that is "vested with authority to exercise governmental functions".[2] Similarly, the notion of "entrustment" or "direction" to a private body under Article 1.1(a)(1)(iv) entails the action of giving governmental "responsibility" or "to command".[3] It is thus clear that the rules of attribution in Article 1.1(a)(1) of the SCM Agreement do not exclude that a body other than the government may provide a financial contribution. It is also clear that actions from these bodies may be attributed to the government. However, for a financial contribution to be attributed to it, the government must exercise its authority; a public body must itself be vested with governmental authority; or, in the case of a private body, the government must exercise its authority to entrust or direct it to provide

[1] Indonesia's first written submission, paras. 137 and 138.

[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Measures (China)*, para. 318. See, also, Panel Reports, *US – Countervailing Measures (China)*, para. 7.65; *US – Pipes and Tubes (Turkey)*, para. 7.11; and *US – Carbon Steel (India)*, para. 7.19.

[3] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, paras. 108-111.

the financial contribution. Thus, the exercise of governmental "authority" is essential, under Article 1.1(a)(1), to attribute an act to the government to one of the listed bodies.

7. Thus, even if the Commission was entitled to attribute foreign governments' actions to the Indonesian government, the standard for attribution should not be lower than that required for a public body or a private body under Article 1.1(a)(1). Therefore the question is whether the Indonesian Government exercised its *authority* over the Chinese Government, a Chinese public body, or a Chinese private body that granted the financial contribution.

8. In sum, Article 1.1(a)(1) of the SCM Agreement contains the rules of attribution of a financial contribution to a government in the narrow sense, a public body vested with governmental authority, and a private body that is entrusted or directed by the government. In contrast, nothing in the SCM Agreement suggests that the actions of entities not listed in Article 1.1(a)(1) may also be attributed to a government in the narrow sense. However, even were the Panel to accept that actions by entities not mentioned in Article 1.1(a)(1) could be attributed to a government in the narrow sense, the interpretation of the SCM Agreement should not accept a standard for attribution of a financial contribution lower than that applicable to the entities listed in Article 1.1(a)(1) (i.e. public body and private body). It would be incongruous to accept a more lenient rule of attribution with respect to actions of entities not listed in Article 1.1(a)(1) than that applicable to the bodies listed therein.

- *Even if it is necessary to find a rule of attribution elsewhere, Article 11 of the ILC Articles is not applicable because it has not been established that it constitutes customary international law*

9. Even assuming that the entities whose actions may be attributed to an entity in the narrow sense can go beyond those listed in Article 1.1(a)(1) of the SCM Agreement, Article 11 of the ILC Articles is not applicable in this dispute.

10. The key question is whether the attribution rule set out in Article 11 of the ILC Articles amounts to customary international law applicable in the relations between the parties. Importantly, customary rules in international law should not be inferred lightly. According to ILC Conclusion 2 of the "Conclusions on identification of customary law", adopted in 2018, the Panel would have to "determine the existence and content" of that rule by ascertaining two elements: general practice and *opinio juris*.

11. To Egypt's knowledge, were the Panel to do so, it would be the first time that an international adjudicatory body would find that Article 11 of the ILC Articles constitutes a general customary rule under international law. Egypt further points out that, as Professor James Crawford pointed out:

> The insertion of Article 11 into the [ILC Articles] came late in the ILC's consideration of state responsibility. Unlike all the other provisions on attribution, it had not basis in the Draft Articles as adopted on first reading.[4]

12. Accordingly, the late insertion of Article 11 of the ILC Articles militates against the idea that the framers of the ILC Articles viewed it as a customary rule of international law. Thus, the Panel may not simply infer, without a careful analysis, that Article 11 of the ILC Articles embodies a customary rule. Rather, should the Panel consider it relevant to rely on Article 11 of the ILC Articles, it should, as a threshold matter, determine the existence of it as a customary rule.

- *Article 11 of the ILC Articles does not support the Commission's conclusion that the financial contributions granted by the Chinese Government may be attributed to the Indonesian Government*

13. Even if the Panel considers that Article 1.1(a)(1) allows an authority to attribute actions of a foreign government to a "government" in the narrow sense, and even if it considers that Article 11 of the ILC Articles reflects customary international law, Egypt submits that this attribution rule

[4] Crawford J., *State Responsibility. The General Part*, (Cambridge University Press: Cambridge, 2013) at 181.

is not applicable to the fact situation in the challenged CVD investigation. The first question that the Panel should address is the temporary application of Article 11 of the ILC Articles. According to the Commentary on Article 11, this rule:

> … provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own.[5]

14. Egypt attaches importance to the word "subsequently". The Panel should have to ascertain whether the Commission's attribution analysis was based on facts that preceded the granting of the financial contributions or, otherwise, whether they were based on subsequent acts by the Indonesian Government. The consequence of this analysis is that, if the Commission based its findings on actions prior to the granting of the financial contributions, Article 11 would not be applicable.

15. The next question would be to determine whether, by virtue of those actions, the Indonesian Government ""acknowledge[d] or adopt[ed]" the Chinese government financial contributions "as its own". The verbs "to acknowledge" and "to adopt" should not be read in isolation. Rather, their meaning is informed by the expression "the conduct in question as its own". Interestingly, the Commentary on the ILC Articles fails to discuss what "as its own" means. In the two cases cited by the Commentary on ILC Article 11, Greece and Iran took over the conduct of another entity and continued it under their responsibility. Thus, to the extent that the standard of "acknowledgement" and "adoption" is informed by these cases, then it is relevant that a State assumes the act of another entity and continues to execute it. To the contrary, simple "endorsement" or "approval" is insufficient.

16. In the circumstances of the SSCRFP investigation, it appears that the Indonesian Government might have welcomed and even pursued the funding from the Chinese Government. But it has not taken those funds "as its own". Accordingly, the fact situation described in the challenged determination appears to be a classical case of endorsement or approval.

17. At any rate, the attribution standard under ILC Article 11 should be read in line with, and not lower than, that of the rest of the Articles in Chapter II of the ILC Articles, in particular Articles 5, 6, 8, and 9. These provisions have something in common: the relevant conduct is attributed to a State to the extent that it exercises its authority over the relevant entity or person. This legal standard for attribution should be similar in Article 11 of the ILC Articles – i.e. a State is exercising its authority when acknowledging and adopting a conduct as its own. This attribution standard is also similar to that of Article 1.1(a)(1) of the SCM Agreement which requires governmental authority.

18. Therefore, should the Panel consider ILC Article 11 to be relevant in this dispute, the question would be whether the Indonesian Government exercised its authority in acknowledging and adopting the Chinese financial contributions as its own. From the Commission's factual findings, it does not appear to be so. Thus, the Commission had no basis to attribute those subsidies to the Indonesian Government under Article 11 of the ILC Articles.

- *Article 6 of the ILC Articles would be the relevant rule envisaging the attribution of actions to other States in the case of international cooperation agreements*

19. Finally on the issue of attribution, Article 6 of the ILC Articles states, in relevant part:

> The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

[5] Commentary on Article 11, para. (1) of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

20. This provision is the rule of attribution in the ILC Articles that most closely resembles the fact situation in this dispute – rather than that in Article 11. It refers to cooperation between two States. Under this rule, the action of a State is attributable to another State only if the former puts an organ at the disposal and under the authority of the latter.

21. As explained in the Commentary on Article 6, when two States enter into a cooperation arrangement to achieve a common objective, the conduct of one State is not attributable to the other State. The fact that one State knows, welcomes, endorses, and approves the actions of another State does not render the conduct of one attributable to the other. Rather, Article 6 of the ILC Articles requires that, in cases of cooperation between two States, one State put an organ at the disposal and under authority of another.

22. In this dispute, Article 6 of the ILC Articles sheds light on the appropriate rule of attribution governing the economic relations between Indonesia and China. What the Commission found was no more than cooperation arrangements between the two countries. However, at no point did the Chinese Government put any of its organs (e.g. public banks) at the disposal and under the authority of the Indonesian Government. Nor was the Indonesian Government given the authority to instruct the Chinese financing bodies to provide financing, how much to provide, under what terms, and/or when to provide it. Accordingly, under Article 6 – which would be the applicable ILC attribution rule – it could not be concluded from the SSCRFP investigation that the Chinese funding was attributable to Indonesia.

23. In sum, borrowing the words of a WTO Member in a different (but related) context, the European Union "seek[s] to gain through litigation what they have not achieved through negotiation".[6] The European Union's approach of countervailing actions of foreign governments is untenable as a legal matter and, therefore, is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

III. INDONESIA'S CLAIMS CONCERNING THE BENEFIT ANALYSIS

24. This section addresses Indonesia's claims under Articles 1.1(b), 10, 14, and 32.1 of the SCM Agreement concerning the Commission's determination of the benefit received as a result of the so-called "shareholder loans" and the provision of equipment to the IRNC Group.

25. *First,* Indonesia contends that the Commission erroneously found that a "pass-through" analysis was not required because the transactions were not at arm's length. On this point, the Appellate Body in *US – Countervailing Measures on Certain EC Products* (referred to by Indonesia) held that an authority may not "overlook the possibility that some of the financial contribution provided to owners may not flow into the firm".[7] The fact pattern in that dispute is akin to that of the dispute in *EU – CVD/AD on SSCRFP (Indonesia)*. In both cases, there is a financial contribution to the owners or shareholders of the investigated company. In this scenario, the authority is still required to ascertain whether that benefit, and how much of it, was transferred to the IRNC Group. Accordingly, failure to conduct a pass-through analysis in the circumstances would be inconsistent with Article 1.1(b), and 14 (a) and/or (b) of the SCM Agreement.[8]

26. *Second*, Indonesia argues that the Commission failed to apply the relevant "guidelines" under Articles 14(a) and/or (b) of the SCM Agreement with respect to the shareholder loans by considering that a loan was effectively a grant. Egypt considers that the proper characterization of the financial contribution in this dispute might have implications for the appropriate interpretation of Article 1.1(a)(1)(i) of the SCM Agreement. Loans and grants are two different types of a direct transfer of funds. If, at the time the transaction is concluded, the transfer of money is made in the expectation that it would be repaid, then it should be treated as a loan and the appropriate benefit must be calculated on that basis. If, later, the loan is not repaid, then the benefit analysis will be similar to that of a grant. However, both concepts remain distinct.

27. *Third*, Indonesia contends that the Commission incorrectly departed from Indonesia and/or China as the relevant market for the calculation of the benchmark prices. In this respect, Article

[6] *Report on the Appellate Body of the World Trade Organization*, February 2020, available at https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[7] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 118.

[8] European Union's first written submission, para. 184.

14(d) of the SCM Agreement requires that the relevant benchmark be that of "the country of provision or purchase". Panel's and the Appellate Body have reasoned that, under Article 14(d), an authority may rely on a benchmark "other than private prices in that country of provision" when those prices do not permit a proper comparison with the financial contribution actually granted.[9] Thus, it is not *per se* WTO inconsistent to resort to an out-of-country benchmark. However, this has to be sufficiently explained.

28. *Fourth*, Indonesia contends that the Commission failed to make adjustments to the benchmark chosen (based on European and U.S. data) to reflect the prevailing market conditions in the country of provision of purchase. As explained above, "the use of an out-of-country benchmark may be permissible".[10] However, in those cases "it would nevertheless have to approximate the conditions specified in Article 14(d)".[11] In the SSCRFP investigation, the Commission saw "no need to make any further adjustments" to the market benchmark calculated based on European and U.S. data because there "was no evidence that the equipment was procured in" either Indonesia or China.[12] To the extent that the refusal to make adjustments was on account on alleged non- cooperation, Egypt recalls that, as the Appellate Body has pointed out, an authority may rely on facts available under Article 12.7 of the SCM Agreement (or Article 6.8 of the Anti-Dumping Agreement) to complete the relevant fact pattern without skipping the legal obligations set out in the WTO covered agreements.[13]

29. *Fifth*, Indonesia alleges, regarding the provision of equipment, that the Commission made an incorrect choice of "sample representative sets of equipment" for the calculation of the benchmark.[14] This argument is highly fact-intensive and requires a careful analysis of the facts and evidence contained on the record.

IV. INDONESIA'S CLAIM CONCERNING THE USE OF FACTS AVAILABLE

30. Indonesia's claim under Article 12.7 of the SCM Agreement calls for an in-depth analysis of the investigation record, which is not available to Egypt. However, it is possible to discern from Indonesia's first written submission some critical legal issues arising from the Commission's use of facts available, notably the drawing of inferences: (1) from documents that the party asserts do not exist; or (2) are not in the possession of the requested party.

31. *First*, when the requested party states that the information does not exist, the authority must objectively ascertain whether this party is acting to the best of its ability and truthfully asserting that the information or documents requested do not exist. The use of facts available must be "limited to those that may reasonably replace the information that an interested party failed to provide".[15] If the information requested does not exist, there is nothing to be "replaced". Along similar lines, an authority may not ask an interested party to prove the negative – i.e. to show that the information requested does not exist. Otherwise, an authority would "impose unreasonable burdens upon those exporters" which is barred by Article 12.7 of the SCM Agreement.[16]

32. At the same time, if an authority has other information or grounds to believe that the information/documents requested actually exist (e.g. some news reports showing their existence), the authority should confront the interested party with that information. The interested party would then carry the burden to clarify how the information at the authority's disposal relates to its assertion that the information/documents requested do not exist. On that basis, an authority would decide as to the accuracy of the assertion made by the party. At any rate, if an objective assessment revealed that the interested party truthfully stated that the information/documents do not exist, this information would not be "necessary" within the meaning

[9] See, for instance, Appellate Body Reports, *US – Softwood Lumber IV*, para. 100; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 482.

[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 482.

[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 482.

[12] EU Regulation, recital 815.

[13] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.22.

[14] Indonesia's first written submission, para. 367.

[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. See, also, Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28.

[16] Appellate Body Report, *US – Hot-Rolled Steel*, para. 102.

of Article 12.7 of the SCM Agreement and, therefore, the authority would not be entitled to use facts available.

33. *Second*, when an interested party states that it does not possess the documents/information requested, an authority must assess, before resorting to adverse facts available, whether the party has the power to produce the information requested. For instance, under U.S. trade remedies practice, the Department of Commerce enquires about whether the interested party has "market power" or "leverage" to induce the cooperation of an unrelated third party to submit the evidence requested by the authority.[17] However, a party may not be regarded as uncooperative, within the meaning of Article 12.7, if it was justifiably unable to submit the information requested on the grounds that it was not in its possession and could not compel the holder of the information to provide it.[18]

34. In sum, the Panel's analysis of Indonesia's facts available claims is key to setting out the limits of the use of facts available when an interested party asserts that certain information does not exist or is not in its possession. Article 12.7 requires a balance between, on the one hand, "the interests of investigating authorities in controlling and completing their investigations and, on the other hand, the due process and participatory rights of interested parties".[19] The Commission's use of facts available in this dispute is remarkably expansive and may invite other authorities to follow suit in both countervailing duty and anti-dumping investigations. Whether this was arbitrary and abusive can be determined only upon analyzing the record evidence as a whole.

[17] See, for instance, GARG TUBE EXPORT LLP and GARG TUBE LIMITED, U.S. Court of International Trade, 11 March 2022.

[18] See, Appellate Body Report, *US – Hot-Rolled Steel*, para. 85.

[19] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.27.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Public Body

1. With respect to a "public body" under Article 1.1(a)(1) of the SCM Agreement, the Appellate Body has explained that it is "an entity that possesses, exercises or is vested with governmental authority".[1] The term "private body", meaning something that is *not* "a government or any public body"[2] is also helpful in illuminating the essential characteristics of a "public body". In Japan's view, the principal characteristic of a private body or entity is that it acts for its own profit in the market, perhaps not necessarily from each individual transaction, but generally from its overall business activities over a certain length of time. This is because a private entity is unable to continue making losses indefinitely[3] – otherwise it would go bankrupt. A government or public body, on the other hand, is ultimately motivated by, and is destined to pursue, public policy goals, rather than profits. Thus, a public body can be distinguished from a private entity by its ability to continue to exist for the sake of achieving its policy goals, even if it records losses for a sustained period of time.

2. An important element in evaluating whether an entity is a public body is whether the entity can continue to operate without giving regard to commercial considerations, or, in other words, whether it can remain in operation while making losses beyond a reasonable period of time. For that purpose, the investigating authorities should examine "different types of evidence"[4] on a case-by-case basis. While the state's ownership of each of the relevant entities is relevant for the purposes of assessing whether an entity is a "public body", it is only one element of "the core characteristics and functions of the relevant entity" and the "relationship with the government". Japan notes that "the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country"[5] which have been described by the Appellate Body as relevant factors for a "public body" determination, are also relevant for evaluating whether an entity can continue to operate without giving regard to commercial considerations, or in other words, making profits beyond a reasonable period of time.

3. While the mining industry is often subject to regulations, according to the EU's Countervailing Duty Determination, Indonesia's regime in the mining industry goes significantly beyond such scope and imposes strict and detailed controls over each of the core activities of the relevant mining companies – i.e., production, processing, exporting, and pricing. Taking into account the likely combined impact of the export restrictions, domestic downstream processing requirements and pricing controls, it is obvious that one of the purposes of the Indonesian regulations is to develop domestic nickel ore processing or other related downstream industry. Under such circumstances, the detailed governmental regulations on the relevant mining companies would imply that the management and operation of the mining companies consistently pursue public policy goals, rather than profits.

II. "Entrust[ment] or Direct[ion]"

4. Article 1.1(a)(1)(iv) of the SCM Agreement concerns "entrust[ment] or direct[ion]" of a private body. The Appellate Body explained that paragraph (iv) is an "anti-circumvention provision",[6]

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[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[2] Ibid. para. 291. (emphasis original)

[3] In clarifying the meaning of "commercial resale" under Article III:8(a) of the GATT 1994, the Appellate Body Report in *Canada – Feed-In Tariff Program*, para. 5.71 observed that "there are circumstances where a seller enters into a transaction out of his or her own interest without making a profit", but "loss-making sales could not be sustained indefinitely and a rational seller would be expected to be profit-oriented in the long term".

[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[5] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.29 and 4.43. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[6] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

which covers "situations where a private body is being used as a proxy by the government",[7] and is intended "to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself".[8]

5. Considering this "anti-circumvention" function to capture actions by a "proxy" of the granting government, the term "private body" in this provision should encompass any entity that is *not* the granting government itself or any public body of that granting government. Under such view, this provision would cover any "subsidization seriously prejudicial to the trade"[9], even via a cross-border transfer of funds by a "proxy" of the granting government.

6. That said, cross-border energy/infrastructure investment projects are carried out all over the world, and have contributed to the economic development of the relevant regions. Financial institutions support the construction and operation of those projects conducted by the relevant stakeholders such as project companies, manufacturers, and trading companies. The financial transactions by the financial institutions involved in those projects are generally based on market principles and are not considered actionable under the SCM Agreement.

7. The clarifications made by past panels and the Appellate Body in identifying the types of actions that constitute "enstrust[ment] or direct[ion]" should be understood as reflecting their efforts to capture all evasions or circumventions, without disrupting legitimate funding arrangements. The Appellate Body referred to "some form of threat or inducement,"[10] or, "a more active role than mere acts of encouragement" by a government[11] as relevant factors. It would therefore be crucial to consider whether a "private body" has been induced to pursue certain financial transactions despite their "commercial unreasonableness"[12], or, in other words, whether its "exercise of free choice" in the market was hindered by government intervention.[13]

8. Some factors discussed in the EU's Countervailing Duty Determination could be relevant in determining whether there was "entrust[ment] or direct[ion]" by the Indonesian government, such as the commercial unreasonableness and the potential lack of free choice in the market.[14] With respect to this project, the EU found that "it appears reasonable to conclude that there was no private lender in Indonesia that would have provided similar loans to the exporting producers,"[15] and that this project "fits perfectly into the usual Chinese pattern of activating preferential financing by its policy banks."[16] The predominance of Chinese state-owned banks in the financing scheme of this project may be an indication that their financings were not commercially reasonable nor attractive, and thus were motivated by some other non-commercial reasons.

III. Benefit

A. Pass-Through Analysis

9. In considering whether a pass-through analysis of the supplier of the subsidised input and the producer of the processed product is required, the key issue is whether the duties levied on the processed product are *in excess* of the amount of the total subsidy accruing to that product, pursuant to Article VI:3 of the GATT 1994.[17] Whether duties imposed on the processed products, based on the amount of the subsidies granted to the input products, are in "excess" should be determined on a case-by-case basis. In particular, it should also be noted that in recent years, the supply chains of many products tend to be globalized and complicated. The relevant factors to be considered include: (i) the degree of effect of the input

[7] Ibid. para. 108.
[8] Ibid. para. 113. (emphasis original)
[9] Article XVI:5 of the GATT 1994; Article 5 of the SCM Agreement.
[10] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.
[11] Ibid. para. 114.
[12] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 138.
[13] Panel Report, *US – Supercalendered Paper*, para. 7.62.
[14] Japan's third-party submission, paras. 22-25.
[15] Countervailing Duty Determination, para. 733.
[16] Ibid. para. 673.
[17] Appellate Body Report, *US – Softwood Lumber IV*, para. 141.

product on the price of the processed products; (ii) the design and nature of the subsidies (i.e., whether upstream subsidies are structured to lower the input price rather than to allow the input producers to pocket the benefit); and (iii) the capital structure and/or other interrelationship between the producers of the input/processed product (e.g., whether their mutual transactions are at arm's length). Whether a "pass-through" analysis is conducted or not, the investigating authority's ultimate finding of benefit should be consistent with such factual background and be based on supporting evidence.

B. Benchmark

10. In this case, questions have been raised with respect to the appropriateness of the use by the European Commission of Philippine export price as an external benchmark, based on the allegation that Indonesia's export restrictions pushed up the world prices of nickel, including the export price from the Philippines. From a micro-economic perspective, an export restriction of one country generally decreases the domestic price of the subject product within such country, and, if the export status of that country is significant in the global market, also increases the world prices of the same product. This would usually benefit the domestic industry who uses the subject product as an input for its production of the processed products for export.

11. The determination of "benefit" under Article 1.1(b) of the SCM Agreement seeks to identify whether the financial contribution has made "the recipient 'better off' than it would otherwise have been, absent that contribution".[18] The term "benefit" implies "some kind of comparison", and "the marketplace provides an appropriate basis for comparison".[19] In this case, it is possible for the authority to find "benefit" by comparing the input costs paid by the "recipient", the domestic industry, with those paid by other competitors in the marketplace absent the export restriction (e.g. by referring to the market price before the imposition of the restriction, or estimated prices without the impact of the restriction).

IV. Facts Available

12. Indonesia's assertion in this case that the party/Member against whom facts available is used must be the same as the party/Member whose non-cooperation has been established has no merit, since the facts available under Article 12.7 of the SCM Agreement is not intended to punish non-cooperation by interested parties, but to close the gap in the record. After the process of reasoning and evaluating reasonable replacements for missing information by the investigating authority, the determination may be done on the basis of facts available, whether it is "affirmative or negative", and whether it is favorable or unfavorable against any interested parties or Members.

13. It is however to be noted that the due process obligations for resorting to facts available under the relevant provisions – e.g., Article 12.1 of the SCM Agreement, as well as Article 6.8 of the Anti-Dumping Agreement and its Annex II, which, as some prior panels have stated, provide relevant context for the evaluation of claims under Article 12.7 of the SCM Agreement[20] – must be fulfilled. The due process requirements include (i) the prior notification of the necessary information to all the interested parties/Members, (ii) ensuring that they are aware of the fact that the failure to submit the requested information would lead to the determination on the basis of facts available, and (iii) giving the opportunity for the parties/Members who actually possessed the requested information to present it within a reasonable period of time.

[18] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 635-636, 662 and 690.
[19] Appellate Body Report, *Canada – Aircraft*, para. 157.
[20] Panel Report, *China – GOES*, para. 7.289.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF REPUBLIC OF KOREA

I. Introduction

1. The Republic of Korea ("Korea") thanks the Panel for the opportunity to provide its views on the issues raised in this dispute. Korea has a systemic interest in the correct interpretation and application of the provisions of the SCM Agreement that are relevant to this dispute.

2. In this statement, Korea will provide comments on the following two issues: (i) the attribution of subsidies and the interpretation of the terms "by a government" in Article 1.1(a)(1) of the SCM Agreement, and (ii) the role and relevance of Article 11 of the ILC Articles.

II. The SCM Agreement requires that, for a countervailable subsidy to exist, the financial contribution is provided by a Member to relevant producers within its jurisdiction

3. Indonesia asserts that Article 1.1(a)(1) does not provide for the actions of a subsidizing government (in the present case, the government of China; hereinafter "GOC") to be attributed to the government of another WTO Member (in the present case, the government of Indonesia; hereinafter "GOID").[1] In response, the EU argues that the financial contributions provided by the GOC to the Indonesian producers could be attributable to the GOID, such that a subsidy within the meaning of Article 1 of the SCM Agreement was found to be granted by the GOID.[2]

4. Korea's view is that the SCM Agreement contemplates the coverage of only financial contributions actually provided by a WTO Member to producers within its territory or jurisdiction.

5. Firstly, a plain reading shows that there is no textual basis in the SCM Agreement for attributing subsidies provided by one Member to another Member. The text of Article 1.1(a)(1) of the SCM Agreement envisages the possibility of attributing to the government financial contributions provided by entities other than governmental organs, but not by other Member governments. The text enumerates only two financial contributions that can be attributed to the government: (i) those "by a public body" and (ii) those made by a private body where the government "entrusts or directs" a private body to carry out functions listed in Article 1.1(a)(1)(i)-(iii). No additional channels of attribution are provided in the text other than these two. Had the drafters wanted to include the possibility of contributions made through any additional channels or entities, they would have provided for such a possibility explicitly. Stated otherwise, the omission of other forms of attribution from Article 1.1(a)(1) should be duly respected and given meaning.[3]

6. Secondly, Article 2.1 of the SCM Agreement is relevant context for the interpretation of Article 1. After all, Article 1.2 directly refers to Article 2 as it states that only subsidies that are specific in accordance with the provisions of Article 2 are subject to the Agreement's disciplines. Article 2 relates to the granting authority and the extent to which it has limited access to the subsidy provided by that granting authority. The ordinary meaning of the term "granting authority" in Article 2.1 of the SCM Agreement denotes an entity that gives or confers the subsidy. According to dictionary definitions, in the context of a subsidy, "grant" means to "give or confer",[4] and "authority" refers to a "governmental agency or corporation that administers a public enterprise".[5] Therefore, the "granting authority" should be a governmental agency or corporation that actually gives, provides or confers the subsidy to the recipient.

7. In addition, Article 2.1(c) and footnote 3 of the SCM Agreement further substantiate the notion that the "granting authority" should not be disconnected from the actual provision or conferment of subsidy. Article 2.1(c) lists "the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy" (emphasis added) as factors to consider in determining *de facto* specificity. And footnote 3, which is linked to the four factors for determining

[1] Indonesia's first written submission, paras. 96-124.
[2] EU's first written submission, para. 62.
[3] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 18.
[4] Black's Law Dictionary (3rd Pocket Ed.), "grant".
[5] Black's Law Dictionary (3rd Pocket Ed.), "authority".

de facto specificity, states that "information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered". The language of these Articles is premised on the concept of the "granting authority" as an entity involved in the actual provision or conferment of a subsidy. The same premise would be applicable to Article 2.1 of the SCM Agreement. Furthermore, Article 2.2 provides that a subsidy which is limited to certain enterprises located within a designated geographical region "*within the jurisdiction of the granting authority*" shall be specific further highlighting the jurisdictional nexus between the government or public body granting the subsidy and the recipient of the subsidy.

8. Accordingly, the granting authority under Article 2.1 and Article 2.2 of the SCM Agreement is the entity that *actually* gives or confers the subsidy, rather than a governmental entity remaining outside such actual provision or conferment. The granting authority is the authority that provides the subsidy and defines its eligibility and not some other entity that welcomes or acknowledges the granting of the subsidy. There is no indication in the text of the Agreement that would support the possibility of turning a non-granting authority into granting authority through the fiction of attribution. Article 2 therefore, which is made an integral part of the concept of a covered subsidy as per Article 1.2, makes expressly clear what is implicit in Article 1, namely that the SCM Agreement only applies where the beneficiary is within the jurisdiction of the government that is *actually* providing or conferring the financial contribution. This type of contextual interpretation of Article 1 based on the clear language of Article 2 is permitted under, and adequately aligned with, well-established principles of treaty interpretation as set out in Article 31(1) of the Vienna Convention.

III. The Role and Relevance of Article 11 of the ILC Articles

9. The EU considers that the terms "by a government" in Article 1.1(a)(1) should be interpreted in light of Article 11 of the ILC Articles, as a "relevant rule of international law" in the sense of Article 31.3(c) of the Vienna Convention.[6] Indonesia, on the other hand, argues that Article 11 of the ILC Articles does not constitute a relevant rule of international law applicable in the relations between the parties.[7]

10. Article 31.3(c) of the Vienna Convention provides that "any relevant rules of international law applicable in the relations between the parties" including any customary law "shall be taken into account" together with the context when interpreting a treaty provision. Accordingly, Article 31.3(c) establishes three elements that must be fulfilled: (i) it refers to "rules of international law", (ii) the rules must be "relevant", and (iii) such rules must be "applicable in the relations between the parties".[8]

11. Korea notes that the ILC Articles are widely regarded by both courts and scholars as a proper codification of the customary international law related to State responsibility.[9] Whether and to what extent these ILC Article are relevant in the light of the specific textual wording of the provision in question is another matter.

12. In the context of the interpretation of Articles 1 and 2 of the SCM Agreement, Korea is of the view that Article 11 of the ILC Articles is not relevant to the situation at hand and that in any case the ILC Articles cannot override the specific textual requirements and limitations of the SCM Agreement. Furthermore, to the extent the Panel would find it relevant to examine the conditions of application of Article 11, it seems open to question whether the EU properly established that these conditions were met.

13. With respect to the relevance of Article 11, the "relevant" rules of international law must concern the same subject matter as that of the treaty terms being interpreted in a dispute.[10] In this respect, Korea notes that the ILC Articles relate to State Responsibility, not the question of whether a subsidy has been provided. In addition, Chapter II, to which Article 11 belongs, relevantly concerns the attribution of certain *non-State* conduct to the State. That is, Article 11 concerns the transformation of an act from private, non-State conduct to State conduct, thus engaging the State's responsibility for the act. It does not address the attribution of *one State's acts to another State*.

[6] EU's first written submission, paras. 107-117.
[7] Indonesia's first written submission, section V.A.3.d.
[8] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 307 and fn. 222.
[9] J Crawford, STATE RESPONSIBILITY: THE GENERAL PART (2013), p. 43.
[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 308.

14. In sum, the "subject matter" of Articles 1 and 2 of the SCM Agreement, which is at issue in this case, relates to the definition of a specific subsidy and the related conditions that must be demonstrated to exist, not state responsibility. Thus, the link between the subject matter of this case and what Article 11 of the ILC Articles refers to in terms of State Responsibility for wrongful acts is unclear, to say the least.

15. Even when looking at the question of attribution, it is noteworthy that there is a separate section of the ILC Articles under Chapter IV, entitled "Responsibility of a State in connection with the Act of another State". Chapter IV addresses the extent to which acts of one State can be attributed to another State, e.g., when one State acts on behalf of another or in collaboration.[11] Article 11 is not part of this Chapter IV, nor does the European Union appear to rely on this Chapter IV of the ILC Articles, even though that seems to be the more relevant section. This further confirms that Article 11 which is part of Chapter II of the ILC Articles is not relevant to the situation at hand.

16. In sum, Korea considers that ILC Articles may be taken into consideration, together with the context, as an additional means of interpretation to the extent that they constitute relevant rules of international law applicable in the relations between the parties and address the subject matter of the provision at issue. However, it is also clear that only those rules of the ILC Articles that are relevant to the situation will need to be taken into consideration. Where the specific ILC Article is not or only tangentially related to the subject matter, it will not be a "relevant" rule of international law. To be "relevant", the ILC Article in question must speak to the issue and thus lend itself to serve as an additional means for the interpretation of the relevant treaty provision. A plain reading of the text of Article 11 of the ILC Articles, in the context of the ILC's commentary and in the light of decisions by the ICJ[12], leads Korea to conclude that this provision is not a relevant rule of international law for the purposes of clarifying whether financial contributions provided by a State can be attributed to another State, *in casu* the government of the exporting Member under Article 1.1(a)(1) of the SCM Agreement.

17. Lastly, even if Article 11 of the ILC Articles is considered to be relevant to this dispute, Korea does not consider that it suffices for a State to merely acknowledge a factual situation in order to adopt a certain conduct "as its own". Korea notes that the ILC Commentary indicates such an adoption would require more—i.e., the "clear and unequivocal" identification by the State as its own conduct.[13]Thus, it is highly unlikely that the act of a State of merely "welcoming" or even "endorsing" would suffice to consider that this conduct constitutes that State's own conduct under the relevant rules of international law such that it engages its responsibility.

IV. Conclusion

18. Korea thanks the Panel for the opportunity to submit its views on the issues raised in this dispute and looks forward to the Panel's questions.

[11] ILC Articles with Commentaries, Chapter IV, comment 2.

[12] *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)*, Judgment, 24 May 1980, 1980 I.C.J. Rep. 3.

[13] ILC Articles with Commentaries, Article 11, comment 8. (IDN-44).

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings.

2. The Russian Federation takes note of the spectrum of the approaches as to how to interpret the rules and provisions of the SCM Agreement. Many of these provisions are pillars of the said Agreement. The term "public body" under Article 1.1(a)(1) is among them. In this Oral Statement Russia will focus on this issue.

3. The EU's position on interpretation of the term "public body" is based on legally flawed proposition that general review of "the legal and economic environment prevailing in Indonesia" is sufficient to make an affirmative conclusion that investigated companies are public bodies.[1] Based on the results of such a review the EU argues that "mining companies, regardless of their ownership, are subject to and must implement a number of government-prescribed measures" such as: "(i) domestic processing obligation, (ii) export restrictions and/or export ban, (iii) mandatory annual working plan and budget […], (iv) divestment obligations and (v) the pricing mechanism".[2] The EU alleges that "[t]hese obligations show that the mining companies are performing governmental functions".[3] One of the EU's central arguments is that "nickel ore mining companies – whether public or private – are entitled to be formally recognised as 'National vital objects'"[4], which means that these companies "are businesses that are vital to the economic development of the country or constitute sources of State income of a strategic nature".[5] Based on these general considerations the EU makes a legally flawed conclusion that "all nickel ore mining companies in Indonesia are public bodies".[6]

4. Some third parties echo the EU's rhetoric. Let's give just a few examples. Canada alleges that when conducting a public body inquiry "analysis may be informed by the legal and regulatory framework within which the entities under examination operate".[7] Canada adds that since "[t]he SCM Agreement affords a high degree of flexibility for Members to conduct countervailing duty investigations", it is sufficient to provide "a 'reasoned and adequate' explanation" for the conclusion that the relevant company is a public body.[8] This means that all that is required within a public body inquiry is just an explanation. Russia will substantiate below that Canada's position is manifestly wrong.

5. The United States goes further. With a clear-cut intention of crossing out the WTO jurisprudence on interpretation of the term "public body" under Article 1.1(a)(1) of the SCM Agreement, the US argues that "nothing" in the said Article "restricts the meaning of 'public body' only to an entity possessing, exercising, or otherwise vested with governmental authority, or exercising governmental functions".[9] The US suggests that 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 […] 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'".[10] What does it mean that there should not be "a one-size-fits-all approach"? This means the absence of rules.

6. In sum, the essence of positions by the EU and supporting third parties with respect to interpretation of the term "public body" is as follows: any companies that follow domestic

[1] EU's FWS, para. 306.
[2] EU's FWS, para. 270.
[3] EU's FWS, para. 270.
[4] EU's FWS, para. 305.
[5] EU's FWS, para. 304.
[6] EU's FWS, para. 308.
[7] Canada's TPS, para. 15.
[8] Canada's TPS, para. 18.
[9] US' TPS, para. 33.
[10] US' TPS, para, 44.

legislation, pay taxes, contribute to social and economic development of their State are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. To prove this, it is enough to make a general overview of the legal framework of the affected WTO Member and provide a reasoned and adequate explanation for the conclusion that the relevant company is a public body. Based on this approach, virtually any company would fall within the definition of a "public body". In such a case the line between public bodies and other entities disappears. The Russian Federation strongly disagrees.

7. The logic underlying the SCM Agreement is based on legal qualification of concrete conduct by certain entities resulting in specific consequences. In order for an entity's conduct to fall within the scope of the rules enshrined in the SCM Agreement, an entity must meet specific characteristics. The list of such entities under the legal text of the SCM Agreement is exhaustive.

8. The Russian Federation respectfully reminds that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. These customary rules are the principles that are codified, *inter alia*, in Articles 31-32 of the Vienna Convention on the Law of Treaties.[11] Based on these rules of treaty interpretation, it is established in the WTO jurisprudence that a "public body" is an entity that "possesses, exercises or is vested with governmental authority".[12]

9. The text of Article 1.1 of the SCM Agreement and immediate context of the term "public body" confirm that the term at issue is limited precisely by entities possessing, exercising, or otherwise vested with governmental authority, as opposed to private bodies that have been "entrust[ed] or direct[ed]" by the government as set forth in Article 1.1(a)(1)(iv) of the SCM Agreement.

10. At first glance it may seem that Article 1.1 of the SCM Agreement is built on a differentiation of financial contribution providers into three categories: "government", "public bodies" and "private bodies" that have been "entrust[ed] or direct[ed]" by the government. However, a deeper look at this issue makes it clear that the first two categories are closely related to each other. This is confirmed by the fact that according to Article 1.1(a)(1) the categories "government" and "public bodies" are collectively referred in the text of the SCM Agreement as "government". It follows that a public body is equivalent to a government in terms of authority. Thus, it is the governmental conduct that constitutes a financial contribution within the scope of subparagraphs (i)-(iii). From a practical point of view this means that there are not three, but two concepts, namely: the concepts of "government" (including "public body") and "private body". Therefore, the term "government" as a shorthand for "a government or any public body" is not merely employed as a drafting device, but is intended to emphasize that the two terms under the collective term "government" have a sufficient degree of commonality or overlap in their essential characteristics.[13] This was the intention of the drafters and it must be respected.

11. The Appellate Body has explained that "[t]he meaning of the term 'private body' may be helpful in illuminating the essential characteristics of public bodies, because the term 'private body' describes something that is *not* 'a government or any public body'".[14] Russia agrees. According to subparagraph (iv) where the entity is a private body, its conduct falls within the scope of subparagraphs (i)-(iii) only when there is the requisite link between the government (i.e. "government" or "public body") and specific conduct as a result of entrustment or direction by "government".[15] It follows that a public body in exercising its *governmental* authority may "entrust" or "direct" a private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii). The authority vested in a public body should be exactly *governmental* since many types of conduct named in sub-paragraphs (i)-(iii) are "an integral part of the sovereign function" (for example, tax incentives).[16]

[11] Appellate Body Report, *US – Carbon Steel*, para. 61.

[12] See, for example, Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317; Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.96.

[13] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288.

[14] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 291 (emphasis original).

[15] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

[16] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296.

12. Neither private bodies nor state-owned enterprises can be entitled to exercise, for example, provision of tax incentives since this authority is inalienable from the State itself. Even the fact that certain powers ("a direct transfer of funds") can be exercised by a private body does not change the matter. The point is that the types of conduct set forth in sub-paragraphs (i)-(iii) are inseparable. Put another way, these types of conduct represent a single "menu" from which a WTO Member selects the most suitable course of action in each specific case. Therefore, the term "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement covers strictly-defined category of entities.

13. The Russian Federation respectfully draws attention of the Panel that the issues under discussion today are fundamentally important. We will all face far-reaching and extremely detrimental consequences if legally flawed approaches advocated by the EU and supporting third parties are adopted.

14. First, permissible limits for application of countervailing measures will be unacceptably expanded. *Second*, investigated entities will be characterized as public bodies just because they comply with national legislation, constitute sources of State income, take into account the tasks of social development and economic well-being of their States.

15. The consequences for the entire multilateral trading system will be extremely negative. Russia believes that this is not the result that meets the common interests of the WTO Members.

16. This concludes our statement. Thank you again for this opportunity to express the views of the Russian Federation.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINESE TAIPEI

Mr. Chairman, Members of the Panel,

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu appreciates the opportunity to present its views as a third party in this dispute.

2. Our statement today will focus on the legal interpretation of certain provisions of *the Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and specifically whether financial contributions provided by the government of China to enterprises located in Indonesia should be considered subsidies attributable to the government of Indonesia under Article 1.1(a)(1) of the SCM Agreement.

3. While we do not take a position on the facts of this dispute, we share U.S. concerns over the widespread use of unfair subsidies and other non-market policies and practices, and their potential to "distort trade, investment and competition".[1] As indicated in the statement we made at MC13 in February 2024, we believe that these subsidies will erode confidence in the global trading system and weaken the rules-based mechanism for all WTO Members.[2] We also agree with the U.S. that the existing WTO rules on subsidies and countervailing duties, including in the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the SCM agreement, should not be "rendered ineffective and irrelevant … where a WTO Member's domestic industry is harmed by subsidized imports".[3]

4. Under Article 1.1(a)(1) of the SCM Agreement, "a subsidy shall be deemed to exist if … there is a financial contribution by a government or any public body within the territory of a Member…"[4] At the core of this dispute is whether the reference to "a financial contribution by a government" should be strictly construed to include only those contributions originating directly from the government of the exporting Member. Like the EU, we are of the view that Indonesia's interpretation is overly restrictive and that Article 1.1(a)(1) allows for a certain amount of flexibility.[5] Essentially, this means that a financial contribution by one WTO Member may be attributed to another under certain circumstances, and a subsidy could still exist even where the contribution does not come directly from the government of the exporting Member.

5. This interpretation is supported by the text of Article 1.1(a)(1). We note that the indefinite article "a" is used in front of both "government" and "Member", suggesting that the subsidy does not have to come from "*the* government of *the* subsidizing Member", and that the application of this provision is not as narrow as Indonesia claims. In fact, no other language in Article 1 imposes any restrictions on where the government or public body providing a financial contribution must be located for such contribution to be deemed a "subsidy" for the purposes of the SCM Agreement.

6. This interpretation also finds support in the language of the GATT 1994. Article VI:3 of the GATT 1994 requires that a countervailing duty levied on any product not exceed "an amount equal to the estimated … subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of … exportation".[6] It also provides that the purpose of this duty is to "offset … any … subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise".[7] This language makes it clear that subsidies granted "*indirectly*", i.e. by governments other than the exporting Member, should be covered by the WTO's anti-subsidy rules, and that the focus of these rules is on determining the existence and amount of the subsidy, as opposed to where it originated.

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[1] U.S. Third Party Submission, para. 2.
[2] WT/MIN(24)/ST/122, pp. 2-3.
[3] U.S. Third Party Submission, para. 3.
[4] Article 1.1(a)(1) of the SCM Agreement.
[5] EU's First Written Submission, paras. 30, 54-62.
[6] Article IV:3 of the GATT 1994.
[7] *Id.*

7. Most importantly, given that the object and purpose of the SCM Agreement is to "impose multilateral disciplines on subsidies which distort international trade",[8] a rigid and narrow interpretation of the term "subsidy" under the SCM Agreement, like the one proposed by Indonesia,[9] would allow Members to circumvent WTO disciplines even though the financing at issue distorts international trade. It would also create a loophole preventing Members adversely affected by subsidized imports from bringing a WTO dispute, thereby undermining the object and purpose of the SCM Agreement.

8. In fact, the idea that Members should not be allowed to circumvent their obligations under the SCM Agreement through various funding arrangements is already reflected in the text of the Agreement itself. Article 1.1(a)(1)(iv), for example, which includes situations in which a government "entrusts or directs a private body" to provide funding within the definition of a "subsidy", is intended to "ensure that governments do not evade their obligations … by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself".[10] If financial contributions granted by a government through a private body can be defined as a "subsidy" for the purposes of the SCM Agreement, there is no reason why contributions granted by a government through another Member cannot also fall within this definition. Here, Indonesia made a deal with China to finance enterprises in its territory, and it should not be allowed to circumvent WTO rules by granting subsidies through another entity, whether such entity is a private body or another WTO Member.

9. Finally, in response to Indonesia's claim that the EU's interpretation of Article 1.1(a)(1) would inhibit foreign direct investment and economic growth in developing countries,[11] the EU argues that the "external financing" being provided by China in this dispute is distinguishable from inter-governmental cooperation agreements involving infrastructure assistance or financing through multilateral institutions such as the World Bank.[12] We agree. The Indonesian government's active coordination with China in a specific joint initiative involving the imposition of unfair subsidies available to certain domestic enterprises distinguishes the facts at issue from those arrangements typically used by Members to attract foreign investment. Therefore, the scope of the EU's proposed reading of Article 1.1(a)(1) is not as broad as Indonesia would have the Panel believe, and Indonesia's concern that it would limit Members' ability to attract foreign direct investment is unfounded.

10. This concludes the oral statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu. We thank the Panel again for the opportunity to submit our comments.

[8] Panel Report, *Brazil – Aircraft*, para. 7.26.
[9] Indonesia's First Written Submission, paras. 84-95.
[10] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.
[11] Indonesia's First Written Submission, paras. 130-136.
[12] EU's First Written Submission, paras. 88-90.

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

I. "GOVERNMENT" UNDER ARTICLE 1.1 OF THE SCM AGREEMENT

1. In this dispute, the European Union (the "EU"), by relying on Article 11 of the International Law Commission's Articles on the Responsibility of States for International Wrongful Act (the "ILC Articles") in sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("Vienna Convention"), interprets that the notion of "government" in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") should not only cover an action directly emanating from the government of the country of origin or export, but also actions imputable to such a government. The preferential financing granted by Chinese grantors could therefore be attributed to the Government of Indonesia (GOID) within the meaning of Article 1.1 of the SCM Agreement.

2. Thailand disagrees with the EU's interpretation. First, Thailand opines that Article 1.1(a)(1) of the SCM Agreement provides a closed list of entities whose actions can be attributed to the government of a WTO Member. The provision clearly and exhaustively indicates that only financial contributions by governments and public bodies within a territory of a WTO Member, as well as those private bodies entrusted or directed by the government, can be attributed to the government of that Member. Therefore, it does not provide for further attribution options, including actions of one Member to another Member's government. This is supported by the Panel in *US – Anti-Dumping and Countervailing Duties (China)* suggesting that "where the author of the financial contribution is either an executive organ of any level of government, or public body of any kind at any level of government within the territory of a Member, the [SCM] Agreement considers the financial contribution to have been made by the government of that Member"[1].

3. Second, Thailand respectfully reminds that the relevant rules of international law cannot add terms to a treaty and shall only "be taken into account together, with context" when interpreting the term of treaty[2]. Even if Article 11 of the ILC Articles could be considered as a relevant rule of international law between the parties, this cannot result in the interpretation that broadens the scope of the agreement beyond its terms. In other words, the EU cannot disregard the clear and unambiguous text of Article 1.1(a)(1) of the SCM Agreement, and then use Article 11 of the ILC Articles to extend the attribution scenarios beyond those which are expressly provided for in Article 1.1(a)(1) of the SCM Agreement. As mentioned by the Panel in *US – Origin Market (Hong Kong, China)*, when the text of a provision does not call for "an interpretation, there is no need to test that reading against the context and the objective and purpose of the treaty. Comporting with the rules of treaty interpretation, neither the context nor the object and purpose of a treaty can validate an interpretation that is not supported by the ordinary meaning of the treaty terms and override another interpretation that does result from those treaty terms"[3].

II. "THE JURISDICTION OF THE GRANTING AUTHORITY" UNDER ARTICLE 2.1 AND 2.2 OF THE SCM AGREEMENT

4. Article 2 of the SCM Agreement refers to "the legislation pursuant to which the granting authority operates", thereby distinguishing in certain instances the legislator and the central government from the entity giving the subsidy.[4] The term "granting authority" in Article 2 of the SCM Agreement is thus the body issuing and administering the subsidy[5], not the government acknowledging and adopting the subsidy.

5. Furthermore, this interpretation is reinforced when determining "the jurisdiction of the granting authority" at the different levels of government, to be central, regional, or local. Pursuant

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[1] Panel Report, *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, para. 8.67.

[2] Appellate Body Report, *Peru – Agricultural Products (DS457)*, para. 5.94. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, para. 312. (emphasis added)

[3] Panel Report, *US – Origin Market (Hong Kong, China) (DS597*, para 7.90.

[4] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)* (*DS353)*, para. 750.

[5] Appellate Body report, *US – Large Civil Aircraft (2nd Complaint) (DS353)*, para. 750.

to Articles 2.1 and 2.2 of the SCM Agreement, when it concerns a regional or local government, the scope of the jurisdiction is limited to the territory of that region or local government. If the granting authority is the central government, the scope of the jurisdiction is the entire territory of the relevant Member. Therefore, the jurisdiction of the granting authority cannot extend beyond the territory within which the granting authority is located.

6. Applying the aforementioned rationale to this dispute, the Chinese grantors are the granting authority whose jurisdiction is limited to the territory of China, whereas the IRNC Group, the recipient, is located in Indonesia, which is clearly outside the jurisdiction of the granting authority. Therefore, the EU cannot claim that "by way of acknowledgement and adoption, the GOID was the granting authority with respect to the preferential financing."

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TÜRKIYE

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Republic of Türkiye (hereinafter referred to as "Türkiye"), I thank you for giving us the opportunity to express our views in this dispute.

2. Our participation as a third party is based on our systemic interest in the correct and consistent interpretation of several provisions of the Agreement on Subsidies and Countervailing Measures (hereinafter referred to as "SCM Agreement") and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as "AD Agreement") discussed in this case.

3. Türkiye will not be elaborating on the particular facts presented by the Parties, rather, underlining her systemic interest, Türkiye would like to limit her third-party submission to the discussion on "public body" determinations by investigating authorities in countervailing duty (CVD) investigations. In addition, Türkiye will share her views on issues addressed by the European Union (hereinafter referred to as EU) and the Republic of Indonesia (hereinafter referred to as Indonesia) as reflected in their first written submissions pertaining to the AD Agreement.

II. "PUBLIC BODY" DETERMINATIONS IN COUNTERVAILING DUTY INVESTIGATIONS

4. According to SCM Agreement, for a countervailable subsidy to exist, an investigating authority must demonstrate: (i) a financial contribution, (ii) by a government or public body and (iii) a benefit that is thereby conferred. Notwithstanding, as there is not a definition of "public body" in the SCM Agreement, Türkiye considers it useful to recall the Appellate Body's guidance regarding the proper interpretation of Article 1.1(a)(1) of the SCM Agreement.

5. The Appellate Body found that the "defining elements" of the term "government" inform the meaning of "public body", such as "*the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions*".[1] Accordingly, the Appellate Body defined "public body", within the meaning of Article 1.1(a)(1) of the SCM Agreement, as "*an entity that possesses, exercises or is vested with governmental authority".*

6. Therefore, Türkiye opines that simple ownership or control of the government alone is not sufficient to reach to the conclusion that the entity is a "public body" reflects the right legal interpretation of Article 1.1(a)(1) of the SCM Agreement.[2] An investigating authority must also evaluate the core features of the entity in question, in order to determine whether the entity performs governmental functions apart from having governmental authority.[3] In this line, Türkiye stresses that the assessment whether an entity is a "public body" should be an examination that includes multiple facets of the entity under consideration.

7. Moreover, in reaching a public body determination, an investigating authority must conduct "*a proper evaluation of the core features of the entity concerned, and its relationship with government*".[4] This evaluation must be conducted on a "case by case" basis[5], providing a sufficient analysis of and giving proper consideration to all relevant evidence on the record.[6] A panel reviewing an investigating authority's determination must focus "*on the reasoning provided by {the*

[1] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[2] *US – Countervailing Measures (China)*, para. 7.72.
[3] *US – Countervailing Measures (China)*, para. 7.66.
[4] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[5] *US – Carbon Steel (India) (AB)*, para. 4.29.
[6] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97.

investigating authority} in its written determinations", rather than on "ex post explanations" provided to the panel.[7]

8. In addition, it is stated in the Panel Report of *US Pipes and Tubes (Turkey)* that "*in evaluating whether the conduct of a particular entity is that of a public body within the meaning of Article 1.1(a)(1), an investigating authority 'must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant*'".[8,9] and added that "*a panel may bear in mind that errors in an investigating authority's examination of individual pieces of evidence 'undoubtedly would affect an examination of the totality of the evidence*'".[10,11]

9. Furthermore, evidence of a government's *ability* to control an entity does not determinatively establish that the entity exercises or possesses governmental authority.[12] For example, an investigating authority cannot base a public body determination solely on evidence that the chief executives of an entity are "*government appointed*"[13], without evaluation of the entity's *conduct* and relationship with the government within the overall legal order.[14] Similarly, the Appellate Body has recognized that "*a government's power to appoint directors to the board of an entity*", is a distinct issue from whether the directors do, in fact, act independently or possess the authority to perform governmental functions.[15]

10. Accordingly, the Panel in *US Pipes and Tubes (Turkey)* found that "*We see nothing in the evidence that the USDOC considered in its analysis of OYAK to suggest that military and government personnel within OYAK have made decisions under the direction of the GOT in pursuit of governmental economic policies*".[16] and added that *"…* we find that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to provide a reasoned and adequate explanation for its determinations based on consideration of the information contained in the record and the explanations given by the authority in its published report".[17]

11. In prior disputes involving a public body determination, the Appellate Body has criticized panels and investigating authorities for relying on evidence of formal indicia of government ownership or control and failing to evaluate evidence of an entity's conduct and overall relationship with government. For example, in *US – Carbon Steel (India)*, the Appellate Body faulted the panel, in its assessment of whether the Indian National Mineral Development Corporation ("NMDC") is a public body, for reviewing evidence of "*formal indicia of control*", but failing to "*address the question of whether there was evidence that the NMDC was performing governmental functions on behalf of the {Government of India ('GOI')}*".[18]

12. Similarly, the Panel in *US Pipes and Tubes (Turkey)* found that "*USDOC considered in relation to OYAK constitutes mere 'formal indicia' of government control, and the USDOC did not identify otherwise establish that OYAK has taken decisions in pursuit of government economic policies*".[19]

13. The Appellate Body in *US – Carbon Steel (India)* also criticized the panel for failing to give proper consideration to evidence on the record regarding "*the relationship between the government and the NMDC, and, in particular, the degree of control by the GOI and the degree of autonomy enjoyed by the NMDC*"[20], such as the following: the NMDC operates "*in a commercial, de-regulated environment and conducts its operations and businesses on commercial principles*"; the NMDC

[7] *US – Carbon Steel (India) (AB)*, para. 4.39.
[8] *US – Anti-Dumping and Countervailing Duties (China)* (AB), para. 319.
[9] *US – Pipes and Tubes (Turkey)*, para. 7.14.
[10] *US – Countervailing Duty Investigations on DRAMS (Korea) (AB)*, para. 154.
[11] *US – Pipes and Tubes (Turkey)*, para. 7.33.
[12] *US – Carbon Steel (India) (AB)*, para. 4.36.
[13] *US – Carbon Steel (India) (AB)*, para. 4.46.
[14] *US – Carbon Steel (India) (AB)*, para. 4.54.
[15] *US – Carbon Steel (India) (AB)*, para. 4.45.
[16] *US – Pipes and Tubes (Turkey)*, para. 7.39.
[17] *US – Pipes and Tubes (Turkey)*, para. 7.50.
[18] *US – Carbon Steel (India) (AB)*, para. 4.42.
[19] *US – Pipes and Tubes (Turkey)*, para. 7.67.
[20] *US – Carbon Steel (India) (AB)*, para. 4.44.

"*enjoys freedom in its day-to-day operations*"; and *"{e}xcept for certain personnel related matters and investment decisions over specific limits*", the NMDC "*takes its own decisions with the approval of its Board*".[21]

14. By comparison, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body affirmed the USDOC's determination in a prior proceeding[22] that certain Chinese state-owned commercial banks ("SOCB") were public bodies, because the USDOC, in making a "complete analysis of the facts and circumstances of the Chinese banking system"[23], considered evidence of other relevant factors in addition to evidence regarding ownership and control. For example, the Appellate Body noted that the USDOC considered "extensive evidence" demonstrating that SOCBs were required by law to take into consideration and support official governmental economic and policies.[24]

III. CLAIMS REGARDING ANTI-DUMPING AGREEMENT

15. Indonesia asserts in its initial written submission that by selectively deducting certain transportation and storage expenses solely from the export price, while omitting such deductions from the normal value, the EU violated Article 2.4 of the AD Agreement and the concluding provision of Article VI:1 of the General Agreement on Tariffs and Trade (GATT) 1994.

16. Türkiye contends that Article 2.4 of the AD Agreement primarily emphasizes the necessity of conducting a fair comparison at the same level of trade, wherein due allowances should be factored into the compared prices. To ensure a fair comparison between export and domestic prices, all requisite due allowances must be duly considered. The AD Agreement does not prescribe the separation of internal and external costs. By delineating certain allowances as internal costs, investigating authorities cannot disregard such allowances in the calculation of dumping margins.

17. In export sales, EU takes the prices at Morowali as ex-factory prices through deductions for related (transport, warehousing) cost items but in for some domestic sales, it takes the prices in Surabaya Port by not adjusting the domestic invoice price by costs like transfer to or warehousing in Surabaya Port. We believe that for a fair comparison, domestic prices should also be adjusted to get a hypothetic Morowali prices for domestic sales.

18. The argument that neither warehousing cost prior to the sale nor the related transfer costs had any impact on price comparability seems unconvincing. These costs are part of domestic Selling, General and Administrative (SG&A) expenses and has certain impact over total domestic Cost of Production (COP). We know that one of the main determinants of selling prices is COP so these costs are part of domestic selling prices and have an impact over it. If there are some costs, which are specific to domestic sales and so only affects domestic prices but have no impact on export prices, necessary adjustments should be held for a fair comparison of domestic and export prices.

19. Indonesia claims that by deducting SG&A expenses and a notional profit solely from the export price for export sales through related traders, while failing to deduct such expenses and notional profit for domestic sales made through related traders, the EU contravened Article 2.4 of the AD Agreement and the concluding provision of Article VI:1 of the GATT 1994.

20. Türkiye maintains that if an investigating authority acknowledges the commission on export sales as an allowable deduction and subtracts it from the export price, it should elucidate why it does not extend the same treatment to the commission on domestic sales. The EU's rationale in this case that it did not consider the commission on domestic sales due to the absence of a request from Indonesian exporters does not appear to represent an equitable or impartial approach. While authorities investigate conditions that serve their objectives, they should also explore conditions that may compromise their findings. Authorities should not await a request from the opposing party to render a determination that would better align with exporters' contentions.

[21] *US – Carbon Steel (India) (AB)*, para. 4.40.
[22] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 354.
[23] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 348.
[24] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.

21. Indonesia argues that the EU's failure to specify the requisite information necessary for ensuring a fair comparison constitutes a violation of the concluding provisions of Articles 2.4 and 6.1 of the AD Agreement.

22. Türkiye asserts that investigating authorities should adopt an impartial stance throughout the course of investigations rather than being solely focused on objectives. They should diligently strive to gather and address all pertinent information that could influence the outcomes, irrespective of whether it supports exporters' or petitioners' assertions. In instances where investigation reveals missing information or ambiguities, authorities should not exploit missing information or ambiguities but rather seek clarification prior to any assessments.

23. It is important to clarify that by missing information or ambiguities we are not addressing new information introduced in the final stages of an investigation, the evaluation of which would exceed investigation time limits. Instead, we refer to information already handled by investigating authorities during the investigation but deemed insufficient for a thorough assessment.

IV. CONCLUSION

24. Mr. Chairman, distinguished Members of the Panel, with these comments, Türkiye expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretations of AD and SCM Agreements.

25. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX C-12

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

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).